

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
2520 Venture Oaks Way, Suite 350
Sacramento, California 95833
(916) 274-5721

In the Matter of a Petition by:)
) **PETITION FILE NO. 598**
Thom Sicklesteel)
Chief Executive Officer)
NCCCO)
2750 Prosperity Avenue, Suite 505)
Fairfax, VA 22031)
)


Applicant.)

The Occupational Safety and Health Standards Board hereby adopts the attached PROPOSED DECISION.


OCCUPATIONAL SAFETY AND HEALTH
STANDARDS BOARD



DAVID THOMAS, Chairman



JOSEPH M. ALIOTO JR., Member

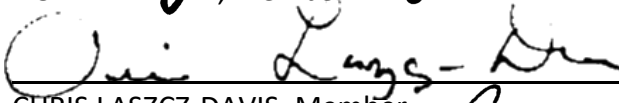


KATHLEEN CRAWFORD, Member

DAVE HARRISON, Member



NOLA KENNEDY, Member



CHRIS LASZCZ-DAVIS, Member



LAURA STOCK, Member

By: 

Autumn Gonzalez, Chief Counsel

DATE: January 18, 2024
Attachments

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**PROPOSED PETITION DECISION OF THE
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD
(PETITION FILE NO. 598)**

INTRODUCTION

The Occupational Safety and Health Standards Board (Board) received a petition on July 18, 2023 from Thom Sickelsteel, Chief Executive Officer, of the National Commission for the Certification of Crane Operators (NCCCO) (Petitioner). The Petitioner requests the Board to amend title 8, California Code of Regulations, General Industry Safety Orders (GISO), subsections 5006.1(d) and 5006.2(d)(3), regulations associated with recertification requirements of crane operators. The Petitioner seeks through rulemaking or a process outside rulemaking, the requirement that, for recertification [of crane operators], a certificant either (i) retake a “hands-on” practical examination, or (ii) have at least 1,000 hours of documented experience operating “the specific type of crane” for which certification is sought. Additionally, the Petitioner requests that California’s requirements be revised to allow accredited certification bodies to determine the appropriate amount of operating experience necessary to be exempt from the practical examination at the time of recertification and the types of experience that should count towards qualifying for a particular “hands-on” exam exemption.

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

SUMMARY

The Petitioner is a non-profit organization that administers written and practical examinations and issues certifications for crane operators nationwide. Petitioner requests that the Board review and consider changing the current requirement for recertification of crane operators. The specific regulations are title 8 section 5006.1(d) and 5006.2(d)(3), which apply to the general industry and construction industry, respectively. Both regulations require that for recertification, a certificant either: (1) retake a “hands-on” practical examination or (2) have at least 1,000 hours of documented experience operating “the specific type of crane” for which certification is sought.

A. Petitioner Disagrees with the Current Requirements.

1. Petitioner Claims Federal Occupational Safety and Health Administration (Federal OSHA) and California State Plan Language are Materially Different.

First, Petitioner states that California's recertification requirements for crane operators are materially different from the federal OSHA requirements and guidance. The federal standard does not provide for an exemption. It states that when a nationally recognized accrediting agency determines that a requisite number of equipment operation hours are sufficient for verifying an individual's operating skills, no practice exam is needed.

The Petitioner believes that a flexible exemption is more appropriate because it is not prescriptive.

2. Petitioner States California's More Stringent Exemption Standard May Not be Reasonably Attainable.

Next, Petitioner asserts there is no information in the rulemaking record to establish the soundness of the 1,000-hour threshold that would preclude the hands-on examination. While questioning the "soundness" of the experience requirement exemption, Petitioner does not define "soundness."

The Petitioner also disagrees with the requirement that the exemption only counts hours spent operating a crane and is also limited to hours spent operating the specific type of crane for which certification is sought. Petitioner believes that it may be "almost impossible" for operators such as municipal utility workers to meet specific experience requirements for each crane type because they may operate their cranes less frequently or only in particular situations.

