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BEFORE THE

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

DEPARTMENT OF INDUSTRIAL RELATIONS

STATE OF CALIFORNIA

In the Matter of the Appeal of: RUDOLPH & SLETTEN, INC. P.O. Box 4637 Foster City, CA 94404 Employer	Docket No. 93-R1D5-1251 **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 granted the petition for reconsideration filed in the above-entitled matter by the Division of Occupational Safety and Health (Division), makes the following decision after reconsideration.

JURISDICTION

On May 19, 1993, a representative of the Division conducted an inspection at a place of employment maintained by Rudolph & Sletten, Inc. (Employer) at 781 San Marin Drive, Novato, California. On May 19, 1993, the Division issued to Employer Citation No. 1 alleging a general violation of section[1] 1630(a) [construction passenger elevator not provided for structure over 60 feet in height]. A civil penalty in the amount of $450 was proposed.

Employer filed a timely appeal from the citation, contesting the existence and classification of the violation, the abatement requirements, and the civil penalty. After a hearing, an administrative law judge of the Board (ALJ) issued a decision dated April 4, 1994, granting Employer's appeal.

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[1] Unless otherwise specified, all section references are to Title 8, California Code of Regulations.

On May 9, 1994, the Division filed a timely petition for reconsideration. The Board granted the Division's petition on May 25, 1994, and stayed the decision of the ALJ pending a decision on the petition for reconsideration. Employer filed an answer on June 13, 1994.

EVIDENCE

In making this decision, the Board relies upon its independent review of the entire evidentiary record in this case, including the tape recording of the hearing and each exhibit admitted into evidence. The Board has taken no new evidence and adopts and incorporates by this reference the "Summary of Evidence" set forth on pages two and three of the ALJ's decision.

Employer is a general contractor which was engaged in the construction of two identical four-story steel buildings, referred to in the testimony as Buildings 2 and 3. Although neither Building 2 nor Building 3 had a construction elevator, only one citation was issued which covered both buildings. Evidence introduced at the hearing related primarily to Building 2.

Employer was cited for not providing construction passenger elevators on Buildings 2 and 3 as required by section 1630(a) for any building over 60 feet in height. Building 2 had a roof which was only 54 feet 5 inches from the ground and perimeter parapet walls which were only 59 feet 4 inches from the ground. However, the roof had a set back elevator and mechanical penthouse (penthouse) which rose above the roof top by 16 feet 1 inch—making the penthouse 70 feet 6 inches from the ground. Because the penthouse was set back 12 to 15 feet from the parapet walls, any construction elevator erected at a perimeter wall of the building would not provide direct access to the penthouse—but only to the roof. The gravamen of the dispute is whether the height of the penthouse (at 70 feet 6 inches), or the height of the parapet and roof (both under 60 feet), should be used to determine whether Employer's failure to provide a construction elevator constituted a violation of section 1630(a) since the elevator would not provide access to any structure in excess of 60 feet.

ISSUE

Was a violation of section 1630(a) established?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

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. This safety order specifies that the

height of the building is determined by measuring from the ground to the top of the structure, including the top of any elevator penthouse. This is the focal point of the dispute: does the height of the penthouse (at 70 feet 6 inches), or the height of the parapet and roof (both under 60 feet), determine whether Employer must comply with the provisions of section 1630(a).

A separate section of 1630, section 1630(d) requires that construction elevators have landings at the third floor or 36 feet, and every third floor or 36 feet thereafter, and at the "upper-most level." The upper-most level in this case is the roof—not the top of the penthouse. Therefore, if Employer erected a construction elevator on the outside wall of the building, the highest level that would be reached by it would be the roof—not the top of the penthouse. In point of fact, although the height of the penthouse (70 feet 6 inches) is used in section 1630(a) to determine when a construction elevator must be installed, if one was installed on Building 2 or 3, it would only provide access to the roof (54 feet 5 inches—clearly less than the 60-feet required) and not to any structure in excess of 60 feet.

