BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: PIERCE ENTERPRISES 11310 Stewart Street El Monte, CA 91731 Employer	Docket No. 00-R1D3-1951 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code, and having granted the petition for reconsideration filed in the above-entitled proceeding by Pierce Enterprises (Employer), makes the following decision after reconsideration.

JURISDICTION

Brian Brooks, a representative of the Division of Occupational Safety and Health (Division), commenced an accident investigation from January 7, 2000 through May 18, 2000, at a place of employment maintained by Employer at the new international terminal at San Francisco Airport in San Francisco, California. On May 18, 2000, the Division issued to Employer a citation alleging a serious, accident-related violation of section[1] 1644(a)(6) [scaffold guard railings].

Employer filed a timely appeal contesting the existence and classification of the violation, the reasonableness of the proposed abatement requirements and the reasonableness of the proposed civil penalty. Employer also raised as affirmative defenses the statute of limitations, employer knowledge and independent employee action.

A hearing was held in Foster City, California on November 28, 2000, before Bref French, Administrative Law Judge (ALJ) of the Board. Attorney Ron

[1] Unless otherwise indicated, all section references are to Title 8 of the California Code of Regulations.

E. Medeiros represented Employer. Michael Horowitz, District Manager, represented the Division.

On December 27, 2000, the ALJ issued a decision denying Employer's appeal and assessing a civil penalty of $5,000.

Employer filed a petition for reconsideration on January 26, 2001. The Division filed an answer to the petition on February 7, 2001. On March 14, 2001, the Board took Employer's petition under submission and stayed the decision of the ALJ.

EVIDENCE

The Board has taken no new evidence and relies upon its independent review of the record as summarized below, including the tape recording of the hearing and the exhibits admitted into evidence, in making this decision.

Safety Compliance Officer Brian Brooks (Brooks) received a telephonic report from Chrissy Hanstad (Hanstad), Field Office Manager for Employer, on November 18, 1999, of a work-related accident that had occurred that same date at the new international terminal under construction at the San Francisco Airport (SFO). Hanstad conveyed to Brooks that employee Daniel Delgado (Delgado) had been working on a metal scaffold which had a missing guardrail, and that Delgado had fallen to the concrete surface below sustaining five (5) broken ribs, a broken collarbone and a broken pelvis.

Hanstad's account of the accident was later confirmed to Brooks on January 7, 2000, by Greg Atwood (Atwood), Project Manager for Employer. At that time Atwood provided Brooks with photographs that depicted missing end and side guardrails on the scaffold. Atwood did not identify who took the photographs; however, Brooks believed that Atwood told him that the photographs were taken on the day of the accident. Atwood informed Brooks that he had not inspected the scaffold on the day of the accident. He also informed Brooks that he was unaware that guardrails were missing on the scaffold.

Brooks next interviewed foreman Javier Martinez (Martinez). Martinez related to Brooks that on the day of the accident he had sent a two-man crew, Delgado and Raul Briones, to the third floor of the terminal to apply tape between adjacent panels on the ceiling. Martinez described the metal scaffold from which the crew worked to apply the tape as a two-level scaffold, standing approximately 12 feet from the floor to the work platform. According to Martinez, he had inspected the particular scaffold the week prior to the

accident and all of the guardrails had been in place at that time. Martinez became aware of missing guardrails after the accident but did not know who had removed them. Martinez identified the scaffold in the photographs provided by Atwood as the scaffold that Delgado had been working from on the day of the accident.

Brooks concluded that Delgado was not a fully experienced worker due to his title of apprentice. He believed Atwood might have told him that Delgado was an apprentice lather. Brooks did not ascertain whether Delgado had performed taping work, had been trained, or had experience on metal scaffolds prior to the accident.

Brandon Pollard (Pollard), a scaffold foreman, testified on behalf of Employer. Pollard's responsibilities as a scaffold foreman included training and supervising the scaffold crew. He had trained Delgado to work on his scaffold crew for approximately six months, after which in May of 1999, Delgado left his scaffold crew to become an apprentice taper. During his six-month training with Pollard, Delgado learned to erect and dismantle scaffolds, work from scaffolds and stock material. Pollard trained employees, including Delgado, not to alter scaffolds or work from unsafe scaffolds. If there was a problem with a scaffold, such as a missing guardrail, employees were to immediately report the condition to Pollard or to another supervisor. One-hour safety meetings were held with employees every Tuesday, which Delgado attended. According to Pollard, if an employee were found to be working on an unsafe scaffold, the employee would receive a verbal warning, then a written warning, and ultimately termination if the conduct continued. Based on these training procedures, Pollard believed that Delgado was sufficiently familiar with the scaffold rules.

