BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

WALSH/ SHEA CORRIDOR CONSTRUCTORS
9323 BELLANCA AVENUE
LOS ANGELES, CA 90045

Employer

Statement of the Case

Walsh/Shea Corridor Constructors (Employer) is a contractor engaged in the construction of large public transportation projects. Beginning on September 16, 2015, the Division of Occupational Safety and Health (the Division), acting by and through Associate Safety Engineer Matthew Switzer (Switzer), conducted an inspection at a worksite maintained by Employer in connection with the construction of the Exposition (Expo) Subway Station, located at the intersection of Crenshaw Boulevard and Rodeo Road, Los Angeles, California (the site). Following its investigation, the Division issued two citations to Employer for alleged violations of safety orders contained in California Code of Regulations, title 8, one of which remains at issue in this appeal. Citation 2 alleges that Employer willfully failed to provide a construction passenger elevator once construction at the site reached 48 feet below ground level.

Employer filed timely appeals from Citation 1, items 1, 2 and 3, and Citation 2. Prior to hearing, the Division withdrew Citation 1, item 1, and Employer withdrew its appeal of Citation 1, items 2 and 3. As to Citation 2, Employer appealed on the grounds that it did not violate the cited safety order, the citation was incorrectly classified as Willful General, and that the proposed penalty is unreasonable. Employer also asserted numerous affirmative defenses, the majority of which it waived at the hearing. (Exhibit 1.)

This matter was heard by Howard Isaac Chernin, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, in Van Nuys, California on June 14, 2017. Sandra Hitt, Staff Counsel, represented the Division. Attorney Diana Dron, Monteleone and McCrory, LLP, represented Employer. The matter was submitted for decision on July 14, 2017, to allow for post-hearing briefing. The undersigned extended the submission date to August 6, 2017 by his own motion.

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1 Unless otherwise indicated, all references are to sections of California Code of Regulations, title 8.
Issues

1. Do the Construction Safety Orders (Section 1502, et seq.) (CSOs) apply to the construction of a cut-and-cover subway station?
2. Did Employer violate section 1630, subdivision (a) by not installing a construction passenger elevator for hoisting workers in and out of the site?
3. Does the application of section 1630 of the CSOs to Employer’s work at the site create an actual conflict with the Tunneling Safety Orders (TSOs)?
4. Was Employer’s alleged violation of section 1630, subdivision (a) excused by the existence of unusual site conditions or structure configurations?
5. Did the Division properly classify the violation cited in Citation 2 as General?
6. Did the Division properly classify Employer’s violation of section 1630, subdivision (a) as willful?
7. Did Employer establish any of its pleaded affirmative defenses?
8. Is the Division estopped from enforcing section 1630, subdivision (a) at the site?

Findings of Fact

1. Employer was constructing a cut-and-cover subway station at the time of the inspection. Construction of the station involved excavation as well as construction of underground structures. These activities are governed by both the Construction Safety Orders (CSOs) and the Tunneling Safety Orders (TSOs).
2. Construction at the site reached a depth of 48 feet below ground level by the second week of August, 2015. Employer did not install a construction passenger elevator prior to reaching a depth of 48 feet where employees were working.
3. Employer did not utilize a shaft for access or egress from the site. Employer did not provide two accepted means for access and egress as it was required to do under the TSOs.
4. There were no unusual site conditions or structure configurations at the site. Employer knew how the subway station would be constructed and configured prior to obtaining a permit from the Division and prior to commencing work at the site.
5. Employees required to access and exit the site via stairs are exposed to increased risk of slips, trips and falls that could result in injuries requiring more than first aid, including ankle and leg injuries.
6. The Division instructed Employer to comply with section 1630, subdivision (a) no later than February 24, 2015. Employer did not comply until November, 2015.
7. It was feasible for Employer to comply with section 1630, subdivision (a). Employer ultimately did install a construction passenger elevator at the site.
8. The Division properly calculated the penalty for Citation 2.²

² This finding of fact results from a stipulation entered into by the parties at hearing. Penalties calculated in accordance with the penalty setting regulations are presumptively reasonable will not be reduced absent evidence that the amount was miscalculated, the regulations were improperly applied, or that the totality of the circumstances warrant a reduction. (Stockton Tri Industries, Inc., Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).) Because no such evidence was produced at hearing, further discussion of the penalties is unnecessary.
1. Do the Construction Safety Orders (Section 1502, et seq.) (CSOs) apply to the construction of a cut-and-cover subway station?

"Labor Code section 6317 requires the Division to cite the applicable safety order." (Stacy & Witbeck, Cal/OSHA App. 04-1142, Decision After Reconsideration (May 12, 2011).) If the Division cites an inapplicable safety order, the appeal must be granted. (Bostrom-Bergen Metal Products, Cal/OSHA App. 00-1012, Decision After Reconsideration (Jan. 10, 2003).) Employer argued throughout the hearing that section 1630 does not apply because the Tunneling Safety Orders (TSOs) apply exclusively to the work it was performing.

