



Memorandum

Date: June 10, 2019

To: Christina Shupe, Executive Officer
Occupational Safety and Health Standards Board
2520 Venture Oaks Way, Suite 350
Sacramento, CA 95833

From: Eric Berg, Deputy Chief *Eric Berg*
Division of Occupational Safety and Health
Research and Standards unit

Re: Amended Evaluation of Petition 577 to Change Title 8 Section 1630(a)

1.0 INTRODUCTION

On June 7, 2019, the Division of Occupational Safety and Health (Cal/OSHA) received a petition from Don Zampa, President of the District Council of Ironworkers of California, and Greg McClelland, Executive Director of the Western Steel Council (petitioners).

The petitioners request emergency rulemaking to change title 8 section 1630(a) regarding construction passenger elevators.

Labor Code Section 142.2 permits interested persons to propose new or revised standards concerning occupational safety and health, and requires the Occupational Safety and Health Standards Board (Standards Board) to consider such proposals and render a decision no later than six months following receipt.

California Labor Code section 147 requires the Standards Board to refer to Cal/OSHA for evaluation any proposed occupational safety and health standard. Cal/OSHA is required to submit a report on the proposal within 60 days of receipt.

2.0 EXISTING REQUIREMENTS OF SECTION 1630 ELEVATORS FOR HOISTING WORKERS.

Section 1630(a) requires employers to install and operate construction passenger elevators (CPEs) for employee access during construction of structures¹ 60 feet or more in height or 48 feet or more in depth. Section 1630(d) requires access to structures from CPEs at intervals not to exceed 36 feet or three stories.

¹ The term "structure," as used in this evaluation, includes buildings. This is consistent with the definition of structure in section 1504.

Subchapter 4. Construction Safety Orders
Article 18. Access and Egress

§1630. Elevators for Hoisting Workers.

(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.

* * * *

(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.

* * * *

3.0 CAL/OSHA LONGSTANDING INTERPRATION AND ENFORCEMENT HISTORY OF SECTION 1630

Cal/OSHA has long held that section 1630 requires access to a structure via a CPE when the height or depth of the structure initially reaches 36 feet for any structure whose final height will be 60 feet or greater or whose final depth will be 48 feet or greater. Cal/OSHA has successfully enforced this requirement for many years. In addition, many employers, as observed by Cal/OSHA, have successfully implemented this requirement of section 1630 for many years.

Cal/OSHA's long held interpretation of section 1630 is based on previous decisions from the Occupational Safety and Health Appeals Board (Appeals Board),

In the Anning-Johnson² Decision After Reconsideration (DAR), the Appeals Board established that subsection 1630(a) and 1630(d) must be read together to determine requirements for a CPE:

...Section 1630(a) is the charging or performance safety order,... Section 1630(d) is the prescription or specification safety order, and... both must be read together in determining whether a violation of the general performance requirement under subsection (a) existed...

In the Rudolph and Sletten³ DAR, the Appeals Board established that the CPE must be installed at 36 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)...

² Anning-Johnson Company, Cal/OSHA 85-R3D1-1438 Decision After Reconsideration, April 24, 1986.

³ Rudolph & Sletten, Inc., Cal/OSHA 93-1251 Decision After Reconsideration, Apr. 8, 1998

...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...

...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)...

...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 more recent Armour Steel Co.⁴ DAR also supports Cal/OSHA's interpretation of section 1630 requiring a CPE when a structure initially reaches a height or depth of 36 feet.:

...The Division may show employee exposure through proof that an employee was working over 36 feet, the level where the first elevator platform should be installed...

4.0 RECENT APPEALS BOARD DECISION OVERTURNING CAL/OSHA ENFORCEMENT HISTORY OF SECTION 1630

On May 29, 2019, the Appeals Board (OSHAB) issued the Alpha Construction⁵ DAR that adversely changed existing precedent regarding an employer's duty to provide a CPE on structures under construction. The Appeals Board found that "*the subject building must actually reach 60 feet in height before the safety order requires installation of a construction passenger elevator.*"

The Alpha Construction DAR eliminated the requirement to install a CPE when a structure initially reaches a height of 36 feet and delayed the installation of a CPE until a structure reached a height of 60 feet. However, the Appeals Board conceded that their decision creates a gap in protection for employees who work in structures in elevations between 36 and 60 feet:

...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...

...These seeming anomalies in coverage warrant further consideration, a matter reserved for the Standards Board...

⁴ *Armour Steel Co., Inc.*, Cal/OSHA 08-R2D1-2649 Decision After Reconsideration, Feb. 7, 2014.

⁵ *Alpha Construction Company, Inc., California Structural Concepts, Inc., KPRS Construction Services, Inc.* OSHAB Decision After Reconsideration. May 29, 2019.

5.0 REGULATORY CHANGES REQUESTED BY THE PETITIONERS

The petitioners request additions to section 1630(a) to clarify that a CPE is required when a structure under construction, whose final height will be 60 feet or greater or final depth will be 48 feet or greater, initially reaches 36 feet in height or depth. The proposed additions are shown in underline format.

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(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, designed to be 60 feet or more in height above or 48 feet in depth below ground level when completed. The elevator shall be installed and operational when the building or structure reaches 36 feet in height or 36 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.

