14-year-old girls who were working in a corn field removing tassels from stalks of corn did not lead to an OSHA citation because investigators concluded that it was not a recognized hazard.[21] The girls were electrocuted after stepping into a pool of rain water that became electrified because of a malfunctioning power supply for the irrigation system. In contrast, a court rejected an energy company's claim that the collapse of a crane that was being erected on an oil rig was not a recognized hazard.[22] The court said that there was credible expert testimony and evidence from safety manuals supporting the view that the industry recognized the hazard. There were also feasible means of abating the hazard, as the operation could be performed using workers stationed on the ground rather than on the rig itself.

Even though the general duty clause provides OSHA with an important weapon for contesting unsafe conditions—one that does not rely on the glacial-pace standard-setting process—it can be difficult for the agency to prove that hazards that have not been the subjects of safety standards are nonetheless recognized and that there are feasible means of abating those hazards. In *SeaWorld of Florida v. Perez*, the court reviews OSHA's use of the general duty clause to cite the marine park following the death of one of its trainers in a killer whale attack. The circumstances of this case are unusual, but the questions it raises are of broader interest.

SeaWorld of Florida v. Perez
748 F.3d 1202 (D.C. Cir. 2014)

OPINION BY CIRCUIT JUDGE ROGERS

SeaWorld of Florida, LLC, operates a theme park in Orlando, Florida, that is designed to entertain and educate paying customers by displaying and studying marine animals. Following the death of one of SeaWorld's trainers while working in close contact with a killer whale during a performance, the Occupational Safety and Health Review Commission found that SeaWorld had violated the general duty clause of the Occupational Safety and Health Act of 1970 by exposing the trainers to recognized hazards when working in close contact with killer whales during performances, and that the abatement procedures recommended by the Secretary of Labor were feasible. SeaWorld challenges the order with respect to one citation. Concluding its challenges are unpersuasive, we deny the petition for review.

On February 24, 2010, SeaWorld trainer Dawn Brancheau was interacting with Tilikum, a killer whale, during a performance before a live audience in a pool at Shamu Stadium in Orlando. Ms. Brancheau was reclined on her back on a platform a few inches below the water surface. Tilikum was supposed to mimic her behavior by rolling over. Instead, the killer whale grabbed her and pulled her off the platform into the pool, refusing to release her. She suffered traumatic injuries and drowned as a result of Tilikum's actions.

The Secretary of Labor issued three citations to SeaWorld after an investigation by an Occupational Safety and Health Administration ("OSHA") compliance officer. Only the second citation is at issue. It alleged two instances of a "willful" violation of the general duty clause for exposing animal trainers to the recognized hazards of drowning or injury when working with killer whales during performances. The first instance related to animal trainers working with Tilikum being exposed to "struck-by and drowning hazards" by being "allowed unprotected contact with Tilikum" while conducting "'drywork' performances on pool ledges, slideouts and platforms." In SeaWorld's terms, when trainers are out of the pool or on submerged ledges called "slideouts" in water no deeper than their knees, their interactions with killer whales are called "drywork." Any interaction in deeper water is "waterwork." * * * The second instance concerned animal trainers working with killer whales other than Tilikum who were exposed to struck-by and

[21] Bruce Rolfsen. "OSHA Will Not Issue Citations for Deaths of Teens Electrocuted in Illinois Cornfield." *Daily Labor Report* 16 (January 25, 2012), A-10.
[22] *ACME Energy Services v. OSHRC*, 542 Fed. Appx. 356 (5th Cir. 2013).

drowning hazards when they were "allowed to engage in 'waterwork' and 'drywork' performances with the killer whales without adequate protection." * * * The Secretary proposed a penalty of $70,000.

* * * Observing that OSHA has "no specific standard" regulating employees working in close contact with killer whales, and that the Secretary had presented no evidence SeaWorld had a "heightened awareness of the illegality of its conduct" or manifested "plain indifference to employee safety," the ALJ found that violations were "serious," not "willful," and imposed a fine of $7,000. * * * SeaWorld petitions for review of the general duty violation.

The general duty clause of the Occupational Safety and Health Act, provides: "Each employer [ ] shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." ". . . [T]his clause enables the Federal Government to provide for the protection of employees who are working under such *unique* circumstances that no standard has yet been enacted to cover this situation." * * *

"To establish a violation of the General Duty Clause, the Secretary must establish that: (1) an activity or condition in the employer's workplace presented a hazard to an employee, (2) either the employer or the industry recognized the condition or activity as a hazard, (3) the hazard was likely to or actually caused death or serious physical harm, and (4) a feasible means to eliminate or materially reduce the hazard existed."

