

**STATE OF ALASKA
DEPARTMENT OF LABOR**

**OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD
P.O. BOX 21149
JUNEAU, AK 99802**

STATE OF ALASKA, DEPARTMENT)	
OF LABOR, DIVISION OF LABOR)	
STANDARDS AND SAFETY,)	
OCCUPATIONAL SAFETY AND)	
HEALTH SECTION,)	
)	
Complainant,)	Docket No. 95-2054
)	Inspection No. 124074055
v.)	
)	
ALASKA BUILDING SYSTEMS,)	
)	
Contestant.)	
_____)	

DECISION AND ORDER

Alaska Building Systems (ABS) contests a citation issued by the State of Alaska, Department of Labor (Department) following an occupational safety and health inspection of ABS' worksite in Soldotna, Alaska on September 21, 1995.

As a result of the inspection, the Department issued a citation to ABS alleging two violations of Alaska occupational safety and health standards. Item 1a alleges a violation of Construction Code (CC) 05.120(b)(1)(D) for failing to install guardrails and toeboards around a scaffold more than six feet above the ground or floor. Item 1b alleges a violation of CC 05.120(b)(1)(J) for failing to use appropriate scaffold grade planking. Items 1a and 1b were grouped into a single citation classified as "serious" with an assessed penalty of \$175.

Pursuant to ABS' contest of the alleged violations, a hearing was held in Kenai on December 17, 1996. The Department was represented by Assistant Attorney General Tony N.

Steinberger. ABS was represented by its owner, James McCool. The parties presented witness testimony, documentary evidence and oral argument. Upon review and consideration of the evidence and arguments of the parties, the Board makes the following findings of fact, conclusions of law and order in this matter.

FINDINGS OF FACT

1. On September 21, 1995, Department enforcement officer Tim Bundy conducted an occupational safety and health inspection of a construction site at 34684 K Beach Road in Soldotna, Alaska.

2. The construction site was a gas station which was being rebuilt after a fire. Bundy had previously driven by the site, noticed some scaffolding that did not appear proper, and obtained authorization to conduct a formal inspection.

3. Alaska Building Systems was the primary construction contractor at the site. ABS is a sole proprietorship owned by James McCool. McCool was not present at the site during the inspection.

4. During his inspection, Bundy observed a welded tubular scaffold with a wooden platform approximately 13 feet, 6 inches above the concrete floor of the building under construction. The platform was open-sided and did not have guardrails or toeboards. (Exs. 1 and 2.)

5. According to Bundy, the scaffold platform consisted of a sheet of plywood laid on top of three planks which he estimated as 2x6s. Bundy did not see any grade stamp on the plywood platform or supporting planks indicating that they were scaffold grade material. For safety reasons Bundy did not climb the scaffold, and he did not closely examine the scaffold platform or measure its dimensions.

6. Bundy did not see any employees working on the scaffold during his inspection. However, he interviewed the ABS foreman who stated that two employees had been working on the platform to install cross-braces on the ceiling joists. This was corroborated by Bundy's interviews with

the two employees.

7. ABS owner McCool acknowledged that his employees had access to the scaffold platform but stated that his foreman had told him that the platform was being used only for storage of materials. Neither the foreman nor the other employees testified at the hearing.

8. McCool conceded that the scaffold platform lacked guardrails and toeboards. He asserted, however, that the platform was built of materials equivalent to scaffold grade material and was strong enough to easily support the weight of two workers and their tools.

9. After Bundy's inspection, McCool directed his employees to take down and remove the scaffold, which they did.

10. Bundy classified the alleged violations as "serious" based on his conclusion that the hazard presented a greater rather than lesser probability of an accident, and that any resulting injury was likely to be at least moderately severe.

11. According to the Department's penalty calculation procedures, a serious violation of greater probability and medium severity carries an unadjusted penalty of \$3,500. ABS' unadjusted penalty was reduced 60% for company size, 25% for good faith, and 10% for no history of prior violations, resulting in an assessed penalty of \$175. (Ex. 3.)

