



# Anatomy of a scaffolding case

*Liability often focuses on witnesses to prove why the scaffolding failed*

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Every year people die or sustain life-changing injuries due to falls from scaffolding. These injuries generally occur on multi-employer worksites where scaffolding is set up so that workers from many different trades can perform their jobs. The United States Department of Labor estimates that 65 percent of the construction industry works on scaffolding. Thus a large percentage of the workers on scaffolding likely rely on the scaffold erector to do their job correctly. Counsel representing the injured worker should expect disputes as to whether this reliance is reasonable.

The injured worker's unfamiliarity with scaffolding requirements is not the only reason why it is often difficult to establish responsibility for a scaffolding failure. By nature, scaffolding is temporary. The scaffolding may have completely fallen apart at the time of the accident or it may have been dismantled shortly thereafter in the normal course of the construction work. Either

way, it is difficult to establish solely from memory how the scaffolding was erected and why it failed.

This article focuses on the identification of witnesses, rules, and documents necessary to establish how scaffolding was erected, how it should be erected, and who is responsible for keeping it safe.

## **The scaffolding contractor witnesses**

Construction projects larger than a small home renovation usually involve a contractor that specializes in the erection and dismantling of scaffolding. A scaffolding contractor is a specialty licensed contractor that erects metal or wood scaffolding including temporary sidewalk sheltered construction work barricades.

A scaffolding contractor typically contracts with a general contractor or landowner for the rental, erection, and dismantling of the scaffolding after providing an estimate of what those services will cost. To put this bid together, the scaffold contractor may employ an estimator responsible for evaluating the needs of



the project – usually by visiting the installation site. The scaffold contractor may also employ a draftsman responsible for creating drawings or plans showing the number and type of scaffolding pieces required and how they are to be assembled. The draftsman and estimator should have knowledge of how the scaffolding was designed and why it was designed in that particular way.

After entering the contract, the scaffold contractor’s “project manager” will be responsible for planning, coordinating, and overseeing the erection, inspection, and dismantling of the scaffolding according to the construction schedule. The company may also employ a safety director responsible for managing and overseeing safety aspects. These witnesses are likely to have information relating to the timing requirements of the work as well as any changes or problems encountered in finishing the work according to schedule in a safe manner.

The scaffold contractor will send “scaffold erectors” to complete the physical labor of installing, modifying, inspecting, and/or dismantling the scaffolding pursuant to the terms of the contract and construction schedule. The scaffolding crew often includes a “foreman” who is typically the most experienced and knowledgeable about the scope of the work. Note that the erection or dismantling of scaffolding must be performed under the direction and supervision of a “qualified” person. (8 C.C.R. § 1637(k).) The scaffolding crew will thus consist of witnesses who should be knowledgeable of both the requirements for scaffolding and how it was actually erected prior to your client’s injury.

### Standards for safe erection of scaffolding

The primary source for determining how scaffolding should have been installed in an injury case will likely be Title 8 of the California Code of Regulations, otherwise known as Cal-OSHA. Cal-OSHA is intended to protect all workers.

(Lab. Code, § 6300 [“...purpose of assuring safe and healthful working conditions for all California working men and women by authorizing the enforcement of effective standards, assisting and encouraging employers to maintain safe and healthful working conditions, and by providing for research, information, education, training, and enforcement in the field of occupational safety and health.”])

Cal-OSHA regulations may be admissible to establish duty or standard of care (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [“...are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions...”]). Regulations may also be relevant to standard of care where employer adopts the regulations as company policy. (*Dillenbeck v. City of Los Angeles* (1968) 69 Cal.2d 472 [“Such rules implicitly represent an informed judgment as to the feasibility of certain precautions without undue frustration of the goals of the particular enterprise.”]); see also (*Grudt v. City of Los Angeles* (1970) 2 Cal.2d 575)

The scaffolding contract and the scaffolding contractor’s own training materials, safety manual, and Injury and Illness Prevention Program (8 C.C.R. 3203) will likely require employees to be knowledgeable about and follow the safety requirements of Cal-OSHA. The contractor’s witnesses should admit that these regulations were a job requirement and inform the standard of care applicable to their work.

The California Department of Industrial Relations maintains a searchable index of all Cal-OSHA regulations including those applicable to scaffolding at [www.dir.ca.gov/samples/search/query.htm](http://www.dir.ca.gov/samples/search/query.htm). In addition to considering the regulations specific to scaffolding (8 CCR 1635.1-1667) the attorney may want to also browse the regulations pertaining to Access, Work Space, and Work Areas (8 CCR 3270-3280); Safe Practices and Personal Protection (8 CCR 3300-3416); and the Erection of Structures Including

Falsework, Shoring and Framing System (8 CCR 1709-1722.1).

