

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

In the Matter of the Appeals of:

**ALPHA CONSTRUCTION COMPANY
INCORPORATED
14601 AETNA STREET
VAN NUYS, CA 91411**

**CALIFORNIA STRUCTURAL CONCEPTS INC.
dba CALIFORNIA STRUCTURAL CONCEPTS
28358 CONSTELLATION RD #660
VALEN CIA, CA 91355**

**KPRS CONSTRUCTION SERVICES, INC.
2850 SATURN STREET
BREA, CA 92821**

Employers

Inspection Nos.

1180499, 1205214, 1192145

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code issues the following consolidated Decision After Reconsideration in the above-entitled matters.

JURISDICTION

Alpha Construction Company (Alpha) is a general contractor. The Division of Occupational Safety and Health (the Division), through Inspector Steven Chu, conducted an inspection of a worksite maintained by Alpha at 124 West Colorado Street, Glendale, California. Alpha constructed an apartment building at that worksite.

KPRS Construction Services, Inc. (KPRS) is a general building contractor. The Division, through Inspector Steven Honjio (Honjio), commenced an inspection of a worksite maintained by KPRS at 225 West Wilson Ave., Glendale, California. KPRS constructed a hotel at that worksite.

California Structural Concepts, Inc. (CSC) is a contractor. The Division, through Inspector Honjio, conducted an inspection at a worksite maintained by CSC located at 225 West Wilson Avenue, Glendale, California—the same worksite in the KPRS matter. CSC assisted in the construction of the hotel at that worksite.

Following the Division's inspections in each matter, the Division issued each employer a citation alleging a violation of California Code of Regulations, title 8, section 1630, subdivision (a).¹ The citation issued to Alpha alleged a Willful, General violation with a proposed penalty of \$35,000. The citation issued to KPRS alleged a Willful, General violation with a proposed penalty of \$35,000. The citation issued to CSC alleged a General violation with a proposed penalty of \$185.

Each employer timely appealed their respective citations, contesting, among other things, the existence of the alleged violation. Alpha's matter came on regularly for hearing before Howard Chernin, an Administrative Law Judge (ALJ) for the Board, at West Covina, California on August 7, 2018. CSC's matter came on regularly for hearing before Christopher Merrill, an ALJ for the Board, at West Covina, California on December 19, 2017 and June 21, 2018. KPRS's matter came on regularly for hearing before Jacqueline Jones, an ALJ for the Board, at West Covina, California on March 13, 2018. Each ALJ issued a decision vacating the section 1630, subdivision (a) citation.

In both the KPRS and CSC matters, the Division filed petitions for reconsideration asking the Board to reconsider the ALJ's decision vacating the citations, which the Board granted. In Alpha, the Board ordered reconsideration on its own motion, as it raised issues similar to those already under reconsideration.

While each matter involves a different employer, the Board concludes the legal issues, facts, and circumstances presented in each case are sufficiently similar to warrant consolidation for decision pursuant to section 363, and so ordered.

In making this consolidated decision, the Board has engaged in an independent review of the entire record in each matter. The Board has additionally considered the pleadings and arguments filed by the parties. The Board has taken no new evidence.

ISSUE

When must a construction passenger elevator for hoisting workers be installed and in operation pursuant to section 1630, subdivision (a)?

FINDINGS OF FACT

1. In each matter, the subject building was designed to exceed 60 feet in height upon completion.
2. In the KPRS and CSC matters, the building at 225 West Wilson Avenue, Glendale, California was designed to be 128 feet tall upon completion.
3. In the Alpha matter, the building at 124 West Colorado Street, Glendale, California was designed to be 65 feet, five inches, upon completion.
4. At the time of the Division's inspections, construction on the subject buildings had not yet reached 60 feet, but had exceeded 36 feet in height.

¹ Unless otherwise specified, all references are to the California Code of Regulations, title 8.

5. When the Division conducted its inspections in the KPRS and CSC matters, construction of the subject building had reached a height of approximately 49 feet.
6. When the Division conducted its inspection in the Alpha matter, construction of the subject building had reached a height of approximately 47 feet.

DISCUSSION

The Division cited each employer for an alleged violation of section 1630, subdivision (a), requiring installation of a construction passenger elevator for hoisting workers. Section 1630, subdivisions (a) and (d), state,

(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, 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.

The building or structure depth shall be determined by measuring from ground level to the lowest floor level excluding local depression such as sumps and elevator pits.
[...]

(d) 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.

The issue presented is whether the Board's ALJs properly vacated the citations on the basis that the safety order did not apply because the respective buildings had not yet reached 60 feet in height at the time of the Division's inspection.

Each ALJ interpreted the plain language of section 1630, subdivision (a), as requiring that the building actually reach 60 feet in height before a construction passenger elevator will be required. The ALJs found the respective buildings had not reached 60 feet in height at the time of the Division's inspection. The ALJs also considered the Board's previous precedent on the issue. The Board has never required a construction passenger elevator on a building less than 60 feet in height. (See *Rudolph & Sletten*, Cal/OSHA App. 93-1251, Decision after Reconsideration (April 8, 1998); *Anning-Johnson Company*, Cal/OSHA App. 85-1438, Decision After Reconsideration (Dec. 31, 1986); *Armour Steel Co., Inc.*, Cal/OSHA App. 08-2649, Decision After Reconsideration (Feb. 7, 2014).)