3. Petitioner Asserts California's Recertification Requirements May Create Unintended Burdens.

Lastly, Petitioner claims that requiring 1,000 hours of documented experience for each type of equipment will increase the costs paid by employers for practical testing of operators. Testing will also take time away from jobsites. An unintended consequence would be a shortage of crane operators in specific categories. This would occur as crane operators decide to drop certifications due to the need to obtain 1,000 hours of documented operating experience in each category. Crane operators may also drop certifications due to the time away from work required to take the exam. This would result in operators having fewer credentials. It may become more difficult to find certified crane operators who maintain certifications for equipment types that are less common or used less frequently.

The Petitioner further believes that operators who drop certifications may also eventually face lost work opportunities.

B. Petitioner Proposes Two Elements of a Possible Solution.

1. Revise California’s Requirements to Allow the Accredited Certification Bodies to Determine the Appropriate Amount of Operating Experience Necessary to be Exempt from the Practical Examination at the Time of Recertification.

And

2. Revise California Requirements for 1,000 Hours of “experience operating the specific type of crane” to Allow for the Consideration of Overall Operating Experience.

RELEVANT STANDARDS

California Regulations

Sections 5006.1 and 5006.2 requirements for the recertification of crane operators as follows:

5006.1. Mobile Crane and Tower Crane – Operator Qualifications and Certification (Applicable to Cranes in General Industry Only).

* * * * *

(d) Re-certification. Crane operators shall re-certify every five (5) years and shall be required to meet all of the qualifications set forth in subsection (a). Operators with at least one-thousand (1,000) hours of documented experience operating the specific type of crane for which re-certification is sought as covered by this section during the immediately preceding certification period and who meet the physical examination, substance abuse, and written examination requirements set forth in subsections (a)(1), (a)(2) and (a)(3) of this section shall not be required to take the practical/hands-on examination specified in subsection (a)(4) to re-certify.

* * * * *

5006.2. Operator Training, Certification, and Evaluation for Cranes and Derricks in Construction.

* * * * *

(d)(3) Re-certification. Crane operators shall re-certify every five (5) years and shall be required to meet all of the qualifications set forth in subsection (d)(1). Operators with at least one-thousand (1,000) hours of documented experience operating the specific type of crane for which re-certification is sought as covered by this section during the immediately preceding certification period and who meet the physical examination, substance abuse, and written

examination requirements set forth in subsection (g)(1)-(g)(3) shall not be required to take the “hands-on” examination specified in subsection (g)(4) to re-certify.

* * * * *

Federal Regulations

Federal OSHA does not require certification of crane operators in general industry. In construction, federal OSHA addresses the requirements for the training, certification, and evaluation of crane and derrick operators in title 29, Code of Federal Regulations.

DIVISION’S EVALUATION

Cal/OSHA’s evaluation report dated October 11, 2023, does not support the proposed changes to subsections 5006.1(d) and 5006.2(d)(3).

With respect to Petitioner’s assertion that 1,000 hours has no basis in the rulemaking record, Cal/OSHA points to specific testimony in the rulemaking record¹. An advisory committee member representing a nationally recognized and NCCA accredited certifying entity testified that in their experience, 1,000 hours provides the operator with sufficient time to maintain crane operating proficiency. This testimony convinced the advisory committee that the 1,000 hours is a number that provides “the operator with sufficient time to develop and prove his/her skills at operating the crane.”

In response to Petitioner’s claim that crane operators spend hours on a job site waiting for instructions instead of operating the equipment, Cal/OSHA interviewed a stakeholder who stated the opposite. The stakeholder said that a crane operator is sent home if the crane is not being used at a jobsite. Cal/OSHA also noted that certain crane models automatically log hours of crane operation, facilitating documentation for the operator. Documentation of operational hours by the operator is through an honor system. However, it is the responsibility of the accredited certifying entity to verify 1,000 hours of experience prior to exempting an operator from the practical/hands-on exam.