Other sources the attorney may want to consider for determining the way scaffolding should have been erected include the contractor’s safety manuals; training materials; the scaffolding contract; the design drawings; the scaffolding manufacturer’s product guide; and the federal OSHA regulations at 29 CFR 1910.28 – although Cal-OSHA is generally as strict as the federal regulations. You may also want to consider consulting with a scaffolding expert to opine on industry custom and practice.

You will ideally have identified the rules you believe to be applicable to your client’s accident before taking the depositions of the scaffolding company’s witnesses. This will prepare you to reach agreement with the witnesses on the rules applicable to your case versus what actually happened.

### Ongoing requirements for condition of scaffolding

Once the scaffolding has been erected, the installer may disclaim any responsibility for what happens thereafter. You should anticipate that the installer will blame subsequent injuries or scaffolding failures on misuse of the scaffolding, improper removal of component parts, or a failure by the injured party’s employer to perform appropriate inspections. It is therefore important to identify how the scaffolding was originally erected, whether and why it was modified during the course of the work, and who was responsible for making sure it remained in a safe condition.

Regardless of the cause of the injury, the scaffold contractor will likely point to the responsibility of the injured party’s employer to provide a safe place to work under California Labor Code section 6400. California law requires all employers to consider job site safety whether they are the employer whose employees were exposed to the hazard, the employer who actually created the hazard, or



the employer who had the authority or responsibility to correct the hazard. (Lab. Code § 6400.)

If the injured party's employer is not conducting regular inspection of the scaffolding, the scaffolding contractor may point to the lack of inspections as the cause of the injury. Cal-OSHA requires that "All scaffold planks shall be visually inspected for defects before use each day." (8 C.C.R. § 1637(f)(6).) The federal OSHA regulations also state that "Scaffolds and scaffold components shall be inspected for visible defects by a competent person before each work shift, and after any occurrence which could affect a scaffold's structural integrity." (29 CFR § 1926.451(f)(3).) Look to the contract documents and testimony of the scaffold employees for evidence as to whether an obligation for ongoing inspections was ever delegated to or undertaken by the scaffold contractor or other party.

Attorneys representing an injured party against a scaffolding contractor should develop a theme from the outset of discovery that the scaffold company is a specialty contractor with greater expertise and knowledge about scaffolding than anyone else on the jobsite. A painter, for example, may notice obvious defects in the scaffolding like obstructions or missing planks but cannot be expected to know a technicality like the requirement that sloped platforms must be "positively secured" under 8 C.C.R. § 1637(o). When that painter's employer hired the scaffolding contractor, he or she was purchasing the contractor's special knowledge and training and it can be argued

that it was therefore reasonable to rely on the scaffolding contractor.

### Document checklist

The following is a list of documents to request in cases brought by injured workers against scaffolding contractors. In addition to requesting these documents from the defendant, also consider third-party subpoenas to other contractors working at the project for some or all of these documents as appropriate.

- All contracts, including change orders, for the erection and/or dismantling of scaffolding.
- All contracts, including change orders, between the landowner and general contractor.
- All requests for modifications to the scaffolding or shoring.
- The scaffolding contractor's entire job file for the work.
- Communications regarding the subject incident and the temporary structure.
- Diagrams, drawings and design plans for the scaffolding.
- All progress photographs of the work site.
- All photographs relating to the subject incident.
- Policies, procedures, and training materials regarding the installation, dismantling, and/or modification of the temporary structure.
- The contractor's Injury and Illness Prevention Program(s) (IIPP) applicable at the time of the subject incident.
- All documents memorializing or relating to safety meetings.
- All documents memorializing or relating to inspections of the work site.

- All written or recorded statements regarding the subject incident.
- All reports regarding the subject incident.
- All documents showing the cost or charge for the scaffolding work such as time and materials forms, invoices, estimates, and similar documents.
- All documents showing the work performed on particular dates such as daily logs, progress reports, time sheets, and similar documents.
- All reports or investigatory materials from Cal-OSHA.

### Conclusion

Scaffolding cases can be difficult because of confusion over the cause of a failure and the identification of the responsible party. Pursuing a case against a scaffold contractor requires a good understanding of how the scaffolding was erected versus how it should have been erected. A strong, focused inquiry into the issues and documents outlined above will help resolve these issues and allow you to reach a fair resolution for your client.



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