Section 1630(d) does not depend on any minimum height. This section requires that access be provided to the upper-most level, whether it is lower or higher than 60 feet. Section 1630(d) imposes a separate and distinct obligation on Employer to provide access, when Employer is obligated to erect a construction elevator under section 1630(a).

A Violation of Section 1630(a) Was Established.

Section 1630(a) defines when the remaining subdivisions of section 1630 apply, and provides:

> (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 . . . 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, stairtowers and **elevator penthouse structures** but excluding antennas, smokestacks, flag poles and other similar attachments. [Emphasis added.]

The ALJ found that section 1630[2] did not apply to Building 2, even though Building 2, measured to the top of the penthouse, was 70 feet 6 inches. The Division's petition contends that Building 2, measured to its highest structural level, the penthouse, as required by section 1630(a), was

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[2] All references to section 1630 are to sections 1630(a) through (d), taken together.

greater than 60 feet in height and that section 1630(a) required that a construction elevator be provided.

The ALJ conceded that giving the terms of section 1630(a) their usual and ordinary meaning, section 1630(a) facially required the installation of a construction elevator on Building 2. However, he found section 1630(a) inapplicable to Building 2 because if the terms of section 1630 were "scrupulously followed," the result would be "impossibility of performance" because of the configuration of Building 2. In the ALJ's view, scrupulous compliance required that a construction elevator be built into the air above the roof of Building 2 to a height of 70 feet 6 inches, the height of the penthouse. From that point on the perimeter of Building 2, the construction elevator could not afford access to the penthouse, because the penthouse was set back 12 to 15 feet from the perimeter of Building 2, nor could it afford direct access to any working surface higher than 60 feet. Because section 1630 requires neither access to the top of the elevator penthouse nor to a working surface above 60 feet to be operative, the Board reverses the decision of the ALJ.

Scrupulous compliance with section 1630(a) does not require that a construction elevator be installed only if access will be provided above 60 feet, only that one be installed if the structure exceeds 60 feet. In Anning-Johnson Company, OSHAB 85-1438 Decision After Reconsideration (Dec. 31, 1986), the Board held "[t]he 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." Scrupulous compliance with section 1630(a) clearly requires that elevator penthouses be included in the measurement of structural height. Section 1630(a) makes no reference to access and in no way depends on access; all access requirements are specified in section 1630(d).

Employer contends in its answer that the broader and more important basis for the ALJ's finding that compliance with section 1630 was impossible on Building 2, was that a construction elevator could not provide access at any point higher than 60 feet. The Board rejects this interpretation of section 1630. It confuses the 60-foot standard for applicability of section 1630, stated in section 1630(a), with the requirement that the construction elevator provide access beginning at 36 feet or 3 floors above ground, stated in section 1630(d).

Section 1630(d) states:

> "Landings shall be provided . . . at the upper-most floor and at intervals not to exceed 3 floors or 36 feet."

Section 1630(d) therefore 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). In a structure like Building 2, with a structural height of 70 feet 6 inches but with an upper-most floor less than 60 feet, access must be provided to the upper-most floor, even though it is less than 60 feet. No showing was made that it was impossible to provide a landing for the construction elevator on the third floor of Building 2, or at the upper-most floor.[3] Therefore, nothing in section 1630(d) makes compliance with section 1630 impossible.

The ALJ's interpretation of section 1630 to the effect that access is only required at levels above 60 feet excises the requirements that access be provided on the third floor, and every third floor thereafter, and at the upper-most floor, from section 1630(d), and substitutes in their place the 60-foot height standard provided in section 1630(a). The 60-foot standard is used solely to determine the applicability of section 1630. Nothing in section 1630 authorizes this substitution of the 60-foot standard in section 1630(a) for the 36-foot access location requirement in section 1630(d). Section 1630(d) makes no reference to 60 feet as a standard for access.

The ALJ's excision of the 36-foot access location standard in section 1630(d) and insertion of the 60-foot height standard borrowed from section 1630(a) in its place does violence to the language of the regulation. Such interpretation is improper not only because it was not included by the Standards Board, but because it is contrary to the effect of the words the Standards Board did include, with no support in the regulation for doing so. This interpretation by the ALJ renders *all* references to rooftop structures in section 1630(a) and the requirement for access at the third floor, surplusage. Such results are contrary to well-accepted principles of statutory construction. (Rudolph and Sletten, Inc., OSHAB 81-265, Decision After Reconsideration (Feb. 24, 1982).)