Cal/OSHA investigated Petitioner’s statement that the experience requirement will result in a shortage of crane operators. Cal/OSHA asked several stakeholders if the 1,000 hours experience requirement would lead to a shortage of crane operators². One said unknown. Another answered there was a possibility of a shortage. Yet another said there would be no shortage. The last person replied there is a possibility of a shortage of crane equipment (not crane operators).

¹ See The Final Statement of Reasons document (page 5 of 26) on page 36 of the December 12, 2002 rulemaking packet.

² Board legal staff is in receipt of a communication from Cal/OSHA staff dated October 24, 2023 regarding responses to this Cal/OSHA question which was not in the Cal/OSHA evaluation.

Cal/OSHA did not agree with Petitioner's suggestion to allow accredited certification bodies to determine the appropriate amount of operating experience, noting Petitioner did not offer any criteria as an alternative to gaining 1,000 hours of operating experience.

According to Cal/OSHA, from 1994 through the current 2021 version, American Society of Mechanical Engineers (ASME) B30.5 Cranes and Hoists has maintained crane operators must qualify on a specific type of crane. California's experience requirement for each type of crane was adopted from ASME B30.5 to ensure operators who hold a certificate for a crane type have a minimum proficiency to operate it safely.

Cal/OSHA believes that Petitioner's proposal would create a subjective standard which leaves room for interpretation. In contrast, the current quantitative accumulated hours threshold provides an objective criterion.

As a basis for its recommendation to deny this petition, Cal/OSHA believes that basing operator experience on a certifying entity's subjective decision decreases worker safety.

STAFF'S EVALUATION

Board staff prepared an evaluation dated October 25, 2023, which concurs with Cal/OSHA that the petition does not have merit.

Board staff analyzed the rulemaking record and found the same testimony cited by Cal/OSHA to show that the 1,000 hours of experience was part of the rulemaking record. In addition, Board staff looked at the history of crane certification associations and their involvement in the regulation of the crane operating industry.

Based on Board staff's review, petitions granted by the Board have played a significant role in the evolution of the current regulations. Petitions No. 404 and No. 409 helped to define and bring crane operator qualifications to a level above outdated national standards. The results were more comprehensive requirements set forth in the ASME B30.5-1995 standard.

In contrast, petitions denied by the Board have ensured that objective criteria are maintained. Petition No. 475 requested that the GISO subsection 5006.1(c) definition of "accredited certifying entity" be amended to include certifying organizations whose certification programs are accredited by certain organizations, or an equivalent accrediting body approved by Cal/OSHA or certification programs that meet other criteria established by Cal/OSHA.

While reviewing Petition No. 475, Board staff found that of the three certifying organizations mentioned in the petition (certifying organizations whose certification programs are accredited by the NCCA, ANSI, the National Center for Construction Education and Research (NCCER), each derived their basis for accreditation from a different source. Some methods of accreditation are more thorough than others. Some are limited to paper audits. Others include site visits and periodic re-evaluation. The need for uniform accreditation of certifying entities is important to

ensure that certification bodies operate in a consistent, comparable and reliable manner to assure the safe operation of applicable cranes.

Due to the wide range of opinions as to what is required for accreditation, allowing accredited certification bodies to determine the appropriate amount of operating experience necessary to be exempt from the hands-on exam would not assure public safety. The Board denied this petition based on lack of merit.

The process and requirements to obtain and maintain certification are different at each organization. None of these processes and requirements align with California's exemption. According to NCCCO, 94% of operators applying for recertification attested that they qualified for the exception and applied for the waiver.

As a basis for its recommendation to deny this petition, Board staff emphasizes the significance of uniformity in accreditation. The need for uniform accreditation of certifying entities is important to ensure that certification bodies operate in a consistent, comparable and reliable manner to assure the safe operation of applicable cranes.