Pollard usually arrived at the site around 5:00 a.m. with Atwood arriving shortly thereafter. Although he could not recall what time Delgado started work on the morning of the accident, he did state that the taping crew usually started work between 6:00 and 6:30 a.m. Pollard conducted routine inspections of scaffolds in his assigned area twice a day, usually between 6 and 9 a.m. and again in the early afternoon. The day before Delgado's accident, he had inspected the particular scaffold at approximately 1:00 or 1:30 p.m. and found all guardrails to be in place. Pollard did not work on the day of Delgado's accident. Nonetheless, he stated that another scaffold foreman should have been working in his place on that day.

On occasion Employer utilized round-the-clock workers at the site; however, Pollard did not believe that was the case at the time of Delgado's accident. Pollard was aware that other subcontractors had been working in the

area but did not know if any of those subcontractors had used the scaffold Delgado was working from at the time of his fall.

ISSUES

1. Was the citation issued within six months of the violation pursuant to Labor Code section 6317?

2. Was the ALJ's decision procured by fraud?

3. Is the documentation submitted with Employer's petition newly discovered evidence?

4. Does the evidence support a finding of a serious violation of section 1644(a)(6)?

5. Does the evidence support the finding that the violation was the cause of the accident?

6. Is the independent employee action defense applicable where a serious, accident-related violation of section 1664(a)(6) has been found?

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

1. The Citation was Issued Within Six Months of the Violation.

Employer argues that the ALJ exceeded her authority by finding that the citation was not barred by the statute of limitations period mandated by Labor Code section 6317. Employer attempts to redefine the limitations period by suggesting that the time of day that the Division becomes aware of the violation is the delineating factor in whether the citation was issued timely. Specifically, Employer argues that because notice of Delgado's accident was given to the Division at 12:30 p.m. on November 18, 1999, the statute of limitations to issue the citation expired at 12:30 p.m. on May 18, 2000. Thus, under Employer's interpretation, calendar months would be reduced to an hour-by-hour vigilance by the Division to ensure timely issuance of thousands of citations. Employer's interpretation of the calculation of the six-month statute of limitations period is unreasonable and not supported by well-established legal precedent.

Labor Code section 6317 provides that the citation must be issued with

reasonable promptness but not later than six months after occurrence of the alleged violation. Labor Code section 6319, on the other hand, provides that notice of the citation must be provided to an employer within a reasonable time after termination of the investigation and issuance of the citation.[2] Based on a plain reading of both statutes, this Board concludes that "service" of the citation under Labor Code section 6319 is a distinct statutory requirement from the six-month statute of limitations period found in Labor Code section 6317. Appeals Board precedent supports this conclusion. In *Channel Constructors, Inc.*, Cal/OSHA App. 77-028, Decision After Reconsideration (Sept. 28, 1982), the issue was whether an undated citation was valid. Because the citation was not dated, the Board looked to the date the employer received the citation by mail to affirm the validity of the citation. In so doing, the Board concluded that ". . . no error appears in the form or manner of issuance or in the service of the citation." [Emphasis added] Although *Channel Constructors* did not involve a statute of limitations challenge, its distinction between "issuance" and "service" of the citation is consistent with this Board's reading of Labor Code sections 6317 and 6319.

The record reflects that the Division was notified of Delgado's accident on November 18, 1999, the same date of its occurrence. The date on the citation is May 18, 2000. The Division has jurisdiction and supervision over every employment and place of employment in this state which is necessary to adequately enforce the safety and health laws, standards, and orders (Labor Code §6307), including the authority to issue citations to employers upon inspection or investigation (Labor Code §6317). The Division performed its official duty by issuing the citation on the specified date. Although there was a standing objection to hearsay made at the hearing, we find that a citation, as evidence of the performance of an official duty, falls within the exception to hearsay provided in Evidence Code section 1280. Further, a rebuttable presumption exists that an official duty has been regularly performed. Evidence Code section 664; *Samson Market Company* v. *Alcoholic Beverage Control Appeals Board* (1969) 71 Cal.2d 1215. No evidence was presented at the hearing to rebut the presumption under Evidence Code section 664 that the citation was issued on the date stated on the citation.