* * * *

There is a minor typographical error in the language proposed by the petitioners. The petitioner did not strike out commas before and after the phrase "*or structure*". The omission is corrected in the above language in ~~strikeout~~ format.

6.0 PETITIONERS' BASIS FOR A REVISED REGULATION

The petition was submitted to remedy the Alpha Construction DAR from the Appeals Board that nullified the longstanding interpretation of section 1630.

6.1 The Alpha Construction DAR Endangers Construction Employees

The petitioners state that elevator access is needed when a structure reaches 36 feet in height for several reasons. The petitioners note that construction workers perform hazardous work on elevated structures, where life-threatening injuries can and do occur frequently. According to the petitioner, when a life-threatening injury occurs, elevator access is critical in saving the life of the injured for the following reasons:

1. Elevators enable emergency personnel to reach an injured worker as soon as possible to provide immediate medical treatment. An injured worker may be bleeding to death, in life-threatening shock, in need of CPR, or be suffering other life-threatening situation where seconds count.
2. Elevators enable immediate medical evacuation of an injured worker.
3. Elevators enable an injured worker with fractured ribs or other bones to be moved with minimal motion to avoid the possibility of fractured bones piercing lung tissue or other critical tissue.

According to the petitioners, the use of stairways and ladders in lieu of elevators creates serious hazards to employees suffering from life-threatening injuries on elevated structures:

1. It takes longer for medical personnel to reach the injured employee.
2. It takes longer to medically evacuate the injured employee.
3. It is much more difficult to carry an injured employee.
4. The injured employee is subject to more vibration and motion, which may exacerbate some injuries.

6.2 The Alpha Construction DAR Disrupts and Creates Confusion in the Construction Industry

The petitioners state an emergency regulation is needed to preserve the status quo. Prior to the Alpha Construction DAR, the construction industry was operating under the longstanding interpretation that CPEs must be installed when a structure initially reaches 36 feet in height. After the DAR, according to the petitioner, there is widespread confusion in the industry on when CPEs should be installed. The petitioner also states that an emergency regulation is needed to re-establish the status quo or else costs to the industry will increase due to the disruption and uncertainty.

7.0 ANALYSIS OF THE PROPOSAL

Cal/OSHA agrees with the petitioner that access to a structure via CPE should be required when the height or depth of the structure initially reaches 36 feet for any structure whose final height will be 60 feet or greater or whose final depth will be 48 feet or greater.

The Appeals Board's holding in the Alpha Construction DAR exposes injured employees to serious harm, accurately described by the petitioner, when work occurs at elevations between 36 and 60 feet.

8.0 FINDING OF EMERGENCY

Regulations in California are usually adopted through regular rulemaking or emergency rulemaking. Emergency rulemaking takes substantially less time than regular rulemaking. The petitioners request that section 1630(a) be amended through emergency rulemaking.

An emergency, for rulemaking purposes, is defined in the California Government Code as the following:

Government Code
ARTICLE 2. Definitions

§11342.545. "Emergency" means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.

* * * *

To adopt an occupational safety and health emergency regulation, the Standards Board must make a finding of emergency as described in Government Code section 11346.1(b)(2):

ARTICLE 5. Public Participation: Procedure for Adoption of Regulations.

§11346.1.

* * * *

(b)(2) Any finding of an emergency shall include a written statement that contains the information required by paragraphs (2) to (6), inclusive, of subdivision (a) of Section 11346.5 and a description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific and to address only the demonstrated emergency. The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies. The enactment of an urgency statute shall not, in and of itself, constitute a need for immediate action.

* * * *

Thus, the Standards Board must demonstrate (1) the existence of an emergency, (2) the need for immediate action, and (3) the need for the proposed regulation.

8.1 Emergency Conditions Exist

Cal/OSHA finds that the Alpha Construction DAR from the Appeals Board created an emergency that needs immediate correction for the following reasons:

- The Alpha Construction DAR reversed many years of successful implementation and enforcement of section 1630.
- The Alpha Construction DAR disrupted and creates confusion in the construction industry.
- The Alpha Construction DAR will take effect on June 28, 2019.
- The Alpha Construction DAR is harmful to employee safety and health as it impairs the ability to provide medical care to injured employees.
- The Appeals Board acknowledged that its decision created “*anomalies in coverage*” and deferred to the Standards Board to resolve the issue.

8.2 Immediate Action Is Needed

Based on current and recent occupational safety health rulemaking projects, regular rulemaking to amend section 1630 would take approximately 3 to 6 years. Since the Alpha Construction DAR did immediate harm to employee safety and health, and the implementation and enforcement of section 1630, reversal of the Alpha Construction DAR must also be immediate.

8.3 The Petitioners’ Proposal Should be Enacted as a Regulation

As discussed in part 6 and 7 of this evaluation, the petitioner established, and Cal/OSHA agrees, that a regulatory change is needed to reconstitute the correct and long held interpretation of section 1630.

The Alpha Construction DAR impairs the ability to treat or medically evacuate injured or ill construction employees working at elevations up to 60 feet. This DAR may create life-threatening hazards depending on the injury or illness.

9.0 CONCLUSION

Cal/OSHA finds that the Alpha Construction DAR created an emergency that must be corrected immediately by emergency rulemaking.

Cal/OSHA recommends that the Standards Board adopt emergency regulations using the changes, as corrected, proposed by the petitioner.