The principal dispute between the parties is one of regulatory interpretation. The Appeals Board has adopted the following rules for interpreting regulations:

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.)

(McCarthy Building Co., Inc., Cal/OSHA App. 12-3458, Decision After Reconsideration (Feb. 8, 2016).)

The Appeals Board construes regulations "by giving words their common sense meaning based on the evident purpose for which the enactment was adopted." (The Herrick Corp., Cal/OSHA App. 07-0495, Decision After Reconsideration (Mar. 26, 2012), citing In re Rojas (1979) 23 Cal. 3d 152, 155.) The Appeals Board broadly interprets words in safety orders in order to be "consistent both with the common sense meaning of the term, the meaning intended by the Standards Board, and the legislative purpose of the OSH Act to provide a safe working environment for California workers." (Id., citing Carmona v. Division of Industrial Safety (1975) 13 Cal. 3d 303.) Ultimately, the Appeals Board interprets safety orders "in a manner that affords maximum protection to workers." (United Parcel Service, Cal/OSHA App. 14-1779, Decision after Reconsideration (Dec. 8, 2015), quoting Beutler Heating & Air Conditioning, Cal/OSHA App. 98-556, Decision After Reconsideration (Nov. 6, 2001).)
The CSOs apply to employment “in connection with the construction... of any fixed structure or its parts. These orders also apply to all excavations not covered by other safety orders for a specific industry or operation.” (Section 1502, subdivision (a).) Section 1504 defines a “structure” as “that which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner. Section 1540 defines an “excavation” as “any man-made cut, cavity, trench, or depression in an earth surface, formed by earth removal.”

Employer did not dispute that it was engaged in work in connection with the construction of an underground subway station during the inspection, as evidenced in Exhibits 2 through 6. Rather, Employer argues that the site is an excavation covered by the Tunnel Safety Orders, and therefore, the CSOs do not apply. However, it is established law that more than one safety order can apply to work being conducted. As the Appeals Board held in Cabrillo Economic Development Corp., Cal/OSHA App. 11-3185, Decision After Reconsideration (Oct. 16, 2014):

It is not uncommon for more than one safety order to apply to a particular set of facts. Applying principles of statutory construction, the Board will only find that a more specific safety order is controlling where there is an actual conflict between the two safety orders. (Vernon Melvin Antonsen & Colleen K. Antonsen, individually and dba Antonsen Construction, Cal/OSHA App. 06-1272, Amended Decision After Reconsideration (Aug. 30, 2012).) Where it is possible to read the safety orders so that they are in harmony with one another, the Board will do so. (Garcia v. McCutchen (1997) 16 Cal.4th 469, 476-478).³

Employer’s argument that the CSOs do not apply to the work it was performing rests upon Employer’s interpretation of Section 8403 (Scope and Application) of the TSOs, which states in relevant part:

(a) These orders establish minimum safety standards in places of employment at tunnels, shafts, raises, inclines, underground chambers, and premises appurtenant thereto during excavation, construction, alteration, repairing, renovating or demolishing and the following:

(1) Cut-and-cover operations such as subway stations which are both physically connected to ongoing underground construction operations and are covered in such a manner as to create conditions characteristic of underground construction.

³ Whether an actual conflict exists between section 1630, subdivision (a) of the CSOs, and the TSOs is discussed separately in section three of this Decision.
Stated succinctly, section 8403 establishes minimum safety standards in places of employment at cut-and-cover operations such as subway stations. There is no dispute that the site was a cut-and-cover operation. The term “minimum” is not defined in the title 8 regulations, but is generally understood to mean the smallest or least permissible of a quantifiable thing. Employer incorrectly interprets the term “minimum” to mean “only.” Adopting Employer’s interpretation, as discussed further under Section 2 of this Decision, would render other sections and subdivisions within the TSOs superfluous or null, both of which are inconsistent with the rules of regulatory construction followed by the courts and the Appeals Board. (See e.g. Orange County Fire Authority, Cal/OSHA App. 12-0439, Denial of Petition for Reconsideration (Apr. 29, 2013.).)

Even assuming that the site is an excavation, Employer’s reading of the second sentence of section 1502, which equates the word “also” with “only”, would render the first sentence meaningless. The plain meaning of the second sentence is to extend the CSOs to excavations not made in connection with the construction of any fixed structure or its parts. Employer does not dispute that it was constructing a subway station at the time of the inspection. Such is evident when reviewing the photographs taken by the Division’s inspector Matthew Switzer. If the court were to apply Employer’s interpretation to section 1502, the exception would subsume the rule, an undesirable result in light of the expansive coverage provided in the first sentence of the safety order. Applying the court’s interpretation, on the other hand, gives full meaning to the text of section 1502, and better conforms to the stated purpose of the Occupational Safety and Health Act in promoting safety and health in places of employment.

In summary, the CSOs apply to the work Employer was performing at the site during the inspection. Employer was engaged in the construction of a structure, and nothing in section 1502, 1603, subdivision (a), or 8403 inherently or explicitly prohibits application of the CSOs to the work Employer was undertaking at the site.