Tempering the range of potential remedies that might be imposed upon finding a violation of the clause, the court explained: ". . . the *Secretary* must prove that a reasonably prudent employer familiar with the circumstances of the industry would have protected against the hazard in the manner specified by the Secretary's citation."

SeaWorld contests only the second and fourth elements regarding recognized hazard and feasibility. * * * First, SeaWorld contends that the finding that it exposed its employees to a "recognized hazard" is unsupported by substantial evidence. Second, it contends that "when some risk is inherent in a business activity, that risk cannot constitute a 'recognized hazard.'" Third, . . . SeaWorld contends that the Secretary failed to prove feasible abatement methods (or that SeaWorld had already implemented these measures), and that the ALJ failed to consider evidence these abatement measures present additional hazards and erred because eliminating close contact changes the nature of a trainer's job. * * *

Whether a work condition poses a recognized hazard is a question of fact. Substantial evidence supports the finding that "drywork" and "waterwork" with killer whales were recognized hazards. Tilikum is a 32-year-old male killer whale with known aggressive tendencies who in 1991 killed a whale trainer at a marine park in Vancouver, British Columbia. SeaWorld had established special protocols for Tilikum, which prohibited "waterwork" and, among other things, required non-killer whale personnel and guests to stay five feet behind pool walls or three feet from Tilikum's head, indicating that SeaWorld recognized the possibility of harm to people standing outside of the pool on land. Although "drywork" with Tilikum continued, SeaWorld limited it to a team of experienced trainers who used extra caution. The caution with which SeaWorld treated Tilikum even when trainers were poolside or on "slideouts" in the pool indicates that it recognized the hazard the killer whale posed, not that it considered its protocols rendered Tilikum safe.

As to other killer whales, SeaWorld suggests that close contact with these whales was not a recognized hazard because all whales behave differently and its incident reports help SeaWorld improve training. But SeaWorld's incident reports demonstrate that it recognized the danger its killer whales posed to trainers notwithstanding its protocols. At the time of Ms. Brancheau's death, seven killer whales were at the Orlando park. Even though SeaWorld had not recorded incident reports on all of its killer whales, a substantial portion of SeaWorld's killer whale population had at least one reported incident. The ALJ also relied on the many comments by SeaWorld management personnel, including corporate curators of animal training, who described the need for caution around killer whales generally, not only around certain killer whales. Killer whales bit trainers' body parts on several occasions (although not generally puncturing skin) and in 2006 a killer whale pulled a trainer underwater by the foot and submerged him repeatedly for approximately 10 minutes. Although this incident occurred during "waterwork," substantial evidence supports the finding with regard to "drywork" as well. On numerous occasions, trainers fell or were pulled into the water, as later happened with Tilikum and Ms. Brancheau, or killer whales lunged out of the water toward trainers. These incidents constitute substantial evidence to support the ALJ's finding that "drywork" was also a recognized hazard.

SeaWorld's position is that working with killer whales was not a recognized hazard because its training and safety program adequately controlled the risk. To train

its killer whales, SeaWorld uses "operant conditioning" to reinforce desired behaviors with food or other rewards. It also trains its employees who work with killer whales to recognize particular behaviors that it calls "precursors," which indicate that the killer whales may act aggressively, and keeps detailed incident reports of when its killer whales had behaved aggressively or otherwise undesirably toward trainers, including pulling trainers into the pool. The Secretary presented evidence that the killer whales posed a hazard in spite of SeaWorld's safety measures. On multiple occasions, including the death of Ms. Brancheau, SeaWorld's incident reports indicated that the killer whales showed no immediate precursors of aggressive behavior or ignored SeaWorld's emergency procedures designed to make them cease aggressive behavior. Statements by SeaWorld managers do not indicate that SeaWorld's safety protocols and training made the killer whales safe; rather, they demonstrate SeaWorld's recognition that the killer whales interacting with trainers are dangerous and unpredictable and that even senior trainers can make mistakes during performances, and the managers repeatedly urged caution in working with the killer whales. The evidence thus supports the ALJ's finding that a recognized hazard existed, even beyond the impact of SeaWorld's safety protocols. * * *

The remedy imposed for SeaWorld's violations does not change the essential nature of its business. There will still be human interactions and performances with killer whales; the remedy will simply require that they continue with increased safety measures. SeaWorld itself has limited human interactions. After Ms. Brancheau's death in 2010, SeaWorld ceased "waterwork" with all of its killer whales. It also imposed distance between trainers and Tilikum during drywork and, to a lesser degree, between other killer whales and trainers during drywork. These self-imposed limitations are relevant to the assessment of which aspects of SeaWorld's business are essential and indicate that the Secretary's remedy will not eliminate any essential element. SeaWorld does not assert . . . that a public perception of danger to its trainers is essential to its business. Nor has SeaWorld ever argued that limiting interactions in the way that the remedy requires would have a detrimental economic impact on its profits. * * *