Other evidence further corroborates that the citation was issued on May 18, 2000. A postal Certified Mail Return Receipt card indicates, and it was not disputed by Employer, that the citation was delivered to Employer on May 23, 2000. A separate Certified Mail Receipt indicates that the citation was sent by certified mail on May 18, 2000.[3] We take official notice that May 18, 2000 was

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[2] For purposes of this decision, this Board need not reach the issue of what constitutes " a reasonable time" for service under Labor Code section 6319 once the citation has issued.

[3] "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over

a Thursday; May 23, 2000 was a Tuesday. (§376.3) The citation was delivered to Employer five days after mailing on May 18, 2000.[4] The cumulative evidence thus preponderates toward establishing that the citation was in fact issued on May 18, 2000—the date stated on the citation and as further supplemented by the mailing date and delivery date. We conclude that the citation was issued on May 18, 2000.

The Board's interpretation of the six-month statute of limitations under Labor Code section 6317 is well established. Labor Code section 6317 provides in relevant part that if, after inspection or investigation, the Division believes an employer is in violation of any standard, rule, order or regulation enacted pursuant to the California Occupational Safety and Health Act of 1973,[5] it shall issue a citation to the employer within six months from the date of the alleged violation. The six-month statute of limitations mandated by Labor Code section 6317 pertains to calendar months, not calendar days. *A-Rem, Inc.*, Cal/OSHA App. 95-4135, Denial of Petition for Reconsideration (Nov. 12, 1997). In calculating the time in which an act is to be done, the first day is excluded and the last day is included, unless the last day is not a working day which then extends the time to the next working day. Section 348(a); see also, Government Code section 6800 and Code of Civil Procedure section 12. November 18, 2000, the date the Division was notified of the accident, is not counted so the first day for computing the time period is November 19, 2000. The last day a citation could be issued within the six-month period was May 18, 2000 which day is included in counting the six-month period.

A citation issued within the six-month statute of limitations period is deemed issued with reasonable promptness absent a showing of prejudice to employer. *Vial* v. *California Occupational Safety & Health Appeals* Board (1977) 75 Cal.App.3d 997, 1004. Employer provided no evidence at the hearing to show that it suffered any prejudice based on the fact that the citation was issued six months after the accident. Therefore, the Board rejects Employer's assertion that the ALJ acted in excess of her authority.[6]

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timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (§376.2) Also, as evidence of mailing, the Certified Mail Return Receipt is not being offered for the truth of the matter that it was mailed on May 18, 2000 but to establish that the citation was *issued* prior to its mailing on May 18, 2000 because mailing of a citation cannot logically predate the issuance of the same citation.

[4] The Board's own regular experience with postal delivery of certified mail is that certified mail is consistently delivered in 3-5 days after mailing.

[5] Labor Code section 6300, *et. seq.*

[6] The ALJ found that the Division caused the citation to issue by serving it on May 18, 2000. Although this Board finds that "service" of the citation is not required in order for a citation to issue, the ALJ's finding in this regard was harmless error in that her conclusion that the citation was issued within six (6) months was correct.

2. The Record does not Support Employer's Assertion that the Decision was Procured by Fraud.

Employer next contends that the Certified Mail Receipt dated May 18, 2000 " . . . may not be correct and may be procured by fraud." (Petition, p. 11) To show that a decision has been obtained by fraud, the burden is on the party asserting fraud to show by credible evidence " . . .a false representation of material fact, made recklessly or without reasonable ground for believing its truth, with intent to induce reliance thereon, and on which the injured party justifiably relies". *Concrete Wall Sawing Co., Inc.*, Cal/OSHA App. 97-1777, Decision After Reconsideration (June 5, 2001). Neither the petition nor the record provides *any* facts that would support Employer's assertion that the Certified Mail Receipt contains false representations.[7] Mere assumptions do not rise to the level of credible evidentiary facts required to show fraud. Therefore, Employer's assertion that the decision was procured by fraud must be rejected.

