

**OCCUPATIONAL SAFETY
AND HEALTH STANDARDS BOARD**

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**PROPOSED PETITION DECISION OF THE
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
(PETITION FILE NO. 577)**INTRODUCTION

On June 7, 2019, Donald A. Zampa, President of the District Council of Iron Workers of the State of California and Vicinity, and Greg McClelland, Executive Director of the Western Steel Council (Petitioners) electronically dispatched to the Occupational Safety and Health Standards Board (Board), a letter of requested action. In accord with Labor Code Section 142.2, the Petitioners letter of request has been duly received by the Board and designated Petition No. 577 (Petition).

Labor Code Section 142.2 permits interested persons to propose new or revised regulations concerning occupational safety and health and requires the Board to consider such proposals, and render a decision no later than six months following receipt. Further, as required by Labor Code Section 147, any proposed occupational safety or health standard received by the Board from a source other than the Division of Occupational Safety and Health (Division) must be referred to the Division for evaluation, and the Division has 60 days after receipt to submit an evaluation regarding the proposal.

SUMMARY

Petition No. 577 requests that the Board amend California Code of Regulations, Title 8, Construction Safety Orders, Section 1630(a), by means of emergency rulemaking. The request for emergency action rests upon the Petitioners' assertion that a recent decision handed down by the Occupational Safety and Health Appeals Board (Appeals Board)¹, interpretation of Section 1630(a), has abruptly "nullified a long-standing enforcement posture of the Division."

Section 1630(a) states:

In addition to the stairways required in Section 1629, a construction passenger elevator for hoisting workers shall be installed and in operation on or in any building, or structure, 60 feet or more in height above or 48 feet in depth below ground level. The building or structure height shall be determined by measuring from ground level to the highest structural level including the parapet walls,

¹ A three-member, governor appointed judicial body decides appeals from private and public-sector employers regarding citations issued by the Division of Occupational Safety and Health for alleged violation of workplace safety and health regulations, the adoption, amendment, or repeal of which are within the sole authority of the Occupational Safety and Health Standards Board.

mechanical rooms, stair towers and elevator penthouse structures but excluding antennas, smokestacks, flag poles and other similar attachments.

Aside from providing a relatively safer means of vertical travel for tool and material laden workers, beyond stairs or ladders, a construction personnel elevator or hoist (CPE or CPH) serves another important purpose. Workplaces where buildings are being erected to heights of 60 feet and above pose some of the most significant risks of serious, potentially fatal injury to workers. In the unfortunate event of such injury, the availability of an operational onsite CPH for use by emergency personnel may prove critical to the recovery, or even survival, of the afflicted worker. Similarly, a CPH typically provides a method for more orderly and rapid egress down to an emergency transport vehicle, while minimizing risk of compounding harm to the physically vulnerable injured.

The subject Appeals Board Decision After Reconsideration (DAR), issued May 29, 2019,² held that the term “height,” as used in Section 1630(a), referred only to the height of the subject structure thus far constructed at the time of potential violation, rather than a potentially higher planned height yet to be reached. The Petitioners and Division argue that “height” has long been recognized to mean the final planned height of the building upon completion, such that subpart (a), in conjunction with the remainder of Section 1630, has been widely understood within the industry to require any structure in the process of construction to a height of 60 feet or greater to have a CPH installed and operational once the structure has reached the lesser of its third floor or 36 feet.

Notwithstanding the Petitioners’ assertion that prior to the recent DAR holding, Section 1630(a) had been adequately clear to serve as the basis of “a longstanding enforcement posture of the Division,” the Petitioners’ also presently requested revisions to subpart (a), going beyond the narrow scope of the DAR holding, to also add language attempting clarification of a related, but nonetheless distinguishable, provision within Section 1630, subpart (d).³

DIVISION’S PENDING REQUEST FOR REGULAR RULEMAKING

The Petitioners’ assert that the issues they seek to have addressed by means of emergency rulemaking are “*entirely separate and distinct* from other issues that have arisen with section 1630.”⁴

To quote the Petitioners:

We are aware the (sic) DOSH has filed a Form 9 requesting a number of changes

² In the Matter of the Appeals of Alpha Construction, Inc., et al, (concerning Inspection Nos. 1180499, 1205214, & 1192145) [https://www.dir.ca.gov/oshab/DECISIONS/California-Structural-Concepts.\(1205214\).pdf](https://www.dir.ca.gov/oshab/DECISIONS/California-Structural-Concepts.(1205214).pdf)

³ Petitioners’ proposed addition to subpart (a) of the sentence: “*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.*”

⁴ (emphasis added)

to section 1630, and we are also interested in participating in the normal advisory committee and rulemaking process to improve this important safety standard. However, this single issue needs to be addressed separately from that process and has become an emergency because of the unanticipated DAR referenced above.

