

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

In the Matter of the Appeal of:

**WEBCOR CONSTRUCTION L.P.
14751 Harbor Bay Parkway, #200
Alameda, CA 94502**

Employer

DOCKET 14-R1D1-0527

DECISION

Statement of the Case

WEBCOR CONSTRUCTION L.P. (Employer) provides construction and general contracting services. On August 23, 2013, the Division of Occupational Safety and Health (the Division) through District Manager Juan Calderon (Calderon) conducted an inspection at an excavation and construction site in which Employer was the general contractor at 350 Mission Street, San Francisco, California (the site). On January 30, 2014, the Division cited Employer for allegedly failing to install an operational Construction Passenger Elevator for employees required to descend into the 52 foot deep excavation to perform work in violation of California Code of Regulations, Title 8, Section 1630.¹

Employer filed timely appeals contesting whether the safety order was violated and alleging multiple affirmative defenses. At the hearing, Employer asserted the logical time defense, impossibility to comply with safety order defense, due diligence defense, and reasonably prudent employer defense. All other affirmative defenses were waived.

This matter came on regularly for hearing before Mary Dryovage, Administrative Law Judge (ALJ) for the California Occupational Safety and Health Appeals Board, at Oakland, California on June 24, 2014. Ron Medeiros, Esq., Robert D. Peterson Law Corporation, represented Employer. District Manager Juan Calderon represented the Division. The parties presented oral and documentary evidence. After oral argument, the case was submitted on June 30, 2014.

Issues

1. Did the employer fail to install an operational Construction Passenger Elevator for employees required to descend into 52 feet deep excavation to perform work.

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

2. Were the penalties proposed for the alleged violation consistent with the applicable regulations?

Findings of Fact

1. The employees of the subcontractor were required to descend 52 feet to the worksite at the base level.
2. Extension ladders were used by employees for ingress to and egress from the worksite.
3. The employer failed to install an operational Construction Passenger Elevator for employees required to descend into a 52 feet deep excavation to perform work installing the foundation.
4. The logical time to install a construction passenger elevator would have been before any employees were required to work 52 feet below ground level.
5. The evidence supports imposition of a \$750 penalty, rather than the \$2,625 penalty proposed.

Analysis

- 1. The Division established the employer failed to install an operational Construction Passenger Elevator for employees required to descend into 52 feet deep excavation to perform work.**

Division cited Employer for a violation of Section 1630(a):

- (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 the 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.

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

Exceptions: (1) Scaffolds and falsework. (2) At work locations where unusual site conditions or unusual structure configurations exist, alternate means of access in conformance with § 1630(c) shall be permitted.

Note: For the purposes of this Section, unusual site conditions and structure configurations are considered to exist at those work locations where the installation of a construction passenger elevator is not feasible.

EXAMPLES:

Unusual site conditions or structure configurations are bridges, steel tank erection, dams, water towers, antennas, cooling towers, refinery towers, stacks, prefabricated parking structures, tower cranes, etc.

Section 1630 (c), in turn, recognizes that for “unusual site conditions or structure configurations” the Division may permit an Employer to adopt alternatives to a construction passenger elevator:

(c) At unusual site conditions or structure configurations, the Division shall permit alternate means of access, consisting of one or more, but not limited to, the following:

(1) Use of personnel platforms designed, constructed, and operated as specified by Section 5004 of the General Industry Safety Orders, and only under the conditions permitted by the general requirements of that section.

(2) Use of suspended power-driven scaffolds where employees are protected by safety belts secured to independent safety lines by means of a descent control device acceptable to the Division.

(3) Use of appropriate vehicle-mounted elevating and rotating work platforms.

(4) Use of other means, such as inclined elevators, etc. acceptable to the Division, presented in written form and acceptance granted prior to use.

In the citation, the Division alleges the following:

On and prior to August 23, 2013, Employer, the Controlling Employer failed to install an operational Construction Passenger Elevator (CPE) for employees required to descend into the 52 feet deep excavation to perform work, employees were using extension ladders to descend.