3. The Documents Submitted with the Petition do not Constitute Newly Discovered Evidence.

Employer requests that the Board consider documentary evidence not presented at the hearing; specifically, the transcript of the injured employee's deposition taken on October 26, 2000, and insurance investigative reports dated December 13 and 23, 2000, which reports contain summaries of recorded statements of Employer's employees and supervisors. Employer claims that this evidence was not available at the time of the hearing due to "pending litigation". (Petition, p. 13) A party that seeks reconsideration based on newly discovered evidence must show that it could not, with reasonable diligence, have discovered and produced the evidence at the hearing. *R.D. Engineering & Construction, Inc.*, Cal/OSHA App. 98-1938, Decision After Reconsideration (Aug. 29, 2001); section 390.1(a)(4).

Information known to Employer's employees and supervisors concerning Employer's safety program and the accident were available to Employer prior to the hearing on November 28, 2000. Certainly, Employer had access to Delgado's training history, and to Delgado himself immediately after the accident for purposes of determining how the accident occurred and the condition of the particular scaffold. Employer does not explain why, with reasonable diligence, it could not have presented this evidence at the hearing by way of affidavits or testimony. "Pending litigation" in other civil forums does

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[7] Employer, by a subsequent letter to the Board, suggests that portions of the parties' closing arguments are missing from the hearing tapes, which according to Employer, further supports its allegation that the Decision was procured by fraud. The Board has reviewed the hearing tapes in their entirety and finds the tapes complete, including the parties' closing statements.

not excuse Employer's obligation to present evidence during its hearing that is relevant to the issues on appeal.

The hearing procedures strive for finality of appeals through an orderly process founded upon due process of law. In essence, what Employer seeks is a new hearing to offer evidence that was available to Employer at the time of the hearing. We will not afford a new hearing to accept the purportedly new evidence. Allowing parties to belatedly introduce evidence without sufficient cause would infringe upon the rights of the opposing party, and ultimately, impugn the integrity of the Board's hearing process.

Nor will we consider the documentary evidence submitted with the petition for reconsideration. If the information Employer now wishes the Board to consider was relevant but could not have been presented at the time of the hearing for reasons such as witness unavailability, Employer should have requested a continuance of the hearing. Failure to seek such a continuance is tantamount to failure to exercise reasonable diligence. *A.L. Hunter Construction, Inc.*, Cal/OSHA App. 00-717, Denial of Petition for Reconsideration (Feb. 22, 2001). Employer has not shown that it exercised reasonable diligence in obtaining the information it now seeks the Board to consider. Hence, the Board finds that Employer has not shown the required diligence to support consideration of its petition on the ground of newly discovered evidence.

4. The Evidence Supports the ALJ's Finding of a Serious Violation of section 1664(a)(6).

Employer asserts that the evidence does not support the finding that a rail was missing from the scaffold on the day of Delgado's accident. Employer further asserts that if there was a rail missing from the scaffold, there is no evidence of when the rail was removed or by whom. A thorough review of the evidence submitted at the hearing supports the findings of the ALJ that the Division established a serious violation of section 1664(a)(6).

To establish a serious violation, the Division must prove by a preponderance of the evidence that, if an accident were to occur, it is more likely than not that the violation would result in death or serious bodily harm, *and* that the employer knew, or with the exercise of reasonable diligence could have known, of the hazardous condition. Labor Code section 6432.[8]

[8] Effective January 1, 2000, the burden to show lack of knowledge of the hazardous condition shifted to the employer. Since the accident in this case occurred in 1999, the burden to show employer knowledge remained with the Division. Accordingly, the burden of proof as discussed herein is applicable only to those citations for serious violations issued prior to January 1, 2000.

Preponderance of the evidence means that the thing to be proved is more likely than not to be true. *Gaehwiler Construction Company*, Cal/OSHA App. 78-651, Decision After Reconsideration (Jan. 7, 1985).

Under the first element, we agree with the ALJ's finding based upon Brooks' testimony that the existence of the violative condition would more likely than not result in death or serious bodily harm. Brooks testified as to the type of injuries that would result from a fall from a height of 12 feet. He testified as to the type of injuries that occurred in the accident investigated and why such injuries would more likely than not occur as a result of someone falling from that height. Brooks' uncontroverted testimony was based upon his personal investigative experience that included investigating similar accidents involving serious injuries. The parties stipulated at the hearing that Delgado sustained a serious injury as defined under Labor Code section 6302(h).

