



TEXAS DEPARTMENT OF LICENSING AND REGULATION

Executive Offices

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December 14, 2001

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OPINION COMMITTEE

The Honorable John Cornyn
Texas Attorney General
Attn: Opinions Committee
P. O. Box 12548
Austin, TX 78711-2548

FILE # ML-42327-01

I.D. # 42327

Re: Request for Attorney General Opinion on Elevator, Escalators, and Related Equipment, Chapter 754, Texas Health and Safety Code

Dear General Cornyn:

The Executive Director of the Texas Department of Licensing and Regulation (the Department) respectfully requests your opinion on questions arising under the provisions of Chapter 754, Texas Health and Safety Code, relating to Elevators, Escalators, and Related Equipment (Chapter 754).

As a preliminary matter, please note that House Bill 1214 of the 77th Texas Legislature amended the enabling law for the Department to provide that all statutory references to the "Commissioner" of the Department shall mean the Executive Director of the Department. Accordingly, this request substitutes the term "Executive Director" for the term "Commissioner" in the following discussion. Also, please note that all section references in this request relate to sections of Chapter 754 of the Texas Health and Safety Code; that "EER equipment" collectively refers to elevators, escalators, and related equipment as commonly understood by the EER industry; that all references to ASME Codes refer to the Codes enacted by the American Society of Mechanical Engineers; and that "operation" of EER refers to both maintenance and repair of EER.

Overview

To assist your understanding of the specific questions to be presented and discussed in this request, we wish to summarize two different policy considerations that underlie our request.

First, Subsection 754.014(a) of Chapter 754 directs the Executive Director to adopt standards for the installation, alteration, operation, and inspection of EER equipment used by the public. In exercising this authority, the Executive Director seeks to take all reasonable steps to ensure the safety of the thousands of Texans who use EER equipment daily. The Executive Director is

especially concerned with the increasing incidence of serious, traumatic injuries to the public that arise from the use of escalators. Many of these injuries result in loss of limb, broken bones, shearing and tearing of skin, and permanent disfigurement of the victims. Department records indicate that the young and the elderly may be particularly susceptible to these injuries.

Towards the goal of maximizing public safety, the Executive Director believes that it would be advantageous to require EER equipment used by the public in Texas to comply with the most effective, up-to-date safety features available in the industry. These safety features have changed over the years and it would be in the best interest of the public to apply current industry safety-related standards to all EER equipment in use by the public in Texas.

At the same time, the Executive Director is cognizant of the interests of building owners who have EER equipment located in their buildings. Many of these building owners believe that the changes in industry safety standards for EER equipment often do not increase public safety, but only result in unwarranted new expenses for building owners for EER equipment that is well-functioning according to the standards that were in effect when the equipment was installed.

Certain provisions of Chapter 754 lend themselves to more than one reasonable interpretation, and the interpretation to be applied will have a significant impact on these competing interests. Accordingly, the Executive Director seeks your guidance on the questions presented and discussed below.

Question One: Whether Subsection 754.014(c) authorizes the Executive Director to require EER equipment to comply with the current version of ASME Code A17.1.

Discussion on Question One

Subsection 754.014(c) provides that the Executive Director's standards must require EER equipment to comply with the installation requirements of ASME Code A17.1 or the applicable municipal ordinance that were *in effect on the date of installation*, whichever is the least restrictive. ASME Code A17.1 governs the technical and mechanical components of EER equipment.

This provision does not appear to preclude the Executive Director from requiring EER equipment to comply with the current version of ASME Code A17.1. So long as the requirements of the Code or the municipal ordinance that were in effect on the date of installation are satisfied, Section 754.014(c) would seem to allow the Executive Director to also require EER equipment to comply with additional requirements found in the current version of the Code.

Alternatively, the words "in effect on the date of installation" could be construed as limiting the Executive Director from requiring compliance with any safety requirement in a version of ASME Code A17.1 that was enacted after the date of installation of the EER equipment at issue.

Question Two: Whether the term “installation requirements” in Section 754.014(c) refers only to those Code requirements directly related to the original installation of EER equipment, or whether it also refers to those Code requirements related to the alteration, operation (*e.g.*, maintenance and repair), or inspection of EER equipment after it has been installed.

Discussion on Question Two

This question is related to the first question presented. In other words, may the Executive Director apply current Code requirements for alterations, maintenance, repairs, or inspections of EER equipment, or is the Executive Director limited to only applying those Code requirements for alterations, maintenance, repairs, and inspections that were in effect on the date of installation?

Question Three: To which versions of ASME Code A17.1 and ASME Code A17.3 does Subsection 754.014(b) refer, and does the Executive Director of the Department have discretion to determine whether to approve and adopt future amendments to ASME Codes A17.1 and A17.3?

Discussion on Question Three

Subsection 754.014(b) provides that “[s]tandards adopted by the Commissioner [Executive Director] may not contain requirements in addition to the requirements in the ASME Code A17.1 or ASME Code A17.3.” This section does not provide a date, year, or edition of the Codes to which it refers. Likewise, subsections 754.014(e), (g), and (h) cite ASME Codes without reference to a date, year, or edition for them.