In contrast, the Division contends that when section 1630, subdivisions (a) and (d) are harmonized, they require installation of a construction passenger elevator on a building planned to be in excess of 60 feet in height once the building reaches 36 feet in height. The Division argues each building exceeded 36 feet in height at the time of its inspections, and the buildings were all designed to exceed 60 feet upon completion.

In ascertaining at what height a construction passenger elevator is required, and in evaluating the various legal positions presented, we apply the rules of regulatory construction, which are well-settled. “[W]e first look the language of the regulation itself.” (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 100-101; see also *Katz v. Los Gatos-Saratoga Joint Union High School Dist.* (2004) 117 Cal.App.4th 47, 54-55.) “If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the [agency].” (*Ibid.*) The plain meaning rule does not prohibit the Board from determining “whether the literal meaning of the [regulation] comports with its purpose...” (*Ibid.*) “[W]e do not construe a regulation in isolation, but instead read it with reference to the scheme of law of which it is a part, so that the whole may be harmonized and retain effectiveness. [Citations.]” (*Ibid.*) “The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.]” (*Katz, supra*, 117 Cal.App.4th at p. 54-55.)

Here, as each ALJ correctly concluded, we find that the plain terms of section 1630 fail to support the Division’s construction of the safety order. Subdivision (a) requires a construction passenger elevator “on or in any building, or structure, 60 feet or more in height...” This plain language compels the conclusion that the subject building must actually reach 60 feet in height before the safety order requires installation of a construction passenger elevator. (See, e.g., *Rudolph & Sletten*, Cal/OSHA App. 93-1251, Decision after Reconsideration (Apr. 8, 1998) [“The safety order at issue in this case, section 1630(a) requires that when a building under construction reaches a height of 60 feet, a construction elevator must be installed. The safety order specifies that the height of the building is determined by measuring from the ground to the top of the structure...”]; *Armour Steel Co., Inc.*, Cal/OSHA App. 08-2649 Decision After Reconsideration (Feb. 7, 2014)—[Section 1630, subdivision (a), “requires the installation of a construction passenger elevator in buildings or structures which are 60 feet or taller in height.”].) Nothing in the safety order speaks of the building’s ultimate design height, intended future height, or final height. “The provisions of Section 1630(a) are clear and precise: a building 60 feet or more in height must be provided with an operating construction passenger elevator.” (*Anning-Johnson Company, supra*, Cal/OSHA App. 85-1438.)

While the Division argues subdivision (d) requires an elevator when the building reaches 36 feet, the plain terms of that subdivision do not dictate when an elevator must be installed; they state where elevator landings must be placed to provide access in the event an elevator is required. (*Rudolph & Sletten*, Cal/OSHA App. 93-1251, Decision after Reconsideration (April 8, 1998)—[“Section 1630(d) ...requires that access be provided at every third floor or 36 feet if the structure is 60 feet tall, measured as directed in section 1630(a).”].)

Although both subdivision (a) and (d) must be read in conjunction to determine whether a violation is established, the subdivisions nevertheless serve different purposes. (*Rudolph & Sletten*, Cal/OSHA App. 93-1251, Decision after Reconsideration (Apr. 8, 1998).) As the Board has previously noted, “The [California Occupational Safety and Health] Standards Board carefully separated the requirements of access and applicability. Only after it has been determined from section 1630(a) that a construction elevator is required is section 1630(d) consulted to determine the levels at which access must be provided.” (*Ibid.*)

We conclude the ALJ’s decisions properly vacated the citations on the basis that the safety order did not yet apply because the respective buildings had not yet reached 60 feet in height at the time of the Division’s inspection, and we affirm each decision. However, in reaching this conclusion, we do observe that the Division identifies some potentially meritorious concerns with the safety order. In requiring a landing at three floors or 36 feet, the safety order does seem to indicate that employees are exposed to the hazard addressed in the safety order when they work in excess of 36 feet. (See, e.g., *Armour Steel Co., Inc.*, Cal/OSHA App. 08-2655 Decision After Reconsideration (Feb. 7, 2014); *Rudolph & Sletten*, Cal/OSHA App. 93-1251, Decision after Reconsideration (April 8, 1998).) However, the plain terms of the safety order specify that no construction passenger elevator is required until the building actually reaches 60 feet in height. Employees must work between 36 feet and 60 feet before the employer is required, creating a gap in coverage. Further, the safety order does not apply to a building that fails to reach 60 feet in height. These seeming anomalies in coverage warrant further consideration, a matter reserved for the Standards Board. The Appeals Board cannot substitute its judgment for that of the Standards Board, the state agency charged by statute with the responsibility of adopting occupational safety and health standards.

DECISION

The Decisions of the ALJs are affirmed and the citations are vacated.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

Ed Lowry, Chair
Judith S. Freyman, Board Member



FILED ON: 05/29/2019