

**BEFORE THE**  
**STATE OF CALIFORNIA**  
**OCCUPATIONAL SAFETY AND HEALTH**  
**APPEALS BOARD**

In the Matter of the Appeal of:

McCARTHY BUILDING CO., INC.  
2241 Douglas Boulevard, Suite 200  
Roseville, CA 95661

Employer

Docket. 12-R1D4-3458

**DECISION AFTER  
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken the petition for reconsideration filed by McCarthy Building Company, Inc. (Employer) under submission, renders the following decision after reconsideration.

**JURISDICTION**

On November 15, 2012, the Division of Occupational Safety and Health (Division) cited Employer for violating workplace safety and health standards codified in California Code of Regulations, Title 8, and proposed civil penalties.<sup>1</sup> Citation 1, Item 1 alleged a general violation of section 1629, subdivision (a)(4) [failure to provide two stairways extended to the uppermost floor of a building 36 feet or more in height]. Citation 1, Item 2 alleged a general violation of section 1630, subdivision (a) [failure to provide a construction passenger elevator extending to the uppermost floor on a building 60 feet or more in height].

Employer appealed the citations and asserted multiple affirmative defenses.

A hearing was held before an Administrative Law Judge (ALJ) of the Board. The ALJ upheld each citation in his decision dated December 24, 2013, denying Employer's affirmative defenses.

Employer then filed a Petition for Reconsideration, which the Board took under submission. The Division filed an Answer to the Petition.

---

<sup>1</sup> Unless otherwise specified, all references are to California Code of Regulations, Title 8.

## **ISSUES**

- 1. Did Employer violate section 1629, subdivision (a)(4) when it failed to have two stairways extending to the roof?**
- 2. Did Employer violate section 1630, subdivision (a) when it failed to have a construction elevator extending to the roof?**

## **FINDINGS OF FACT**

1. Employer acted as the general contractor for the construction of a Kaiser medical facility located at 275 West MacArthur Boulevard, Oakland, California (the “building”).
2. The building had 12 floors above street level, excluding the roof, and one floor below street level.
3. The building was steel framed.
4. At all pertinent time periods, there were at least two permanent stairways that provided access between floor levels up to the 12<sup>th</sup> floor, and only one permanent stairway that provided access between the 12<sup>th</sup> floor and the roof.
5. The roof of the building had multiple structures on it, including an elevator penthouse, mechanical and electrical rooms, HVAC units, and a large photo-voltaic (solar-power) deck. These structures were not meant for permanent occupancy.
6. Following receipt of a complaint, the Division, through Safety Inspector David Hornung (“Inspector”), conducted an inspection of the building on two occasions. The Inspector conducted the first inspection on September 19, 2012 and the second inspection on October 29, 2012.
7. During the Inspector’s first visit to the building on September 19, 2012, he inspected the roof of the building. He observed multiple persons working on the roof—both Employer and subcontractors had personnel on the roof.
8. At the time of the first inspection, Employer had three construction passenger elevators (or hoists) providing access and egress to the roof, affixed to the exterior of the building.
9. At the time of the Division’s second inspection, the Employer had dismantled the hoists and was using the permanent interior elevators, which provided access and egress up to the 12<sup>th</sup> floor, but provided no access the roof. Employer had to remove the exterior construction elevators by the time of the Inspector’s second visit in order to complete construction of the building.
10. At all pertinent times, Employer was in the process of installing an additional hatch leading to the roof, which would either use a ship’s ladder or alternating tread device to provide access to the roof. But it was not completed at the time of either of the Division’s inspections.

## **DECISION AFTER RECONSIDERATION**

In making this decision, the Board relies upon its independent review of the entire record. The Board has taken no new evidence.

### **1. Did Employer Violate Section 1629, subdivision (a)(4) when it failed to have two stairways extending to the roof?**

The Division issued to Employer Citation 1, Item 1 alleging a violation of section 1629, subdivision (a)(4). Section 1629 requires suitable stairways for all buildings or structures more than two stories in height. Section 1629, subdivision (a)(4) specifies that:

A minimum of 1 stairway shall be provided for access and exit for buildings and structures to 3 stories or 36 feet; if more than 3 stories or 36 feet, 2 or more stairways shall be provided.

Citation 1, Item 1 asserts the following:

On and about September 19, 2012, at a multiemployer worksite, the controlling and correcting employer did not provide two or more stairways for access and exit to the roof of the 296 feet tall building under construction where multiple trades were performing work on the roof.

In sum, the Division cited Employer with a violation of section 1629, subdivision (a)(4) for failing to have two stairways providing access and egress to the roof of the building.