One interpretation is that these subsections only refer to the versions of the Codes that existed on the effective date of Section 754.014, but not to updated versions of the Codes enacted since the effective date of Section 754.014. Prior Attorney General Opinions could be construed to support this interpretation, on the ground that, otherwise, there would be a prospective delegation of legislative powers to a private entity (the ASME) in violation of Article III, Section I of the Texas Constitution. *See, e.g.*, Tex. Att’y Gen. Op. Nos. JC-0012 (1999) at 2; DM-378 (1996) at 2; DM-211 (1993) at 6-7; JM-629 (1987) at 3; JM-509 (1986) at 3-4.

These Opinions also state, however, that there would not be a violation of the Texas Constitution if the state agency is provided discretion to determine whether to approve and adopt future amendments to the rules by the private entity. *Id.* Thus, we request that your opinion address the question of whether Section 754.014 or Chapter 754 grants the Executive Director of the Department discretion to determine whether to approve and adopt future amendments to the ASME Codes A17.1 and A17.3.

Significant problems would be posed by an interpretation that Subsection 754.014(b) only refers to the versions of ASME Codes A17.1 and A17.3 that were in effect on the effective date of Section 754.014 or that the Executive Director lacks discretion to approve and adopt future

amendments to these Codes. One problem is that there would be a conflict with the requirement in Subsection 754.014(c) that the standards adopted by the Executive Director must require EER equipment to comply with the installation requirements in effect on the date of installation. In other words, if EER equipment is installed before or after the effective date of Section 754.014, would the Executive Director apply the Code requirements in existence on the effective date of Subsection 754.014(b) or the Code requirements in effect on the date of installation under Subsection 754.014(c)?

Another problem with this interpretation is that it would preclude the Executive Director from applying current ASME Code safety provisions to any alterations, maintenance, repairs, or inspections that occur after the effective date of Section 754.014. This would operate to restrict the Executive Director from protecting the public through the application of current safety standards for EER.

Finally, this interpretation would create confusion in the fire service provisions to be applied to EER. The ASME Code A17.1 in effect on September 1, 1995, the effective date of Section 754.014, requires fire service standards for all elevators. Yet, under Section 754.014(d), all EER must comply with the provisions of the 1994 ASME Code A17.3, which provides that fire service standards do not apply to elevators that travel 25 feet or less.

An alternative interpretation of Subsection 754.014(b) would be to apply the version of the Codes in existence on the date that the installation, alteration, maintenance, repair, or inspection occurs. This interpretation would eliminate any conflict between Subsections 754.014(b) and (c) and would be consistent with the Department's goal of protecting public safety through the application of current ASME Code safety standards.

Question Four: Whether Subsection 754.014(d) authorizes the Executive Director to require EER equipment to comply with the current version of ASME Code A17.1 or the current version of ASME Code A17.3.

Discussion on Question Four

Subsection 754.014(d) provides that, regardless of the date of installation of EER equipment, the Executive Director's standards must require EER equipment to comply with the installation requirements of the 1994 ASME Code A17.3.

This provision does not appear to preclude the Executive Director from requiring EER equipment to comply with the current versions of either ASME Code A17.1 or ASME Code A17.3. So long as the applicable requirements of the 1994 ASME Code A17.3 are satisfied, Subsection 754.014(d) would appear to allow the Executive Director to also require EER equipment to comply with additional requirements found in the current versions of ASME Code A17.1 and A17.3.

Question Five: To which version of ASME Code A17.3 does Subsection 754.014(d) refer?

Discussion on Question Five

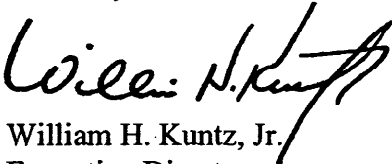
As discussed in regard to question four above, Subsection 754.014(d) refers to the "1994 ASME Code A17.3". The problem is that there is no 1994 edition of ASME Code A17.3. There is a 1993 ASME Code A17.3, which subsequently was updated by addenda in 1994, but there is no "1994 ASME Code A17.3".

In light of this ambiguous Code reference in the statute, should the Executive Director interpret Subsection 754.014(d) to refer to the ASME 1993 Code A17.3, as amended by the 1994 addenda? May the Executive Director interpret this reference to include the most current version of ASME Code A17.3? Finally, if you determine that the Executive Director may make either of these interpretations, how would this affect your determinations of the questions above as they relate to the Executive Director's authority to require EER equipment to comply with current Code requirements?

In closing, we wish to reaffirm our desire to reach a clear resolution of the complex questions presented above so that we may proceed to enforce the provisions of Chapter 754 in a way that will provide maximum protection to the public while according maximum fairness to building owners with EER equipment in their buildings.

Thank you for your consideration of this request and please contact us if you need further information.

Sincerely,



William H. Kuntz, Jr.
Executive Director

Texas Department of Licensing and Regulation

WHK/MDC/dm

- c: William Fowler, Chair, Texas Commission of Licensing & Regulation
- Mickey Christakos, Vice-Chair, Texas Commission of Licensing & Regulation
- Elliott McConnell, Texas Commission of Licensing & Regulation
- Gina Parker, Texas Commission of Licensing & Regulation
- Patricia P. Stout, Texas Commission of Licensing & Regulation
- Leo R. Vasquez, III, Texas Commission of Licensing & Regulation