Despite the Petitioners' urging to the contrary, there are issues of concern in common between the present Petition and the Division's preexisting formal written Form 9 request to the Board for amendments to Section 1630.⁵

Quoting the Division's written Form 9 [Division's Request for New, or Change in Existing, Safety Order] request submitted to the Board on April 3, 2019:

Section 1630 is not clear on when CPEs must be first installed...

It is not clear if a CPE must be operational when a structure initially reaches 36 feet in height or depth or if the CPE does not have to be operational until the structure reaches a height of 60 feet... or depth of 48 feet.

Quoting the Petition:

[The May 29, 2019, Appeals Board DAR] nullified a long-standing enforcement posture of the Division of Occupational Safety and Health (DOSH) and custom and practice in the construction industry that calls for a construction passenger elevator (CPH) on any building designed to be 60 feet or more in height when the building reaches 36 feet in height.

In addition, both the Division's Form 9, and the Petition seek changes beyond the scope of the DAR's narrowly focused holding,⁶ with the apparent purpose of clarifying the operative relationship between above discussed subpart (a) of Section 1630, and its subpart (d), which states:

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

Highlighting concerns the Petitioners seek to have addressed by emergency action, which also are among those identified within the Division's Form 9 request for regular rulemaking, is not to suggest those shared concerns lack validity, but rather the importance of considering the Petition within the broader context of the preexisting Division request.

⁵ Cal/OSHA Form 9, Request for New, or Change in Existing, Safety Order, dated April 4, 2019.

⁶ Defining the applied meaning of the term "height" within Section 1630(a).

DIVISION EVALUATION

The June 10, 2019, dated written evaluation of the Division asserts that the DAR holding is contrary to the Division's long held position that Section 1630 requires access to a structure via 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. The Division reports having successfully enforced this requirement for "many years." It further summarily describes "many employers" having successfully conformed to this requirement "for many years."

The Division also cites previous Appeals Board decisions characterized as having been consistent with its long held position.⁷ Despite this, the Division does not seem to be suggesting that the subject DAR is something other than a superseding precedent to which it is bound.

The Division is in support of the Petitioners' position and requested emergency action.

BOARD STAFF EVALUATION

The June 17, 2019, dated Board staff evaluation of the Petition raises concerns about the scope of requested changes to Section 1630(a), having gone beyond the scope of the Appeals Board holding cited by Petitioners as the precipitating basis for emergency action. At the same time, in light of the recent DAR holding, Board staff agrees that Section 1630(a) could be clearer in its intent regarding when a CPH is required.

Of great concern to Board staff is the extent to which the requested emergency action risks overreaching the special authority of the Board to dispense with most due process and public participation in order to take immediate action essential to avoiding the risk of serious harm to the public posed by an urgent situation.⁸ However, Board staff also recognizes that the Board may deem those concerns less compelling than the argued need for remedial clarification of the subject regulation. Therefore, Board staff cautiously advises that should the Board chose to undertake emergency rulemaking in response to the Petition, it be strictly limited in scope to the precipitating DAR holding at issue, namely the intended meaning of the term "height," for purposes of Section 1630.

Toward that purpose, Board staff would suggest adding to Section 1630, immediately following the existing definition of "Ground Level," a definition of "Height," as follows:

* * * *

Ground level, for the purposes of this section, is defined as the level of the primary construction entrance to the building or structure.

⁷ *Anning-Johnson Company*, Cal/OSHA 85-R3D1-1438 Decision After Reconsideration, April 24, 1986; *Rudolph & Sletten, Inc.*, Cal/OSHA 93-1251 Decision After Reconsideration, Apr. 8, 1998

⁸ Gov. Code Section 11342.545

Height, for purposes of this section, is defined as existing height, or planned height upon completion.

When computing the height...

* * * *

DISCUSSION

Setting aside the question of the Board's statutory authority to adopt emergency regulations in the present situation, the Board's long standing dedication to the principle of meaningful public participation in the rulemaking process weighs heavily against resort to emergency adoption. Nonetheless, exceptional circumstances will sometimes arise which justify expedited action. In the present instance, the Petitioners cite with exceptional specificity the scope of the claimed emergency, in the form of an Appeals Board DAR, which itself describes the crux of its subject holding as follows:

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.

* * * *

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.

The Appeals Board did take the opportunity to reflect more broadly upon the potential interest of the Standards Board in restating its intent:

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.

However, such musing of the Appeals Board are just that, and do not constitute a justification for emergency rulemaking under APA guidelines.

CONCLUSION AND ORDER

Having read and considered the Petition and the evaluations by the Division and Board staff, the Board hereby grants, in part, Petition 577, to the extent that Board staff is directed to promptly develop a highly expedited permanent rulemaking limited in scope to address the definition of “Height” as it pertains to Section 1630. Additionally, Board staff is to proceed in considering the pending Division Form 9 requesting additional amendments to Section 1630 as a separate rulemaking proposal, and refrain from blending the two.