Under the second element of Labor Code section 6432, contrary to Employer's understanding, the Division was not required to prove who removed the guardrail. It was sufficient for the Division to show that a guardrail was missing in violation of section 1664(a)(6), and that Employer could have with reasonable diligence discovered the missing guardrail. Hanstad, Employer's field manager, stated when she reported the accident to Brooks that Delgado had fallen from a scaffold that had a *missing guardrail*. Hanstad, as Employer's field manager, was duly authorized to communicate information to the Division on behalf of Employer. Thus, Hanstad's statement constitutes an authorized admission of knowledge of a violative condition. Such an admission overcomes a hearsay objection and is binding on Employer. *Metalclad Insulation Corp.*, Cal/OSHA App. 83-812, Decision After Reconsideration (Sept. 11, 1987); *Robinson Enterprises, Inc.*, Cal/OSHA App. 91-1316, Decision After Reconsideration (July 29, 1993); Evidence Code section 1222.

The evidence also supports the finding by the ALJ that Employer, with reasonable diligence, could have discovered the hazardous condition. Employer knowledge is established by showing that (1) the employer knew or should have known of the hazard; (2) the employer failed to exercise any supervision over its employees to assure adequate safety; (3) the employer failed to ensure that its employees complied with its safety rules; or (4) the violation was foreseeable. *Newbery Electric Corporation* v. *Occupational Safety and Health Appeals Board* (1981) 123 Cal.App.3d 641, 648; *Gaehwiler* v. *Occupational Safety and Health Appeals Board* (1983) 141 Cal.App.3d 1041, 1044.

An employer's affirmative duty to anticipate hazards within a reasonable degree of foreseeability may be relevant to an employer's knowledge of the

hazard. *Greene and Hemly, Inc.*, Cal/OSHA App. 76-435, Decision After Reconsideration (April 7, 1978). An independent review of the record in this case reflects that the hazard was reasonably foreseeable by Employer.

Martinez, Employer's foreman, acknowledged that he had not inspected the scaffold on the morning of Delgado's accident. Martinez' statement is imputed to Employer as an authorized admission. Since the only evidence available to the ALJ was that there was no inspection on the morning of the accident with Employer providing no evidence to the contrary, the Board finds that there was no inspection on the day of the accident. Pollard testified that another scaffold foreman should have conducted a routine inspection on the morning of the accident. It can be inferred from Pollard's testimony that Employer anticipated the hazard but was derelict in its duty to provide a safe work place. This Board finds that the ALJ correctly found a serious violation of section 1644(a)(6).

5. The Evidence Supports the Finding that the Violation of Section 1664(a)(6) Caused Delgado's Serious Injury.

Employer contends that because neither Atwood nor Martinez witnessed the accident, the ALJ erred in finding that Delgado's serious injury was caused by the violation of section 1664(a)(6). Employer further contends that Brooks merely assumed, without any supporting evidence, that the violation caused Delgado's serious injury. Employer's contentions are misplaced.

To establish the characterization of the violation as accident-related, the Division must show by a preponderance of the evidence a causal nexus between the violation and the serious injury. *Obayashi Corporation*, Cal/OSHA App. 98-3674, Decision After Reconsideration (June 5, 2001). In *Obayashi*, the Division did not establish causation because there was no evidence as to who prepared the accident report relied upon by the Division. In this case, however, Hanstad's report to Brooks that Delgado sustained injuries after he fell from a scaffold that had missing guardrails is an authorized admission. Hanstad's statement alone supports the ALJ's finding regarding causation. The statements of Atwood and Martinez, taken together with the photographs provided by Atwood, further support Hanstad's report of how the accident occurred. Employer offered no evidence to refute the Division's evidence. The evidence supports the finding that the serious violation of section 1644(a)(6) was the cause of Delgado's injuries.

6. The Independent Employee Action Defense is not Available to Employer Where the Basis of its Defense is that Delgado Violated its Rule by Working on an Unguarded Scaffold.