In support of the citation, the Division's Inspector, Hornung, testified that he conducted an inspection of the roof of the building on two occasions, on September 19, 2012 and October 29, 2012. During both inspections, he observed only one stairway providing access to and egress from the roof. Hornung testified that the roof of the building had multiple structures on it, including an elevator penthouse, mechanical and electrical rooms, HVAC units, and a large photo-voltaic (solar-power) deck extending about fifteen feet above the roof. He also observed multiple people working on the roof at the time of the first visit.

Hornung issued Citation 1, Item 1 because he believed that section 1629, subdivision (a)(4) required two stairways to the roof, particularly due to the structures and workers on the roof. The ALJ's decision upheld the citation, effectively finding that the roof should be construed to be the uppermost floor. However, we reverse that decision and conclude that the Division failed to establish a violation of section 1629, subdivision (a)(4).

The rules of statutory construction apply to interpreting regulations. (*Auchmoody v. 911 Emergency Servs.*, (1989) 214 Cal. App. 3d 1510, 1517.) The fundamental task in statutory and regulatory construction is to ascertain the intent of the lawmakers. (*Branciforte Heights, LLC v. City of Santa Cruz*, (2006) 138 Cal. App. 4th 914, 934). To determine the intent of the lawmakers, we begin by giving the words their usual and ordinary meaning. “If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs.” (*Ibid.*) “If possible, significance should be given to every word, phrase, sentence and part of an act...” (*People v. Black*, (1982) 32 Cal. 3d 1, 5 [citations omitted].) “[A] construction making some words surplusage is to be avoided.” (*Ibid.*) The words of a statute or regulation should also be construed in context. (*Ibid.*)

Section 1629, when it is read as a whole and in context (including subsections (a)(4) and (b)(2)<sup>2</sup>), and when its words are given their ordinary meaning, only requires two stairways to extend to the “uppermost floor” for steel frame buildings in excess of three stories. Here, applying the ordinary meaning to the terms used in the regulation, we decline to find that the roof of the building constituted the “uppermost floor.” We conclude that the terms “roof” and “uppermost floor” have different and distinct meanings in ordinary usage, and cannot be interchanged.<sup>3</sup> In reaching the holding, we are guided by *Langer Roofing & Sheet Metal, Inc. v. Sec’y of Labor*, (1975) 524 F.2d 1337. In that case, which considered a challenge to a citation brought under the Federal Occupational Safety and Health Act, the Seventh Circuit found that the Secretary’s attempt to define the term “floor” to encompass roofs used as working surfaces did not comport with “normal usage,” finding that such an interpretation was “unreasonable.” (*Ibid.*)

Additionally supporting our finding that section 1629, subdivision (a)(4) does not apply to roofs, we observe that roof access is specifically governed by a separate subdivision within the regulation. Section 1629, subsection (b)(4) states:

Roof and attic work areas of all buildings shall be provided with a safe means of access and egress, such as stairways, ramps or ladders that conform to the provisions of Article 25 of these safety orders.

Were we to construe the roof here as the uppermost floor, it would render section 1629, subsection (b)(4) surplusage, and we are bound to avoid a construction that renders words or parts of regulation surplusage. (See, *Sully-*

---

<sup>2</sup> Section 1629, subsection (b)(2) states: “Steel Frame Buildings. Stairways shall extend to the uppermost floor that has been planked or decked. Ladders may be used above that point.”

<sup>3</sup> Further supporting our holding we also observe that the terms “floor” and “roof” have effectively been given different definitions in other portions of the Safety Orders, including section 1731 [defining the word roof] and section 1504 [defining the term floor area].

*Miller Contracting Co. v. California Occupational Safety & Health Appeals Bd.*, (2006) 138 Cal. App. 4th 684, 695.)

Therefore, we find that the Division failed to establish a violation of section 1629, subdivision (a)(4) and vacate Citation 1, Item 1. Ultimately, Section 1629, subsection (b)(4) only requires “a safe means of access and egress” to the roof, not two stairways, and the Board cannot impose stricter or more detailed requirements than those set forth in a safety order promulgated by the Standards Board. (*Mobil Oil Corp.*, Cal/OSHA App. 00-222, Decision After Reconsideration (Apr. 29, 2002), *citing*, *Hylton Drilling Co.*, Cal/OSHA App. 82-216, Decision After Reconsideration (Jan. 17, 1986).)

**2. Did Employer Violate Section 1630, subdivision (a) when it failed to have a construction elevator extending to the roof?**

The Division also issued to Employer Citation 1, Item 2 alleging a violation of section 1630. Section 1630, subdivision (a) states:

In addition to the stairways required in Section 1629, a construction passenger elevator for hoisting workers shall be installed and in operation on or in any building, or structure, 60 feet or more in height above or 48 feet in depth below ground level. The building or structure height shall be determined by measuring from ground level to the highest structural level including the parapet walls, mechanical rooms, stair towers and elevator penthouse structures but excluding antennas, smokestacks, flag poles and other similar attachments.