2. Did Employer violate section 1630, subdivision (a) by not installing a construction passenger elevator for hoisting workers in and out of the site?

Section 1630 (Elevators for Hoisting Workers) of the CSOs states in relevant part:

(a) 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...48 feet in depth below ground level. [...] Citation 2 alleges:

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(See Webster’s New World Dict. (3d college ed. 1988), p. 863, col. 2 through 864, col. 1.)
Prior to and during the course of the inspection, including, but not limited to on September 16, 2015, September 21, 2015, and October 12, 2015, the employer willfully failed to have a construction passenger elevator for hoisting workers installed and in operation at the Exposition Station of the Crenshaw/LAX Transit Corridor Project. The structure is under construction at the corner of Crenshaw Blvd. and Rodeo Rd. in Los Angeles and was more than 48 feet in depth below ground level.

Switzer credibly testified that construction of the subway station at the site reached a depth of 48 feet when measured from ground level, by the second week of August, a fact that Employer did not dispute. Switzer inspected the site in September and October of 2015, and observed employees working at a depth of at least 48 feet (see Exhibits 3 and 4), but did not observe a construction passenger elevator.

Accordingly, the Division established a violation of section 1630, subdivision (a).

3. **Does the application of section 1630 of the CSOs to Employer’s work at the site create an actual conflict with the Tunneling Safety Orders (TSOs)?**

Even if the CSOs apply to Employer’s work at the site, Employer nonetheless argues that section 1630 conflicts with portions of the TSOs, and that as a result, the TSOs prevail. Employer’s position is an affirmative defense, which Employer has the burden of proving by a preponderance of the evidence. (*Central Coast Pipeline,* Cal/OSHA App. 76-1342, Decision After Reconsideration (July 16, 1980).)

“If an employer wishes to allege that another, allegedly more specific safety order should have been cited, the employer must first demonstrate that it was in compliance with the more specific safety order.” (See *Bragg Crane & Rigging Co.*, Cal/OSHA App. 01-2428, Decision After Reconsideration (Jun. 28, 2004); *Bellingham Marine Industries, Inc.*, Cal/OSHA App. 12-3144, Decision After Reconsideration (Oct. 16, 2014).) Here, Employer contends that section 8495 applied to its work, and that it was in compliance with section 8495.

The Appeals Board has long recognized that the fact that one safety order may be more specific or more particular to a given set of facts than another is immaterial; only when an actual conflict between them exists will the more specific safety order control over the general. (*See Pacific Gas and Electric Company,* Cal/OSHA App. 82-1102, Decision After Reconsideration (Dec. 24, 1986).) Employer contends that an actual conflict exists between the two sections. Citing to section 8403, subdivision (b), Employer thus argues that the TSOs “take precedence...over any other safety orders of the Division that are inconsistent with them.”

Employer argues, and the Division did not dispute at hearing, that section 8495 (Shafts and Hoisting Systems) is more specific than section 1630 (Elevators for Hoisting Workers).
Assuming that such is the case, the remaining issue is whether an actual conflict exists between the two sections.

Section 8495 (Shafts and Hoisting Systems) states in relevant part:

(a) General Requirements.

(1) When a shaft is used as a means of egress, the employer shall make advance arrangements for power-assisted hoisting capability to be readily available in an emergency, unless the regular hoisting means can continue to function in the event of an electrical power failure at the jobsite. 

[...]

(3) There shall be two safe means of access in shafts at all times. This may include a ladder and acceptable hoisting system.

[...]

(17) Makeshift hoisting operations shall not be permitted for personnel or materials.

[...]

(18) Construction elevator-type hoists as defined in the Construction Safety Orders shall comply with the California Code of Regulations, Title 8, Article 14 of the Construction Safety Orders.

Section 8495 merely states that when a shaft is used as a means of egress, there shall be two safe means of access at all times, which may include a ladder and an acceptable hoisting system. It further states that makeshift hoisting operations are not permitted for personnel hoisting, and construction elevator-type hoists, as the term is defined in the CSOs, must comply with title 8, article 14 (Construction Hoists) of the CSOs, which contains specific requirements for construction passenger elevators. By including a reference to the CSO requirements for construction passenger elevators in section 8495, the drafters resolved any potential conflict by declaring that in a shaft, where construction elevator-type hoists are used, employers shall comply with the CSO requirements as well as those contained in the TSOs. Employer did not offer any reliable evidence to the contrary. Thus, Employer failed to establish that an actual conflict exists between section 1630 and section 8495.