Employer challenges the ALJ's finding that it did not present sufficient evidence at the hearing to establish elements 1 and 5[9] of the independent employee action defense under *Mercury Service, Inc.*, Cal/OSHA App. 77-1133, Decision After Reconsideration (Oct. 16, 1980).[10] Element 1 requires a showing by the employer that the employee was experienced in the job being performed.[11] Element 5 requires the employer to show that the employee caused a safety infraction that was contrary to the employer's safety program. Essentially, Employer argues that its safety program prohibits all of its employees, regardless of their job assignment, from working atop an unsafe scaffold. Thus, according to Employer, Delgado caused his own accident by working on an unsafe scaffold, an act he knew was against Employer's own safety rule.

The Board has long recognized that where employee protection against a particular hazard must be provided by means of positive guarding, an employer's instructions, admonitions or warnings are not a substitute for adequate guarding. *Bethlehem Steel Corporation*, Cal/OSHA App. 78-723, Decision After Reconsideration (Aug. 17, 1984). *Bethlehem Steel* has been extended to trash compactors with unguarded pinch points (see *City of Los Angeles Department of Public Works*, Cal/OSHA App. 85-958, Decision After Reconsideration (Dec. 31, 1986)); to unguarded roll machines (see *Metalclad Insulation Corp.*, Cal/OSHA App. 96-130, Decision After Reconsideration (Oct. 4, 2000)); and more recently, to floor openings (see *RFG Oil, Inc.*, Cal/OSHA App. 96-1663, Decision After Reconsideration (June 4, 2001)). In all of these cases, the Board recognized that a positive requirement to guard may not be undercut by substitute actions.

Employers have a non-delegable duty to provide a safe and healthful place of employment. Labor Code sections 6402, 6403; *Southern California Gas Co.*, Cal/OSHA App. 81-0259, Decision After Reconsideration (Sept. 28, 1984). The independent employee action defense is a Board-created defense to the existence of a violation. The defense recognizes that in spite of an employer complying with safety requirements and promoting safety to employees

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[9] Based on its review of Employer's Injury and Illness Protection Program (IIPP), the Division stipulated at the hearing that Employer had satisfied elements 2, 3 and 4 of *Mercury Service, infra.*

[10] The independent employee action defense under *Mercury Service* requires the employer to show that: (1) the employee was experienced in the job being performed; (2) the employer has a well-devised safety program which includes training employees in matters of safety respective to their particular job assignments; (3) employer effectively enforces the safety program; (4) employer has a policy which it enforces of sanctions against employees who violate the safety program; and (5) the employee caused a safety infraction which he or she knew was contrary to the employer's safety program.

[11] Although the record contains some evidence of Delgado's work history and experience, the bulk of Employer's argument with respect to element 1 consists of statements contained in its Petition as opposed to actual evidence submitted at the hearing. Factual allegations contained in a petition, without evidentiary support in the record, will not be considered by the Board.

through an effective and enforced safety program, an employee, by affirmative act or omission, may still disregard the established safety measures. The defense is premised upon an employer's compliance with non-delegable statutory and regulatory duties. Where positive guarding is required, the Board has held that the independent employee action defense cannot be used to excuse an employer's failure to provide required guarding. *City of Los Angeles Department of Public Works, supra; Kaiser Aluminum and Chemical Corp.*, Cal/OSHA App. 80-1014, Decision After Reconsideration (Feb. 19, 1985))

Unguarded scaffold platforms present an inherent hazard. We frequently see construction site accidents where workers have sustained serious injuries and even death as a result of falls from unguarded scaffold platforms. The positive restraint of a guardrail is a protective measure that promotes worker safety. As in unguarded pinch points, roll machines and floor openings, an employer's rule prohibiting employees from working on unguarded scaffold platforms is inadequate and cannot provide a substitute for guarding, particularly since employees may be reluctant to follow the rule when balanced against the ongoing pressure to complete their work.

Because of the inherent hazard presented by unguarded scaffold platforms and an employer's non-delegable duty to inspect and provide guardrails for such scaffold platforms, Employer cannot avail itself of the independent employee action defense.

DECISION AFTER RECONSIDERATION

The ALJ's decision is affirmed. A serious, accident-related violation of section 1644(a)(6) is established and a civil penalty of $5,000 is assessed.

Marcy Saunders
MARCY V. SAUNDERS, Member

Gerald P. O'Hara
GERALD P. O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: MAR 20, 2002
A.M.

CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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