Citation 1, Item 2 described the violation as follows:

At the time of the Cal/OSHA inspection, at a multiemployer worksite, the controlling and correcting employer did not install and maintain in operation a construction passenger elevator for hoisting workers to the upper most floor of the 296 feet tall building.

From testimony and evidence introduced at hearing, the basis for this citation is that Employer did not have any construction passenger elevators that provided access to the roof at the time of the Inspector’s second visit.

However, section 1630 does not require Employer to provide a construction elevator providing access to the roof. Section 1630(d) states:

Landings shall be provided for the passenger elevator on or in buildings or structures at the upper-most floor and at intervals not to exceed 3 floors or 36 feet.

This regulation does not require a construction elevator to have a landing on the roof; it requires a landing on the “uppermost floor.” And for the reasons discussed in the preceding section, we find that the terms “roof” and “uppermost floor” in ordinary usage are separate and distinct, and not interchangeable.<sup>4</sup>

Since we find that section 1630 only requires an elevator landing at the uppermost floor (not to the roof) and at intervals not to exceed three stories, and since elevators and elevator landings did exist extending to the required floor levels during both the Inspector’s first and second visit, the Division failed to establish a violation of section 1630.

Therefore, we find that the Division failed to establish a violation of section 1630, subdivision (a) and vacate Citation 1, Item 2.

### **DECISION**

In sum, for the reasons stated herein, the Board reverses the ALJ’s Decision and vacates Citation 1, Items 1 and 2.

ART CARTER, Chairman  
ED LOWRY, Board Member  
JUDITH S. FREYMAN, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD  
FILED ON: FEB 8, 2016

---

<sup>4</sup>The Division, who bears the burden of proof, also failed to establish that the interior elevators, which were utilized during the second visit, did not, or could not, constitute compliant elevators meeting the requirements of section 1630. In reaching this holding, we reject *Rudolph and Sletten, Inc.*, Cal/OSHA App. 93-1251, Decision After Reconsideration (Apr. 8, 1998) to the extent that it can be construed as finding that the roof was the uppermost floor.

## SUMMARY TABLE

### DECISION AFTER RECONSIDERATION

In the Matter of the Appeal of:

**McCARTHY BUILDING CO., INC.**  
**Docket No. 2012-R1D4-3458**

|                   |                |
|-------------------|----------------|
| Abbreviation Key: | Reg=Regulatory |
| G=General         | W=Willful      |
| S=Serious         | R=Repeat       |
| Er=Employer       | DOSH=Division  |

IMIS No. 315319400

| DOCKET           | C<br>I<br>T<br>A<br>T<br>I<br>O<br>N | I<br>T<br>E<br>M | SECTION    | T<br>Y<br>P<br>E | ALLEGED VIOLATION DESCRIPTION<br>MODIFICATION OR WITHDRAWAL<br>AND REASON | A<br>F<br>F<br>I<br>R<br>M<br>E<br>D | V<br>A<br>R<br>I<br>A<br>T<br>I<br>O<br>N | PENALTY<br>PROPOSED<br>BY DOSH IN<br>CITATION | PENALTY<br>ASSESSED<br>BY ALJ | <b>FINAL<br/>PENALTY<br/>ASSESSED<br/>BY BOARD</b> |
|------------------|--------------------------------------|------------------|------------|------------------|---------------------------------------------------------------------------|--------------------------------------|-------------------------------------------|-----------------------------------------------|-------------------------------|----------------------------------------------------|
| 12-R1D4-3458     | 1                                    | 1                | 1629(a)(4) | G                | Vacated by the Board.                                                     |                                      | x                                         | \$750                                         | \$750                         | <b>\$0</b>                                         |
|                  |                                      | 2                | 1630(a)    | G                | Vacated by the Board.                                                     |                                      | x                                         | \$750                                         | \$750                         | <b>\$0</b>                                         |
| <b>Sub-Total</b> |                                      |                  |            |                  |                                                                           |                                      |                                           | \$1,500                                       | \$1,500                       | <b>\$0</b>                                         |

**Total Amount Due\***

(INCLUDES APPEALED CITATIONS ONLY)

**\$0**

NOTE: Payment of final penalty amount should be made to:  
 Accounting Office (OSH)  
 Department of Industrial Relations  
 P.O. Box 420603  
 San Francisco, CA 94142

\*You will owe more than this amount if you did not appeal one or more citations or items containing penalties. Please call (415) 703-4291 if you have any questions.

POS: 2/8/2016