5 “Makeshift” is not defined in the TSOs, but is generally understood to mean something temporary. (See Webster's New World Dict. (3d college ed. 1988), p. 817, col. 1. [Defining “makeshift” as “that will do for a while as a substitute”])
Even assuming that Employer could establish an actual conflict, Employer still failed to establish that it complied with the requirements of section 8495. Section 8495, subdivision (a)(3) requires that there be “two safe means of access in shafts at all times”, which “may include a ladder and acceptable hoisting system.” Subdivision (a)(17) specifically prohibits “makeshift hoisting operations for personnel.” Switzer testified that there was no construction passenger elevator at the site during his inspection. During one of many meetings held between the Division and Employer regarding the project, Employer told Switzer that it had an alternative means that it was using – a crane with a basket used for mucking operations. Switzer was told that the crane could be outfitted with a man cage (which he described as the size of a small car and resembling a dumpster) to carry employees. According to Switzer, the man cage, which could hold between six and eight employees, was a makeshift hoisting device that was not attached to the crane most of the time, and he found no evidence that employees ever requested to use the man cage in lieu of stairs or ladder. Employer, for its part, offered no evidence that employees ever utilized the crane and man cage for access or egress. Thus, Employer did not meet its burden of establishing that it met the requirements of the allegedly more specific safety order for access and egress.

For all of the foregoing reasons, Employer failed to establish that application of section 1630 of the CSOs would create an actual conflict with other, more specific sections of the TSOs.

4. Was Employer's violation of section 1630, subdivision (a) excused by the existence of unusual site conditions or structure configurations?

Employer argues that even if a violation of section 1630 exists, it is nonetheless excused by the second exception to section 1630. Relevant to the facts here, the second exception to section 1630, subdivision (a) provides that “at work locations where unusual site conditions or unusual structure configurations exist, alternate means of access in conformance with Section 1630(c) shall be permitted.” The exception defines unusual site conditions or structure configurations as “bridges, steel tank erection, dams, water towers, antennas, cooling towers, refinery towers, stacks, prefabricated parking structures, tower cranes, etc.” An exception to the safety order is in the nature of an affirmative defense, and Employer bears the burden of proving the existence of an exception by the preponderance of the evidence. (See Roof Structures, Inc., Cal/OSHA App. 81-357, Decision After Reconsideration (Feb. 24, 1983); and The Koll Company, Cal/OSHA App. 79-1147, Decision After Reconsideration (May 27, 1983).) An exception must be read narrowly; a reading of an exception that “consumes the rule” is an absurd interpretation and is disfavored under rules of statutory construction. (See Thyssenkrupp Elevator Corp., Cal/OSHA App. 11-2217, Denial of Petition of Reconsideration (Mar. 11, 2013), reversed on other grounds by Thyssenkrupp Elevator Corp. v. Occupational Safety and Health App. Bd., 2016 Cal. App. Unpub. LEXIS 6487.)

The Appeals Board has held that reasonable inferences can be drawn from evidence introduced at hearing. (ARB, Inc., Cal/OSHA App. 93-2984, Decision After Reconsideration
(Dec. 22, 1997).) “An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or established in the action.” (Evidence Code § 600, subdivision (b).) Evidence Code section 413 provides that “in determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.”

Employer presented evidence on the existence of unusual site conditions and structure configurations at the site. For instance, Dennis Poulton, JF Shea Construction’s Vice President and Chief Engineer testified about the presence of struts, walers, and utilities that posed obstacles to the placement of a construction passenger elevator. However, Employer did not explain how the presence of these items made the site similar to the examples provided by the safety order exception, nor did Employer demonstrate that it had sought permission to utilize alternate means of access prior to receiving a permit for the construction.

In Chicago Bridge & Iron Company, Cal/OSHA App. 76-1082, Decision After Reconsideration (Feb. 4, 1980), the employer (a contractor) argued that it provided proposed alternate effective means of access to the Division prior to obtaining a permit. The Appeals Board rejected the employer’s argument, noting that there was “nothing in the record to show what was presented to the Division at the time Employer obtained its permit to excavate.” Although the Appeals Board did not explicitly state in its Decision that an employer must provide proposed alternative means of access prior to issuance of a permit, such an interpretation is more logical than the alternative. Were the Appeals Board to read the exception to allow work to start at sites with unusual site conditions or unusual structure configurations prior to providing an acceptable alternative means of access to the Division, employees would be imperiled by having to work at a site where they lack safe means of access or egress. This would be an absurd result and would, in effect, nullify section 1630 and frustrate the intent of the California Occupational Safety and Health Standards Board.

Here, neither party thought to introduce the original permit as evidence at hearing. In spite of this, the undersigned reasonably infers from the entirety of the record that at all times relevant to this discussion the parties contemplated that Employer would be performing construction in connection with building a subway station at depths of more than 48 feet below ground level. Furthermore, the evidence at hearing was sufficient to establish that Employer did not present the Division with alternative means of access 1) prior to receiving a permit for the construction; 2) after receiving the permit, but prior to beginning construction at the site; or, 3) after construction commenced, but prior to when Employer had reached a depth of 48 feet. Finally, Employer acknowledges that it was performing construction work per plans prepared by or under the direction of the Los Angeles County Metropolitan Transportation Authority (LACMTA). Regardless of whether those plans called for installation of a construction passenger elevator, the undersigned infers that the plans provided enough information to Employer to determine, prior to commencement of work, whether unusual site conditions or structure configurations existed warranting alternative means for access and egress under section 1630,
subdivision (a). The time for Employer to propose an alternative means would have been prior to commencing construction.

In light of the above evidence, Employer did not meet its burden of establishing an exception to the requirements of section 1630, subdivision (a).