Division has the burden of proving by a preponderance of the evidence that 1) the employer did not install a CPE, 2) the worksite was 48 feet or more in depth below ground level (as alleged here, a 52 foot deep excavation worksite), and 3) employees were exposed to the hazards associated with lack of safe access and egress that Section 1630(a) was designed to protect. (*Howard J. White, Inc.*, Cal/OSHA App. 78-741, Decision After Reconsideration (June 16, 1983).) The "zone of danger" is "that area surrounding the violative condition that presents the danger to employees that the standard is intended to prevent." (*Benicia Foundry & Iron Works, Inc.*, *supra*; *Ja Con Construction Systems, Inc., dba Ja Con Construction*, Cal/OSHA App. 03-441, Decision After Reconsideration (March 27, 2006).) Section 1630(a) defines ground level as the level of the primary construction entrance to the building or structure.

In *Rudolph & Sletten*, Cal/OSHA App. 93-1251, Decision after Reconsideration (April 8, 1998), the Appeals Board found that a Section 1630(a) requires the measurement from ground level to the level at which the work is performed. A violation of section 1630(a) was found because there was no construction elevator, and the safety order required one when employees are working on a building which was 70 foot, six inches tall counting the penthouse. Notwithstanding the fact that the building measured 59 feet, 4 inches from the ground level to the parapet walls, the 60 foot threshold for installing a construction passenger elevator was triggered by the top structure of the building.

Webcor Construction LP sought and received a permit to construct a twenty seven story concrete office building with a three story below grade parking area on October 23, 2012.² The permit application form, project activity form and project permit are each stamped "construction passenger elevator required". (Exhibits 3-1, 3-2, 4-1 and 4-2) The plans included construction of the foundation of the structure, which included a four to six inch layer of moisture proofing material ("rat slab") at EL (-) 52 feet and six inches and a ten foot layer of concrete and rebar below the floor of the third level of the garage ("mat slab") at EL (-) 52 feet.

It is not disputed that the employer did not install a CPE, as of the day of the inspection, August 23, 2013. It was also not contested that the excavation was EL (-) 52 feet deep from the ground level to the work site on the day of the inspection. Employees accessed the work site by using red extension ladders to reach various levels of the excavation site. The worksite and break facilities were

² Webcor Builders filed a second Project Permit which was approved on April 25, 2013 to correct the name of the employer to Webcor Construction LP.

at EL (-) 52 feet. Employees were working on the foundation to create the rat slab at Elevation Level ("EL") (-) 56 feet and the membrane between the rat slab and the mat slab at(EL) (-) 52 feet, which was at least 48 feet below ground level. A construction elevator for accessing the base level is required.

The fact that it is possible to use extension ladders to access various levels of the excavation site does not eliminate the danger of falling fifty-two feet down to the rat slab. (Exhibits 5 through 13.) Employee exposure was established since employees come within the zone of danger while climbing down or up the extension ladder to perform their work related duties. Employee exposure to the hazard addressed by the safety order is established by the fact that employees were required to both descend and ascend the ladders at least one time each shift and have exposure to adverse weather conditions and slip and fall potential without protection.

The Division established that the employer failed to provide a CPE for use by the subcontractors employees, who were exposed to the hazard addressed in the safety order while constructing the foundation of the building at an elevation of (-) 52 feet below ground level.

2. Compliance with the safety standard was not impossible.

Employer argues that compliance with Section 1630(a) was impossible because if a CPE had been constructed to allow access to the worksite at EL (-)52 feet, it would have to be ripped out as it would be in the way of the ten feet of rebar and concrete. In section 1630, the Standards Board recognized that installation of a CPE may be "unfeasible" for some projects – and in those circumstances, the Standards Board, in section 1630(c) has described alternative safety measures and procedures. But paragraph (c) makes it clear that these alternatives must be presented to the Division, and gain the Division's approval. Here, the evidence is that the Division did not approve of any alternative – it issued a permit which stated "construction passenger elevator required. Further, the alternative chosen by employer – a series of ladders- is not one of the alternatives described by section 1630(c). As Employer did not have in place either a CPE or any acceptable alternative, its argument based on impossibility of compliance is rejected.

3. There was no evidence that the logical time to install a construction passenger elevator had not yet arrived.

The "logical time" defense is an affirmative defense in which employer bears the burden of proof. The logical time defense is a Board created rule which provides that the requirements of any safety order will not begin to apply until the necessary and logical time has arrived for an employer to make provisions to correct the violation and abate the hazard. (*JSA Engineering, Inc.*, Cal/OSHA App. 00-1367, Decision After Reconsideration (Dec. 3, 2002) citing *Nicholson-Brown, Inc.*, Cal/OSHA App. 77-024, Decision After Reconsideration (Dec. 20, 1979).) This concept recognizes that employers can comply with the requirements only

when the logical time has come, given the normal sequence of the construction or work activities, and that a reasonable amount of time is necessary for employers to achieve compliance and make the area safe.