CONCLUSIONS OF LAW

Item 1a

Construction Code 05.120(b)(1)(D) provides:
Guardrails and toeboards shall be installed on all open sides and ends of platforms more than six feet above the ground or floor, except needle beam scaffolds and floats. Scaffolds four feet to six feet in height, having a minimum of horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

The evidence clearly demonstrates, and ABS does not controvert, that the scaffold in

question was over six feet high and did not have the required guardrails and toeboards. Nevertheless, ABS argues that the Department did not adequately establish employee exposure to the hazard, based on the inspector's failure to personally observe employees working on the scaffold. This argument is without merit. Employee exposure need not be established through direct personal observation by the inspector, but may be proved through other evidence. In this case, the inspector interviewed the jobsite foreman and two employees, each of whom acknowledged that employees were working on the scaffold. Moreover, the Department is not required to prove actual exposure of employees to satisfy the employee exposure element of a violation. Employee exposure may be established merely by showing that one or more employees had access to the "zone of danger" created by the hazard. *See* Mark A. Rothstein, *Occupational Safety and Health Law* ? 103, at 139-42 (3d ed. 1990). Here ABS' owner admitted that his employees had unrestricted access to the scaffold. This evidence alone is sufficient to satisfy the employee exposure requirement.

With regard to the classification of the violation as "serious," ABS argues that it did not willfully violate the scaffolding requirements and that a warning would have been sufficient. However, willfulness is not at issue since ABS has not been charged with a "willful" violation which is distinct from a "serious" violation. *See* AS 18.60.095(b) and (e). A "serious" violation is considered to exist if the violation creates in the place of employment a substantial probability of serious physical harm or death in the event of an accident. In this case, we are persuaded that if an employee were to fall over 13 feet from the unprotected scaffold platform onto the concrete floor, it is likely that serious physical harm would result. Accordingly, we conclude that this violation was properly classified as "serious."

With regard to the penalty assessment, we note that ABS was given the maximum 95% reduction for company size, good faith and no history of prior violations. We find no basis to change the penalty assessment of \$175.

Item 1b

Construction Code 05.120(b)(1)(J) provides:
All planking shall be Scaffold Grade as recognized by approved grading

rules for the species of wood used. The maximum permissible spans for two-inch by 10-inch or wider planks shall be as shown in the following

TABLE L-3
Material

	Full thickness undressed lumber			Nominal thickness lumber	
Working load (p.s.f.)	25	50	75	25	50
Permissible span (ft.)	10	8	6	8	6

Sitka spruce of approved grade for scaffold planks shall be used in full thickness only. Nominal thickness lumber is not recommended for heavy duty use.

The Department bears the burden of proving that the scaffold platform used by ABS was not composed of scaffold grade material. The Department's evidence of this violation consists primarily of the inspector's testimony that he did not see a "scaffold grade" stamp when visually observing the scaffold platform from the floor 13 feet below the platform. ABS contends that the Department failed to adequately prove that the platform was not made of scaffold grade wood and, even if it was not, ABS argues that the platform was as strong or stronger than scaffold grade planking.

We find the evidence submitted by the Department is insufficient to meet its burden of proving that the scaffold platform was not composed of scaffold grade materials. The inspector viewed the underside of the platform from a distance of over 13 feet. He did not closely examine the platform or otherwise document the materials used in its construction. Although we agree that it was inadvisable for the inspector to climb the unprotected scaffold during the inspection to check the materials used, we believe the scaffold platform could have been examined at a later time after the scaffold had been dismantled. The Department's lack of documentation regarding the scaffold planking leaves us with significant doubts as to whether or not scaffold grade wood was used, particularly in light of the description by ABS' owner of the materials used in the construction of the platform. Because the Department has failed to convince us that scaffold grade planking was not used, we dismiss this alleged

violation.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is ordered as follows:

1. Citation 1, Item 1a is affirmed as a "serious" violation with a penalty of \$175.
2. Citation 1, Item 1b is dismissed.

DATED this 20th day of March, 1997.

ALASKA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

/s/
By: _____
Timothy O. Sharp, Chairman

/s/
By: _____
James J. Ginnaty, Member