5. Did the Division properly classify the violation cited in Citation 2 as General?

Section 334, subdivision (b) states that a General Violation "is a violation which is specifically determined not to be of a serious nature, but has a relationship to occupational safety and health of employees." Switzer gave uncontroverted testimony that by failing to provide a construction passenger elevator, Employer exposed its employees to slips and trips and falls on the provided stairs, which could result in minor injuries to their ankles and legs, and could delay first responders from reaching injured employees. Switzer noted that it was unlikely that employees would routinely request Employer to attach the man cage to the crane used for removing muck from the excavation, and would instead use the stairs for access and egress. Employer had the opportunity to present its own evidence to refute the Division's evidence, but it did not.

Thus, the Division established that it properly classified Citation 2 as General.

6. Did the Division properly classify Employer's violation of section 1630, subdivision (a) as willful?

Section 334, subdivision (e) provides that a willful violation "is a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition."

The Division has two alternate means of proving the willfulness of an employer's conduct under section 334, subdivision (e). It could prove either: (1) that the employer knew the provisions of the cited safety order and intentionally violated them ("intentionally violated a safety law"), or, (2) that the employer knew "that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition." (See Rick's Electric, Inc. v. Occupational Safety & Health Appeals Bd. (2000) 80 Cal.App.4th 1023, 1034, and Mladen Buntich Construction Co., Cal/OSHA App. 85-1668 through 1670, Decision After Reconsideration (Oct. 14, 1987).)

Switzer testified that Employer's work at the site had reached a depth of 48 feet below ground level by the second week of August, yet when Switzer inspected the site on October 12, 2015, there was no construction passenger elevator present. Switzer testified that as early as February 24, 2015, the Division and Employer participated in a preconstruction meeting where
Switzer discussed the need for a construction passenger elevator with Employer's representatives, including Dennis Poulton, JF Shea Construction's Vice President and Chief Engineer. Employer acknowledged the requirement on March 17, 2015, when it wrote a letter to James Wittry, District Manager of the Mining and Tunneling Unit, and stated "CalOSHA representatives discussed the requirement to install Elevators for Hoisting Workers whenever the depth of station excavation below ground level reaches 48 vertical feet or greater. There was also discussion of Tunnel Safety Orders, TSO, and Construction Safety Orders, CSO, as these orders pertain to the work." (Exhibit E.) The letter further stated that Employer "understands it is responsible to operate under any applicable safety requirement in the Title 8, CSO and TSO." (Id.) The letter went on to discuss what Employer believed were unusual site conditions and structure configurations, and included various photographs of the site to illustrate Employer's points.

Employer offered no substantial evidence to controvert the Division's evidence. Dale Baggett, JF Shea Construction's Corporate Safety Manager, testified that he did not recall whether the permit issued by the Division to Employer required installation of an elevator. Employer had the ability to produce the permit to refresh Baggett's recollection or to set the record clear but did not, which led the undersigned to view Baggett's testimony with distrust. Baggett also repeatedly testified that he did not feel Employer had to comply with section 1630, subdivision (a), but he also acknowledged that Wittry told him at a meeting after construction again that the Division would "probably never" find the use of cranes and man baskets acceptable. Indeed, Employer was still providing critical information to the Division regarding the effectiveness of its proposed alternative means as late as September 16, 2015. (Exhibit K.)

Employer argues several points in its post-hearing brief to demonstrate that its violation was not willful. First, Employer argues that "WSCC knew that the TSO applied to this Project and superseded § 1630," but as discussed previously this argument is rejected because Employer acknowledged that it had been informed as early as February 24, 2015 that the Division required a construction passenger elevator. Employer's next argues that "All [Employer] knew was that one man at the Division decided that §1630 applied to the Project, despite the fact that he had never worked on a cut-and-cover-and-decked project and knew nothing of the industry standards for access/egress into Station excavations." (Employer's Post Hearing Brief, page. 12.)

Employer's argument is meritless for two reasons. Notably, Employer misstates the evidence, in that both Switzer, an Associate Safety Engineer, and District Manager James Wittry both instructed Employer that it needed to provide a construction passenger elevator. Labor Code section 6307 confers jurisdiction to the Division over every employment and place of employment in California in order to enforce and administer California's workplace safety and health rules. There is nothing in the record suggesting that, as employees of the Division, either Wittry or Switzer lacked authority to speak and act on behalf of the Division in relation to regulating Employer's conduct at the site. Additionally, regardless of Switzer's or Wittry's familiarity with the alleged industry standards, the Division is not obligated to take into

6 In the absence of further clarification in the record, the undersigned assumes that a "man basket" is objectively similar to or the same as a "man cage" like the one testified to by the various witnesses.
consideration the industry standard when enforcing the Occupational Safety and Health Act, and Employer may not ignore a safety order in reliance on its industry’s own practices. (Empire Pro-Tech Industries, Cal/OSHA App. 07-2837, Denial of Petition for Reconsideration (Aug. 19, 2008) [“An employer may not substitute its own safety measure for one required by a safety order.”])