Employer argues that the logical time had not yet arrived to install a CPE. Essentially, it argues that if the elevator had been built to reach EL (-)52 feet, the level at which the layer between the rat slab and the mat slab of the foundation was being constructed, the elevator would be ten feet below the lowest level of the garage after the ten foot mat slab was installed.

That argument fails for two reasons. First, the CPE was required during the time that employees of AlCal Specialty Contracting (AlCal) were working at base level of the excavation. At the time of the inspection on August 23, 2013, these employees had been working at EL (-)52 feet for a few months. The logical time for construction and use of a CPE was that period.

Second, section 1630(c) defeats this argument as well: If Employer believed that construction of a CPE at the beginning of construction of the lower levels would have been more hazardous than some other arrangement, or impractical, and therefore the logical time had not arrived for construction of the CPE, it could have sought the Division's approval to use an alternative means of access. There is no evidence that Employer presented any such request or alternative to the Division. Section 1630(a) and (c) allow an Employer to seek an alternative means. The Employer has the option of seeking a variance from the safety order from the Standards Board or an alternative effective means of access acceptable to the Division, pursuant to Labor Code section 6450. (*Chicago Bridge & Iron Company*, Cal/OSHA App. 76-1082, Decision After Reconsideration (February 4, 1980).) Calderon testified that the Employer could have given the Division an opportunity to consider an acceptable alternate to a passenger elevator method of access, due to a structural configuration or other valid reasons. The employer did not avail itself of this step.

Division presented evidence that compliance with the safety order at this stage could have been designed any number of ways, such as by building the CPE to EL (-) 42 feet and then building a temporary means of safe ingress and egress for the remaining ten feet, until the "mat slab" was completed. The logical time to build the CPE was *before* sending employees of AlCal to work at 52 feet below the ground level. Employer thus failed to establish the logical time defense. The Division presented sufficient evidence to demonstrate that the employer did not request an alternative effective means of access as an alternative to installing a CPE for the employees to use to access the work site.

Therefore, the Division established a violation of Section 1630(a) by a preponderance of the evidence.

4. The Division failed to establish that the penalty was correctly calculated.

The Division enjoys a rebuttable presumption that its proposed penalties are reasonable once it establishes that they were calculated in accordance with the Division's policies, procedures and regulations (*Stockton Tri Industries, Inc.*, Cal/OSHA App. 02-4946, Decision After Reconsideration (Mar. 27, 2006).)

The violation was classified as General, as having an effect on the health and safety of employees.

Section 336(b) provides that for "general" violations:

Any employer who violates any occupational safety and health standard, order or special order and such violation is determined to be a General violation (as provided in section 334(b) of this article) may be assessed a civil penalty of up to **\$7,000** for each such violation.

Gravity of a General Violation – The Base Penalty of a General violation is determined by evaluating Severity (as provided in section 335(a)(1)(S) of this article).

If the severity is:

LOW - the base penalty shall be \$1,000.

MEDIUM the base penalty shall be \$1,500.

HIGH, the base penalty shall be **\$2,000**.

Calderon testified that the Division ranked the severity as "high" because the potential for worker injury, including slipping and falling, given that the extension ladders were the sole means of accessing the worksite. (Section 335(a)(1)(A).) The subcontractor's employees did not have a safe means of egress to the work site. The Division ranked extent and likelihood as "medium", which did not change the gravity based penalty.

Calderon testified that the Division's penalty calculations began at \$7,000, but he did not explain why this amount was chosen as the starting point. As Employer argues, section 336(b) states that if the severity rating is "high" the correct starting point for the penalty calculation is \$2,000, not \$7,000.

As the starting point of \$7,000 is incorrect, Calderon's explanations of the additional calculation are not relevant. However his explanations for the other ratings, as required by sections 335 and 336, are not disputed and will be applied here. Calderon applied a 25% reduction based on two factors: 1) the Employer's "history", afforded 10% reduction and 2) the Employer's "good faith" was rated fair, affording a 15% reduction. The 25 % reduction reduces the penalty from \$2,000 to \$1,500. Employer has over 100 employees and is therefore not entitled

to any reduction based on the “size” of the Employer. In addition, section 336(e) calls for a 50% reduction for abatement credit, further reducing the penalty to \$750.