DISCUSSION

As stated in the Board staff's evaluation, the original purpose of the rulemaking process was to address the crane operators' qualification requirements. The goal was for the California regulations to be at least as effective as their federal counterpart. During this time, Peititioner's organization, NCCCO, was an active participant of extensive rulemaking meetings, but did not raise any objections to the requirements.

A. Current California Regulations Are Not Just as Safe, But Are Safer, Than the Federal Requirements.

It is well established that the Board has rulemaking authority pursuant to LC section 142.3. This section further states that the Board "shall adopt standards at least as effective as the federal standards for all issues for which federal standards have been promulgated . . ."

Not only did the Board adopt standards that are at least as effective as the federal standard, but the California regulations also went further by adding additional standards (the experience exemption). While Petitioner objects that the experience exemption is more stringent than the federal standard, there is no legal basis for this claim. As evidenced by California's reputation as a trailblazer in the field of occupational health and safety, nothing in the federal regulations prohibits enacting a higher standard of safety than the federal standard.

1. The Federal Letter of Interpretation Cited Is Not Only Unenforceable but Aligns with California Standards.

The Petitioner points to a federal letter of interpretation³ as a basis for its position that California should mirror the federal standard. The Board does not find this argument persuasive. A federal letter of interpretation is just that, an interpretation of federal OSHA's rulemaking at the time. The letter itself comes with a cautionary statement: "OSHA requirements are set by statute, standards, and regulations. Our interpretation letters explain these requirements and how they apply to particular circumstances, but they cannot create additional employer obligations."

Federal OSHA specifically points out the rationale for why the "the negotiated rulemaking committee that developed the provision" did not make the recertification process as rigorous as for initial certification. This was because the rulemaking committee's reasoning was given great deference in the drafting of regulations.

Similarly, the Board must look at the advisory committee's rationale in developing the California standards.

2. Advisory Committee Members Found the Experience Exemption to Be Sufficient and Attainable.

Petitioner is incorrect in stating that "there is no information in the rulemaking record to establish the soundness of the 1,000-hour threshold established by California's particular exemption." There is substantial history in the rulemaking record to support the experience requirement.

The rulemaking record shows that the issue of crane operator qualifications and the number of hours of experience required were discussed in detail. The first draft of the experience exemption appears as proposed amendments included to stakeholders in a letter dated March 13, 2001⁴. Subsequently, there is correspondence objecting to the number of hours and the experience exemption. That language is then deleted⁵. However, by September 28, 2001, the 1,000 hours of experience language of the exemption is back, and it remains in other reviews of the proposed regulations through October 22, 2001⁶. This shows that there was healthy discussion and finally consensus about the 1,000 hour experience requirement.

³ Occupational Safety and Health Administration, Crane operator certification and whether a practical test is required for recertification. (Accessed 11/2/23) <https://www.osha.gov/laws-regs/standardinterpretations/2012-08-31>

⁴ See page 352-53 of the December 12, 2002 rulemaking packet. Letter showing attachments including a copy of the December 20, 2000 proposed amendments to section 5006.

⁵ See pages 359-61 of the December 12, 2002 rulemaking packet. Letter dated February 15, 2001 to OSHSB from NACB referencing markup language and 362-63, containing the markup language with NACB input.

⁶ See pages 393-97 of the December 12, 2002 rulemaking packet. Letter dated September 10, 2001 from OSHSB to advisory committee members with attachment of revised rulemaking proposal, per July 6, 2001 subcommittee meeting. See also page 398-416 of the December 12, 2002 rulemaking packet. Letter dated October 22, 2001 from OSHSB to advisory committee members and subcommittee members and visiting testing/validation experts with attachment of revised section 5006 and new section 5006.1.

The exemption to the hands-on exam ensures safety by counting hours spent operating a crane and limiting hours spent operating each specific type of crane. The federal OSHA letter of interpretation offered by Petitioner cuts against its own argument on this issue. Federal OSHA recommends that in determining experience, to “count only time spent operating a crane and not time accrued while performing other crane-related activities.” It further adds that in addition to the practical exam, the recertification process must: “satisfy all of the other applicable requirements of the cranes standard.”