Finally, Employer, citing to Williamson v. United States, (1908) 207 U.S. 425, argues that its violation was not willful because it was acting under the advice of counsel. The undersigned can find no Appeals Board precedent or California court decisions stating that acting under the advice of counsel is an affirmative defense recognized in this forum, or a means of negating one or more elements that the Division must prove to establish a willful violation. More fundamentally, Employer produced only one letter, dated July 8, 2015, from its counsel to the Division, in support of its contention. (Exhibit M.) The letter itself acknowledges that Switzer stated on February 24, 2015, that Employer was “required to install elevators for hoisting workers once the depth of the excavation reached 48 vertical feet.” Employer provided no credible evidence that Employer reasonably relied on the advice of counsel in deciding not to comply with section 1630, subdivision (a), prior to reaching a depth of 48 feet at the site. Even assuming Employer received a legal opinion prior to beginning construction to the effect that it was not obligated to comply with the safety order, Employer’s unquestioning reliance on such advice was not reasonable once District Manager Wittry informed Employer in clear terms on February 24, 2015 that it was required to install construction passenger elevators.

For all of the foregoing reasons, the Division met its burden of establishing that Employer’s violation of section 1630, subdivision (a) was willful because Employer intentionally and knowingly violated section 1630, subdivision (a) even after the Division insisted that Employer comply with its requirements once work reached a depth of 48 feet below ground level.

7. Did Employer establish any of its pleaded affirmative defenses?

Employer has the burden of presenting evidence relevant to its pleaded affirmative defenses, and any affirmative defenses for which Employer did not present evidence at hearing are deemed waived. (See section 361.3 “Issues on Appeal” and Western Paper Box Co., Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (Dec. 24, 1986).) Employer waived numerous of its affirmative defenses at the hearing. Employer’s fourth, sixth and seventh affirmative defenses are discussed at length above. Of the remaining affirmative defenses, Employer only presented evidence relevant to its ninth affirmative defense, that it is impossible to comply with the safety order. As noted above, Employer provided some evidence of the presence of struts, walers, utilities, and other limitations at the site that affected placement of a construction passenger elevator. Even if Employer believed it was impossible to comply with section 1630, subdivision (a), its remedy is not dismissal of the citation, but to prospectively seek a variance from the safety order’s requirements from the Occupational Safety and Health Standards Board. (See Mar-Val Food Stores, Cal/OSHA App. 92-1507, DAR (June 10, 1995); and Paso Robles Public Schools, Cal/OSHA App. 96-1722, DAR (Oct. 4, 2000).) Employer
offered no evidence that it (or LACMTA) could not have designed around a construction passenger elevator. The court is not persuaded by Employer's decision to proceed without such an elevator, that it was impossible to provide one at the site, particularly in light of the fact that Employer ultimately did install such an elevator, albeit well after it was required.

Thus, Employer failed to present legally sufficient evidence on any of its remaining pleaded affirmative defenses.

8. **Is the Division estopped from enforcing section 1630, subdivision (a) at the site?**

Employer raised affirmative defense of estoppel for the first time in its pre-hearing brief, filed mere two days before the hearing. Employer argues that similar cut-and-cover subways station construction over the past 30 years was constructed without the requirement of construction passenger elevators under section 1630, subdivision (a), and that Employer relied on this in planning, designing and building the project at the site. It further argues that when the Division, without prior notice, changed its interpretation of the TSOs and CSOs and suddenly insisted that Employer comply with section 1630, subdivision (a), that Employer suffered an "injustice" in the form of millions of dollars spent, as well as time and energy to work out the issue with the Division. Employer, therefore, argued that the Division should be estopped from enforcing section 1630, subdivision (a) at the site.

The Division correctly points out in its post-hearing brief that equitable estoppel is in the nature of an affirmative defense, and should have been pleaded when it filed its appeal, or alternatively Employer should have sought to add the affirmative defense by properly noticed motion. (Section 371.2; see County of Nevada, Cal/OSHA App. 09-2287, Decision After Reconsideration (Mar. 10, 2010).) By failing to either timely raise this defense in its pleadings or by noticed motion pursuant to the Appeals Board's regulations, Employer has waived this defense.