The 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.

The Board agrees that although they are separated in the text of section 1630, sections 1630(a) and (d) must be considered together. The Division correctly cites Anning-Johnson for the Board's coordination of

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[3] The Note to section 1630(d) provides: "[o]ther landing locations acceptable to the Division may be substituted where the design of the building or structure make the above impractical." This allows the employer, with Division approval, to make reasonable adjustments to the landing levels to deal with problems such as the parapet wall being a few feet above the upper-most floor.

section 1630(d) with section 1630(a): when no construction elevator is provided as required by section 1630(a), exposure, and therefore, a violation will be found to exist only if employees are working at a level exceeding 36 feet, the first landing level required by section 1630(d). Employer concedes its employees were working on the rooftop, at 54 feet 5 inches. Exposure, according to section 1630(d) begins at 36 feet, 24 feet below the 60-foot level applied by the ALJ. Therefore, its employees working on the roof, 54 feet above the ground, were more than 18 feet above the level where exposure existed, not almost 6 feet below it, as argued by Employer. A large part, if not the majority of the work on Building 2, was on floors three, four, and the roof—clearly in the zone of exposure. Employer's assertion that applying section 1630 to Building 2 would lead to the absurd result of requiring installation of a construction elevator when only a small percentage of its employees, those who worked on the penthouse were exposed, is therefore unpersuasive.

The ALJ found that access to the roof did not have to be provided by a construction elevator because the roof could be reached by stairways governed by section 1629 and ladders governed by section 1675. All floors of any multi-story building under construction can be reached by stairways or ladders. That in no way excuses the obligation to install a construction elevator. The construction elevator need only provide access on every third floor, necessarily implying that the regulations contemplate that stairways and ladders as well as construction elevators will be part of the access system on a multi-story building project, not that one will replace the others.

While the ALJ concluded that the Standards Board should not have required that access be provided at any level lower than 60 feet, the Standards Board clearly did so. Employer should have petitioned the Standards Board for an amendment to the regulation or applied for a variance. The Appeals Board is without authority to change the clear terms of a safety order. (Kenneth L. Poole, Inc., OSHAB 90-278, Decision After Reconsideration (Apr. 18, 1991).)

Here, a construction elevator was required on the 60-foot-tall building to hoist employees to a landing at the upper-most floor and to a landing at the third floor or 36-foot level. Employer failed to provide a construction elevator. Therefore, a violation of section 1630(a) was established.

DECISION AFTER RECONSIDERATION

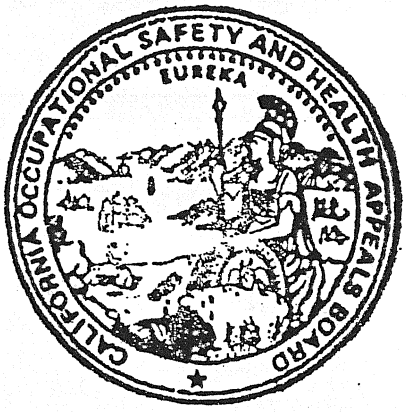
The decision of the ALJ dated April 4, 1994, is reinstated and reversed. A general violation of section 1630(a) is found to exist and a civil penalty of $450 is assessed.

JAMES P. GAZDECKI, Chairman

BILL DUPLISSEA, Member

BRYAN E. CARVER, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
SIGNED AND DATED AT SACRAMENTO, CALIFORNIA
APR 8 1998



DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 1300 I Street, Suite 940, Sacramento, California 95814.

On April 8, 1998, I served the attached **Decision After Reconsideration** by placing a true copy thereof in an envelope addressed to the persons named below at the address set out immediately below each respective name, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with first-class postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed:

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Executed on April 8, 1998, at Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct.

D. Sisneroz
DECLARANT