To the extent SeaWorld maintains that close contact is integral to cleaning and caring for their animals (i.e., "husbandry"), and that it was arbitrary and capricious to find a recognized hazard in the performance context but not in the husbandry context, its position is unfounded. Contact during husbandry was not at issue before the ALJ or the Commission. Regardless, although some aspects of husbandry may require close contact, according to SeaWorld's vice president for veterinary services, many procedures can be conducted in a medical pool with a lifting bottom that restricts the killer whale's mobility, or can be performed from poolside behind a short wall. * * *

SeaWorld's suggestion that because trainers "formally accepted and controlled their own exposure to . . . risks," the hazard of close contact with killer whales cannot be recognized, contravenes Congress's decision to place the duty to ensure a safe and healthy workplace on the employer, not the employee. This court has long held "this duty is not qualified by such common law doctrines as assumption of risk, contributory negligence, or comparative negligence." * * *

The Secretary and the Commission could also reasonably determine that the remedy does not go to the essence of SeaWorld's productions. SeaWorld has had no "waterwork" performances since Ms. Brancheau's death in 2010, and it temporarily suspended "waterwork" after other incidents, such as the killing of a trainer by a killer whale in 2009 at a non-SeaWorld park in Spain. With distance and physical barriers between Tilikum and trainers during drywork, Tilikum can still perform almost the same behaviors performed when no barriers were present. The nature of SeaWorld's workplace and the unusual nature of the hazard to its employees performing in close physical contact with killer whales do not remove SeaWorld from its obligation under the General Duty Clause to protect its employees from recognized hazards. * * *

[A]lthough this case is only about a single "entertainment show," our [dissenting] colleague repeatedly characterizes this case as being about the "*sports and* entertainment *industries*." No one has described SeaWorld's killer whale performances as a "sport," and a *legal* argument that the "sports industry" should not be regulated by OSHA can be raised when and if OSHA attempts to do so. * * * [O]ur colleague is simply wrong in saying that OSHA has "departed from tradition and stormed headlong into a new regulatory arena," involving entertainment shows. In fact, this is hardly the first time that OSHA has regulated the working conditions of such shows. * * * Many traditional industries can be extremely dangerous to their employees: construction, metal pouring, logging, welding, firefighting, roofing, electrical power line installation, handling explosives. Yet these industries have been regulated pursuant to the Occupational Safety and Health Act, notwithstanding that employers could claim their employees were also "willing participants," "even in the face of known

physical risk," or that the employees were taking part in "the 'normal activities' intrinsic to the industry."

Our colleague's main point appears to be that the Secretary and the Commission were arbitrary and capricious by failing to reasonably distinguish SeaWorld's killer whale shows from the NFL and NASCAR. It's all or nothing, the dissent suggests. Either OSHA must regulate SeaWorld's killer whale shows *and* the NFL *and* NASCAR—or it cannot regulate any of the three because no rational distinction is possible. But SeaWorld offers nothing to show that it raised the NFL/NASCAR hypothetical before the Commission. * * * No principle of administrative law requires an agency to anticipate and distinguish a hypothetical that a party did not raise until its subsequent appellate briefs. Perhaps when squarely faced with that question OSHA will accept the dissent's argument that . . . it cannot regulate sports regardless of statutory text because "Congress could not have intended" it. Perhaps OSHA will say . . . that physical contact between players is "intrinsic" to professional football in a way that it is not to a killer whale show. In any event, no principle of law requires a court, when reviewing a citation based on specific facts relating to one of several kinds of entertainment shows put on by a single employer, to reach beyond that citation and decide the hypothetical application of the statute to another industry. * * *

Furthermore, * * * had Congress intended all unsafe and unhealthy performances in the entertainment industry to be beyond the scope of employee protection, it could have included such an exemption in the Occupational Safety and Health Act, and it did not. * * * SeaWorld does not contest that it is an "employer" under the Act. Neither does SeaWorld point to anything in the Act or regulations that would require exemption of its shows, much less of all entertainment performances.