... Even assuming for sake of argument that Employer timely raised estoppel, Employer did not meet its burden of establishing its affirmative defense by a preponderance of the evidence. "The essence of an estoppel is that one has, by false statements or conduct, led another to do that which he would not otherwise have done and as a result the other has suffered injury. [Citation.] The elements of an estoppel claim are: '(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.' [Citation.] Where the defendant is a government entity, a fifth element requires that the injury to the plaintiff's personal interest if the government is not estopped outweighs the injury to the public interest if the government is estopped. [Citation.]" (Golden Day Schools, Inc. v. Department of Education (1999) 69 Cal.App.4th 681, 692-693 [81 Cal. Rptr. 2d 758].) Moreover, simple reliance on a false statement or conduct is not enough. In order to invoke the doctrine of equitable estoppel, the reliance must be reasonable. (Morrison v. California Horse Racing Bd. (1988) 205
Cal.App.3d 211, 218 [252 Cal. Rptr. 293].) "Whether reliance on a false statement or conduct is reasonable is a question of fact." (Brown v. Chiang, (2011) 198 Cal. App. 4th 1203, 1229.) The courts will not apply estoppel to a public agency, such as the Division, "if the result will be the frustration of a strong public policy." (Phelps v. State Water Resources Control Bd. (2007) 157 Cal.App.4th 89, 115), citing, Bib'le v. Committee of Bar Examiners of The State Bar (1980) 26 Cal.3d. 548, 553 [162 Cal. Rptr 426, 606 P.2d 733].) Where the elements of estoppel are met, the Board will then weigh the equities and consider the impact on the public policy of ensuring workplace health and safety in granting an estoppel defense in a given case. (Owens-Illinois Glass Container Inc., Cal/OSHA App. 09-2021, Decision After Reconsideration (June 16, 2014).)

Employer provided insufficient evidence that the Division acted in such a way that Employer had the right to believe that it intended for Employer not to install a construction passenger elevator. Employer failed to produce the permit issued by the Division for the construction at the site, and therefore the undersigned exercises his discretion in drawing a negative inference that the permit contained a condition requiring provision of a construction passenger elevator once construction reached a depth of 48 feet below ground level. Employer also offered no evidence that it was ignorant of the true regulatory requirements, or that it reasonably relied on the Division's supposed lax enforcement over the past 30 years. The Division informed Employer on February 24, 2015 that it was required to construct a construction passenger elevator at the site. Employer also offered insubstantial evidence that the public's interest in employee safety and health was outweighed by Employer's personal interest. A private employer's interest in saving money can never outweigh the strong public interest expressed in Labor Code section 6300:

The California Occupational Safety and Health Act of 1973 is hereby enacted for the purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health.

That purpose is best effectuated by requiring employers to spend the money necessary to assure safe and healthful working conditions. To hold otherwise would eviscerate protections afforded by the Occupational Safety and Health Act. Here, Employer offered insufficient evidence as to the cost of installing a construction passenger elevator for the undersigned to determine that such cost outweighs the public's strong interest in assuring safe and healthful working conditions.

///
Conclusions

Section 1630, subdivision (a) of the Construction Safety Orders applies to the construction of a cut-and-cover subway station. Enforcing section 1630, subdivision (a) does not create a conflict with the Tunnel Safety Orders. Employer violated section 1630, subdivision (a) by not providing a construction passenger elevator once construction reached a depth of 48 feet measured from ground level. Employer's violation is not excused by the existence of unusual site conditions or unusual structure configurations. The Division properly classified as Employer's violation as General, and properly characterized the violation as willful. Employer did not establish any of its pleaded affirmative defenses. Employer waived its affirmative defense of equitable estoppel, but regardless, Employer failed to establish all of the defense's required elements. The Division correctly calculated the proposed penalties.

Orders

Citation 1, item 1 is vacated. Citation 1, items 2 and 3, and Citation 2 are affirmed. Total penalties of $11,810 are assessed as set forth in the attached Summary Table.

Dated: 9/5/17

Howard I. Chernin
Administrative Law Judge

The attached decision was issued on the date indicated therein. If you are dissatisfied with the decision, you have thirty days from the date of service of the decision in which to petition for reconsideration. Your petition for reconsideration must fully comply with the requirements of Labor Code sections 6616, 6617, 6618 and 6619, and with California Code of Regulations, title 8, section 390.1. For further information, call: (916) 274-5751.
APPENDIX A
SUMMARY OF EVIDENTIARY RECORD

Inspection No.: 1093606
Employer: WALSH/ SHEA CORRIDOR CONSTRUCTORS
Date of hearing(s): February 7, 2017, June 14, 2017

DIVISION’S EXHIBITS

<table>
<thead>
<tr>
<th>Exhibit Number</th>
<th>Exhibit Description</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Jurisdictional Documents</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>2</td>
<td>Photograph taken 9/21/15 at bottom of station construction</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>3</td>
<td>Photograph of bottom of station construction (portrait orientation)</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>4</td>
<td>Photograph of employees at bottom of excavation along with structural supports</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>5</td>
<td>Photograph of worksite taken from street level</td>
<td>Admitted Into Evidence</td>
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<tr>
<td>6</td>
<td>Photograph of northern third of excavation taken from street level</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>7</td>
<td>Letter dated April 2, 2015</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>8</td>
<td>Meeting sign in sheet dated May 11, 2015</td>
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<tr>
<td>9</td>
<td>Sign in sheet for May 20, 2015 tunnel pre-job safety conference meeting</td>
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<td>10</td>
<td>Sign in sheet for meeting at MLK station on May 28, 2015</td>
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<td>11</td>
<td>Sign in sheet dated June 18, 2015</td>
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<tr>
<td>12</td>
<td>Letter dated 7/10/15</td>
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<tr>
<td>13</td>
<td>Proposed penalty worksheet</td>
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EMPLOYER’S EXHIBITS