3. The Unintended Burdens from the Recertification Requirements Are Minimal but Have a Maximum Effect on Workplace Safety.

The Petitioner claims that operators who do not meet the experience requirement will suffer lost time/cost of taking additional practical exams for recertification. However, this cost is to the employer, not the employee, and recertification only occurs every five years. The cost to the employer to maintain qualified operators is equivalent to the cost of maintaining specialty certifications in other professions. Similarly, the time taken away from work for operators to demonstrate proficient crane operating skills is no more burdensome than continuing education in other professions. Maintaining skills including safety knowledge is typically part of the job, not a burden.

However, even if obtaining 1,000 hours of experience for multiple crane types is burdensome, the benefits outweigh the burden. An objective metric based on experience for operator competency ultimately leads to a safer workplace.

Moving on to Petitioner’s next claims, on one hand Petitioner states that the experience requirement will result in a shortage of crane workers as operators with multiple certifications drop some certifications due to the experience requirement for each type of crane. On the other hand, Petitioner also believes that operators forced to drop certifications may face lost work opportunities.

The Board is unconvinced by either of these blanket statements. If a crane operator chooses to drop certifications, they will be less marketable in the workplace. This will result in that worker losing income, not a shortage of all workers. Workers who do not have the experience requirement but chose to hold on to their certifications by taking the hands-on exam will still be working.

Likewise, if a worker does not want to face lost work opportunities, that worker has a choice to take the hands-on exam. The requirement itself is the hands-on exam. The 1,000 hours experience requirement is an exemption to the hands-on exam.

B. Petitioner’s Proposed Solution Relies on Subjectivity Which Decreases Worker Safety.

1. Permitting Accredited Certification Bodies to Determine Inconsistent Amounts of Operating Experience Would Jeopardize Worker Safety.

If each accredited certifying entity were to create their own individual subjective criteria for operator experience, the results would vary greatly. The lack of a single objective criteria will result in varying degrees of difficulty to fulfill practical/hands-on examination exemption.

Additionally, the certification scheme between accrediting agencies is, and always has been, inconsistent and should not be the sole basis for an amendment of sections 5006.1 and 5006.2, as it jeopardizes worker safety.

In contrast, the existing regulation provides sufficient flexibility for employers and has resulted in a reduction of crane incidents in California since its implementation.

2. Substituting Overall Operating Experience Instead of Specific Crane Experience Would Similarly Lead to Inconsistent Results Affecting Workplace Safety.

There is substantial evidence in the rulemaking record to support the 1,000 hours of experience exemption from the practical hands-on exam for each crane where recertification is sought.

The Petitioner did not offer any criteria as an alternative to operators gaining experience on a specific crane type. The Petitioner suggests certifying entities, such as their organization, NCCCO, will determine “overall” operator experience gained from operating a variety of cranes. From there they will determine if the operator is exempt from the practical/hands-on examination.

This type of evaluation is subjective, difficult to audit and lacks accountability. More importantly, each worker could potentially operate under different standards than a coworker certified by a different entity. This would lead to inconsistency within the industry. For these reasons, the current regulatory standards should be upheld.

CONCLUSION AND ORDER

The Occupational Safety and Health Standards Board has considered the petition of Thom Sickelsteel, Chief Executive Officer, of the National Commission for the Certification of Crane Operators to make recommended changes to subsections 5006.1(d) and 5006.2(d)(3), regulations associated with recertification requirements of crane operators. The Petitioner requests that California’s requirements be revised to allow accredited certification bodies to determine the appropriate amount of operating experience necessary to be exempt from the practical examination at the time of recertification and the types of experience that should count towards qualifying for a particular “hands-on” exam exemption.

For reasons stated in the preceding discussion and considering testimony received today, Petition 598 is hereby granted to the extent that Board staff is directed to convene an advisory committee to consider the necessity of potential changes to the regulation.