* * * Substantial evidence supports the ALJ's findings that it was feasible for SeaWorld to abate the hazard to its employees by using barriers or minimum distance between trainers and killer whales, most notably because SeaWorld has implemented many of these measures on its own. When an employer has existing safety procedures, the burden is on the Secretary to show that those procedures are inadequate. The record evidence showed that SeaWorld's training and protocols did not prevent continued incidents, including the submerging and biting of one trainer in 2006, the killing of a trainer by a SeaWorld-trained and owned killer whale in 2009 at an amusement park in Spain, and Ms. Brancheau's death in 2010. SeaWorld employees repeatedly acknowledged the unpredictability of its killer whales. This record evidence supports the ALJ's finding that existing protocols were inadequate to eliminate or materially reduce the hazard to SeaWorld's trainer employees performing with killer whales.

Abatement is "feasible" when it is "economically and technologically capable of being done." After Ms. Brancheau's death, SeaWorld required that all trainers work with Tilikum from a minimum distance or behind a barrier, and "waterwork" ceased with all of its killer whales. . . . [I]mplementing the ordered abatement is feasible because it would involve extending these practices to all killer whales and into the future. As the ALJ noted, SeaWorld had not argued the Secretary's proposed abatement was not economically or technologically feasible and had already implemented abatement for at least one of its killer whales and needed only to apply the same or similar protective contact measures it used with Tilikum to other killer whales. Consequently, the Secretary was not required to specify the precise manner in which abatement should be implemented. That the ALJ subsequently granted SeaWorld's request for a six-month extension of the abatement deadline, in view of SeaWorld's difficulty in scheduling two consulting experts, does not undermine the substantial evidence that SeaWorld could feasibly abate the hazard. SeaWorld does not dispute that the Secretary's abatement measures would materially reduce, if not eliminate, the hazard killer whales pose to its employees during performances. * * *

DISSENTING OPINION BY CIRCUIT JUDGE KAVANAUGH

Many sports events and entertainment shows can be extremely dangerous for the participants. Football. Ice hockey. Downhill skiing. Air shows. The circus. Horse racing. Tiger taming. Standing in the batter's box against a 95 mile per hour fastball. Bull riding at the rodeo. Skydiving into the stadium before a football game. Daredevil motorcycle jumps. Stock car racing. Cheerleading vaults. Boxing. The balance beam. The ironman triathlon. Animal trainer shows. Movie stunts. The list goes on.

But the participants in those activities want to take part, sometimes even to make a career of it, despite and occasionally because of the known risk of serious injury. To be fearless, courageous, tough—to perform a sport or activity at the highest levels of human capacity, even in the face of known physical risk—is among the greatest

forms of personal achievement for many who take part in these activities. American spectators enjoy watching these amazing feats of competition and daring, and they pay a lot to do so. * * *

The broad question implicated by this case is this: When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants? And most importantly for this case, *who decides* that the risk to participants is too high?

In the first instance, the sports and entertainment industries regulate themselves, often through collaboration between management and participants, to ensure that the risks are at least known to all. * * * Sometimes Congress, state legislatures, or state regulators jump into the fray by prohibiting or otherwise regulating certain sports or entertainment activities. State tort law also looms as a significant constraint in most jurisdictions, particularly for allegedly known but unwarned-of risks to the participants, as the NFL has recently experienced. * * * But the Department of Labor, acting with a fair degree of prudence and wisdom, has not traditionally tried to stretch its general authority under the Act to regulate participants taking part in the normal activities of sports events or entertainment shows.

In this case, however, the Department departed from tradition and stormed headlong into a new regulatory arena. The Department issued a citation to SeaWorld that effectively bans SeaWorld from continuing a long-standing and popular (albeit by definition somewhat dangerous) show in which SeaWorld trainers play with and interact with whales. * * * Whether SeaWorld's show is unreasonably dangerous to participants and should be banned or changed is not the question before us. The question before us is whether the Department of Labor has authority under current law to make that decision. . . . * * *

In the leading *Pelron* case, the Department of Labor had issued a General Duty Clause citation to Pelron Corporation, a manufacturer of liquid specialty chemicals, following a chemical explosion at one of Pelron's manufacturing facilities. The Department alleged that the mere "accumulation" in Pelron's facility of a potentially dangerous chemical constituted a recognized hazard that Pelron had failed to eliminate. But the Occupational Safety and Health Review Commission vacated the Department's citation. In explaining why the mere presence of a dangerous chemical could not constitute a recognized hazard, the Commission stated: "Obviously, some industrial activities are by their very nature dangerous. To permit the normal activities in such an industry to be defined as a 'recognized hazard' within the meaning" of the General Duty Clause is "to eliminate an element of the Secretary's burden of proof and, in fact, almost to prove the Secretary's case by definition, since under such a formula the employer can *never* free the workplace of inherent risks incident to the business." *Pelron* means that some activities, though dangerous, are among the "normal activities" intrinsic to the industry and therefore cannot be proscribed or penalized under the General Duty Clause. * * *