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<th>Exhibit Description</th>
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<tr>
<td>A</td>
<td>Photo, aerial of Exposition Site (1/24/17)</td>
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<tr>
<td>C</td>
<td>Photo, aerial of shafts, man-cage, elevator, stair tower</td>
<td>Admitted Into Evidence</td>
</tr>
<tr>
<td>D</td>
<td>Drawing of shaft and calculations</td>
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<td>E</td>
<td>Letter, March 17, 2015, WSCC to Division</td>
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<td></td>
<td>Description</td>
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<tr>
<td>---</td>
<td>------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------</td>
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<td>G</td>
<td>Letter, April 21, 2015, WSCC to Division</td>
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<td>H</td>
<td>Powerpoint Presentation (first 7 slides)</td>
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<td>Letter, June 15, 2015, WSCC to Division</td>
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<td>J</td>
<td>Letter, July 10, 2015, Division to WSCC (withdrawn)</td>
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<td>Letter, September 16, 2015, WSCC to Division</td>
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<td>Letter, July 8, 2015, Monteleone &amp; McCrory to Division</td>
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Witnesses testifying at hearing:

Matthew Switzer
Dale Baggett
Bryan Lee
Dennis Poulton

Associate Safety Engineer
Corporate Safety Manager
Senior Project Engineer
Vice President and Chief Engineer
APPENDIX A
CERTIFICATION OF HEARING RECORD

Inspection No.: 1093606
Employer: WALSH/ SHEA CORRIDOR CONSTRUCTORS

I, Howard I. Chernin, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above-entitled matter, hereby certify the proceedings therein were electronically recorded or recorded by a certified court reporter. If the proceedings were recorded electronically, the recording was periodically monitored during the hearing. Either the electronic recording or the recording made by a certified court reporter constitutes the official record of the proceedings, along with the documentary and other evidence presented and received into evidence during or after the hearing. To the best of my knowledge the recording equipment, if utilized, was functioning normally and exhibits listed in this Appendix are true and correct, and accurately represent the evidence received during or after the hearing.

[Signature]
Howard I. Chernin
Administrative Law Judge

9/5/17
Date
SUMMARY TABLE
OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

In the Matter of the Appeal of:
WALSH/ SHEA CORRIDOR CONSTRUCTORS

Citation Issuance Date: 12/04/2015

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<th>ITEM</th>
<th>SECTION</th>
<th>TYPE</th>
<th>CITATION/ITEM RESOLUTION</th>
<th>AFFIRMED</th>
<th>VACATED</th>
<th>PENALTY PROPOSED BY DOSH IN CITATION</th>
<th>FINAL PENALTY ASSESSED</th>
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Total Amount Due* $11,810.00

*You may 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.

PENALTY PAYMENT INFORMATION

1. Please make your cashier's check, money order, or company check payable to: Department of Industrial Relations
2. Write the Inspection No. on your payment
3. Mail payment to:
   Department of Industrial Relations (Accounting)
   Cashier Accounting Office
   P.O. Box 420603
   San Francisco CA 94142-0603

Online Payments can also be made by logging on to http://www.dir.ca.gov/dosh/CalOSHA_PaymentOption.html

-DO NOT send payments to the California Occupational Safety and Health Appeals Board-

Abbreviation Key:
G=General
S=Serious
RG=Repeat General
W=Willful
R=Regulatory
E=Employer
Er=Employee
A/R=Accident Related
RR=Repeat Regulatory
RS=Repeat Serious
DECLARATION OF SERVICE BY MAIL OR EMAIL

Inspection Number

1093606

I, Laura Freedman, declare:

1. I am at least 18 years of age, not a party to this action, and I am employed in
   Los Angeles at 100 N. Barranca St., Suite 410, West Covina, CA 91791.

2. On ______________, I served a copy of the attached Decision in an envelope
   addressed as shown below and placed the envelope for collection and mailing on
   the date and at the place shown in item 3 following our ordinary business practices. I
   am readily familiar with this business's practice for collecting and processing
   correspondence for mailing. On the same day that correspondence is placed for
   collection and mailing, it is deposited in the ordinary course of business with the
   United States Postal Service in a sealed envelope with postage fully prepaid.

3. Date mailed: ___________________________ Place mailed: (city, state): West Covina, CA

   ATTN: WALSH/ SHEA CORRIDOR Constructors
   WALSH/ SHEA CORRIDOR Constructors
   9323 Bellanca Avenue
   Los Angeles, CA 90045

4. On ______________, I electronically served the document listed in item 2 as follows:

   NAME OF PERSON SERVED         ELECTRONIC SERVICE ADDRESS

   Nathan Schmidt, DOSH Legal          nschmidt_doshlegal@dir.ca.gov
   DOSH Southern Office                doshlegal_la@dir.ca.gov
   Diana M. Dron                       dron@mmlawyers.com
   Sandra Hitt                         SLHitt@dir.ca.gov
   James Wittry                        JWittry@dir.ca.gov

I declare under penalty of perjury under the laws of the State of California that the
information contained herein is true and correct.

Laura Freedman

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)