Conclusion

It is hereby ordered that the allegations of Citation 1-1 are sustained as to a General violation, and the appeal is denied.

It is further ordered that the penalty of \$750, as set forth in the attached Summary Table be assessed, for the reasons stated above.

IT IS SO ORDERED.

DATED: July 30, 2014

MARY DRYOVAGE
Administrative Law Judge

Pursuant to §364.2(d), Title 8 California Code of Regulations, Employer shall post for 15 working days a copy of this Decision.

Pursuant to §364.2(b), Title 8 California Code of Regulations, the Division shall serve a copy of this disposition on any authorized employee representative if known to the Division to represent affected employees.

Exh. No.

APPENDIX A

Admitted

**SUMMARY OF EVIDENTIARY RECORD
WEBCOR CONSTRUCTION L.P.
Docket 14-R1D1-0527
Date of Hearing: June 24, 2014**

Division's Exhibits

Exhibit Description

1	Jurisdictional Documents	Yes
2	Proposed penalty worksheet	Yes
3-1	Permit Application Form	Yes
3-2	Project Activity Form	Yes
4-1	Project Permit No. 706968 issued to Webcor Builders on October 23, 2012	Yes
4-2	Project Permit No. 706968 issued to Webcor Construction L.P. on April 25, 2013	Yes
5	Photo of subcontractor's employees on worksite at base level - Elevation Level (EL) (-) 52 feet	Yes
6	Photo of employee installing membrane at base level	Yes
7	Photo of employees next to extension ladder at base level	Yes
8	Photo of ground level entrance to worksite showing red extension ladders used to access first and second level	Yes
9	Photo showing two employees using red extension ladder	Yes
10	Photo showing scaffolding at ground level EL-0	Yes
11	Photo of scaffolding and extension ladder to base level	Yes
12	Photo of corporate safety officer descending to base level on extension ladder	Yes
13	Photo of corporate safety officer talking to subcontractor's employee at base level	Yes

Exh. No.	Exhibit Description	Admitted
14	A/SH-40 Building Plan cross section showing depth of excavation – EL (-)52.5 feet	Yes
15	Webcor Construction Inc. dba Webcor Builders, Inspection 125490003, U.S. DOL OSHA Intranet	Yes
16	Webcor Construction Inc. dba Webcor Builders, Docket No. 07-3905, Order dated April 8, 2009	Yes

Employer’s Exhibits

Exhibit Letter	Exhibit Description	Admitted
A	Drawing of Building plan cross section showing depth of Level B-4 (-)42 feet	Yes

Witnesses Testifying at Hearing

1. Juan Calderon
2. Keith Fearnside

CERTIFICATION OF RECORDING

I, Mary Dryovage, the California Occupational Safety and Health Appeals Board Administrative Law Judge duly assigned to hear the above matter, hereby certify the proceedings therein were electronically recorded. The recording was monitored by the undersigned and constitutes the official record of said proceedings. To the best of my knowledge, the electronic recording equipment was functioning normally.

Signature

July 30, 2014
Date

SUMMARY TABLE DECISION

In the Matter of the Appeal of:

**WEBCOR CONSTRUCTION L.P.
DOCKET 14-R1D1-0527**

Abbreviation Key:

G=General Reg=Regulatory
S=Serious W=Willful
Er=Employer R=Repeat
DOSH=Division

DOCKET	C I T A T I O N	I T E M	SECTION	T Y P E	ALLEGED VIOLATION DESCRIPTION MODIFICATION OR WITHDRAWAL AND REASON	A F F I R M E D	V A C A T E D	PENALTY PROPOSED BY DOSH IN CITATION	PENALTY PROPOSED BY DOSH AT HEARING	FINAL PENALTY ASSESSED BY BOARD
14-R1D1-0527	1	1	1630(a)	G	[Failure to install Construction Passenger Elevator for employees required to descend into the 52 foot deep excavation to perform work.] Violation sustained and penalty recalculated by ALJ.	X		\$2,625	\$2,625	\$750
Sub-Total								\$2,625	\$2,625	\$750
Total Amount Due*										\$750

(INCLUDES APPEALED CITATIONS ONLY)

NOTE: Please do NOT send payments to the Appeals Board. All penalty payments must be made to:

Accounting Office (OSH)
Department of Industrial Relations
PO Box 420603
San Francisco, CA 94142
(415) 703-4291, (415) 703-4308 (payment plans)

*You will 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.

**ALJ: MD/sp
POS: 07/30/14**