In the sports and entertainment fields, the activity itself frequently carries some risk that cannot be eliminated without fundamentally altering the nature of the activity as defined within the industry. Tackling is part of football, speeding is part of stock car racing, playing with dangerous animals is part of zoo and animal shows, and punching is part of boxing, as those industries define themselves. * * * Here, SeaWorld has decided that close contact between SeaWorld trainers and whales is an important aspect of its shows. * * *

Under the current statutory scheme, *Pelron* precludes the Department of Labor from entering the arena and altering the activities of the participants in those competitions or shows, whether it be the NFL or NASCAR or SeaWorld. The Department of Labor can no more tell the participants in a sports event or entertainment show that their activities are simply too dangerous to perform than it could tell the Pelron Corporation that its chemicals were simply too dangerous to produce. * * *

I take no position here on whether SeaWorld—or for that matter the NFL or NASCAR—should be subject to more stringent government regulation or liability, or otherwise should voluntarily make its activities safer. That *policy* question is not before us. My *legal* disagreement with the majority opinion boils down to one basic question: Who decides? Under current law, it is not the Department of Labor. I respectfully dissent.

CASE QUESTIONS

1. What are the legal issues in this case? What did the appeals court decide?
2. What things must be shown to establish a violation under the general duty clause of the OSH Act? How are each of these elements satisfied in this case?
3. This case involves an unusual hazard faced by employees in a business that produces a unique form of entertainment. Legally speaking, should any of

that matter? Should OSHA be able to regulate safety in the entertainment industry in the same manner as any other industry? Why or why not? If so, should this authority also extend to the realm of professional sports? Why or why not?

4. An undercurrent in this case is the claim that the regulation of safety by OSHA is interfering with the basic business model and product of SeaWorld. Is that true? Why or why not? In general, should OSHA be able to ban activities, substances, or work processes because they are too dangerous even if they are widely used in an industry? Order the closure of inordinately dangerous facilities? Why or why not?
5. Do you agree with the court's decision? Why or why not?

JUST THE FACTS

In February 2014, shooting began for *Midnight Rider*, a film based on the lives of the Allman brothers. The film was never completed. As the film crew set up to shoot a scene on an active train trestle owned by CSX Transportation, a freight train barreled through, killing a 27-year-old camera assistant and seriously injuring several other film crew members. The director and producers in charge of the film knew that the railroad tracks were in active use and that CSX had refused permission to film on the tracks. Film crew and cast members were not informed that CSX would not be on site and would not be controlling train traffic while they were filming on the tracks. Did the film company violate the OSHA's general duty clause? Why or why not? Were the director and producers criminally responsible? Why or why not?

THE CHANGING WORKPLACE

Ergonomic Hazards

Ergonomics deals with the fit between the physical demands of jobs and the physical abilities of people. Work tasks, equipment, and surroundings can pose hazards to employees when they entail such things as frequent use of force, lifting of heavy loads, repetitive motions, awkward postures, excessive standing in one place, vibration, and exposure to cold temperatures. These ergonomic risk factors can result in a variety of **musculoskeletal disorders (MSDs)**, also referred to as repetitive stress injuries or cumulative trauma disorders. Particular types of MSDs include carpal tunnel syndrome, rotator cuff syndrome, epicondylitis (an elbow problem), trigger finger, low back pain, sciatica, and tendonitis. These conditions range in severity but can be painful and debilitating. MSDs constitute the lion's share of recorded occupational illnesses (in contrast to injuries) and account for a significant proportion of workers' compensation claims. Laborers, firefighters, freight handlers, nurses, nursing assistants, stock clerks and order fillers, production workers, and delivery drivers are among the occupations with the highest incidence of MSDs.[1] A study by NIOSH of one particular type of production worker—poultry processing workers—found that fully 42 percent of the workers at a plant in South Carolina showed evidence of carpal tunnel syndrome.[2] Not all MSDs are caused by work activities, but substantial evidence exists that many MSDs are work related and that ergonomic interventions in workplaces can reduce the incidence of MSDs.[3]

OSHA's efforts to develop an ergonomics standard are another classic illustration of the highly contentious and politicized standard-setting process. The agency started out in the mid-1980s by offering ergonomics training to employers. It issued voluntary guidelines for the meat-packing industry in 1990. In 1992, OSHA announced that it intended to develop an ergonomics standard (it issued an "advance notice of proposed rule making"). A draft standard was released in 1995, and as