United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
721 Nineteenth Street, Suite 407
Denver, CO 80202-2517

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 11-1877
	:	
TRICON INDUSTRIES, INC.	:	
	:	
Respondent.	:	

APPEARANCES:

Matthew B. Finnigan, Esq.
Office of the Solicitor
U.S. Department of Labor
1999 Broadway, Suite 1600
Denver, CO 80202
For the Complainant

Robert R. Miller, Esq.
Stettner Miller, P.C.
1050 17th Street
Suite 1700
Denver, CO 80265-2077
For the Respondent

BEFORE: Hon. John H. Schumacher,
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act").

FACTS

Tricon Industries, Inc. ("Respondent" or "Tricon"), is a Colorado corporation engaged in steel erection, welding and construction. (Joint Stipulation #3). On May 5, 2011, Tricon was one of several contractors in the process of constructing a new building for the Mike Ward Infiniti car dealership at 1800 Lucent Court, Highlands Ranch, Colorado. (Joint Stipulation #4). Tricon was a subcontractor, retained by Saunders Construction, Inc., to install metal decks on the new

building. (Joint Stipulation #5). Pursuant to a complaint that employees on the deck were not using fall protection, the Occupational Safety and Health Administration ("OSHA") sent OSHA Compliance Safety and Health Officer Chad Vivian (the "CO") to inspect the worksite. (Tr. 19-20, Joint Stipulation #4). During the inspection, Mr. Vivian observed Tricon's employees on the deck of what was to become the car dealership's service bay, more than 15 feet above the ground. (Joint Stipulation #6). The deck had a parapet along its north, south, and east perimeters. A three-foot gap in the deck existed along the length of the deck's east and west perimeters. (Joint Stipulation #7).

As a result of the inspection, the Secretary issued to Tricon a citation alleging a serious violation of 29 C.F.R. §1926.760(a)(1), on the grounds that "employees were exposed to falls in excess of 15 feet while performing decking work (welding) and other activities on a partially decked roof without the use of a fall protection system." The Secretary proposed a penalty of $2,295 for the violation.

The parties stipulate that Respondent is engaged in a business affecting interstate commerce and that the standard applies to Tricon's activities at the worksite. (Joint Stipulations # 3, 8).

Relevant Testimony

Chad Daniel Vivian

The Secretary's only witness was Chad Vivian. Mr. Vivian is an OSHA Compliance Safety and Health Officer and has worked for OSHA since July 2007. (Tr. 16). During that period, he has inspected approximately six worksites that included steel erection. (Tr. 19). Mr. Vivian testified that he was sent to the Mike Ward Infiniti car dealership in Highlands Ranch, Colorado, pursuant to a complaint. (Tr. 19-20). The complaint involved fall hazards, which constitute the most prevalent source of injuries in the construction industry and, therefore, are included within the local emphasis program. (Tr. 20, 22).

The CO arrived at the site on May 5, 2011 and parked across the street, about 200 yards away. (Tr. 21) He observed the site and began videotaping. (Tr. 21, Ex. GX-1). From his vantage point, the CO observed at least three employees walking back and forth on the deck. (Tr. 23). There were parapets on the north and south sides of the deck, but they did not appear to meet the criteria of a standard guardrail because they only came up to knee level. (Tr. 23). The CO estimated that the parapets were one-to-two feet high (Tr. 34), except for the parapet on the east

side which appeared to be three feet tall. (Tr. 43). If a parapet is to qualify as fall protection, it needs to come up to waist level. (Tr. 27). There were three-foot wide openings in the parapet walls on the east and west sides of the deck. (Tr. 43). Based on the drawing he reviewed, the CO testified that the top of the parapet was twenty-two feet above the ground. Assuming the parapet was three-to-four feet high, he estimated that the deck was approximately eighteen-to-nineteen feet above the ground. (Tr. 35).

One of the employees walked over to a welder, apparently to either turn it on/off or to adjust its settings.[1] (Tr. 23-24, Ex. GX-1). The welder was about 3.5 feet high. It was located in the northwest corner of the deck, about six-to-seven feet from the north side edge of the deck. (Tr. 31, 34, 44, 66, 84; Ex. CX-2).

Mr. Vivian testified that he viewed the deck from inside a scissors lift. He did not get out of the lift because he did not feel comfortable getting on the deck without a fall arrest or guardrail system. (Tr. 38, 44). Nonetheless, there was nothing obstructing his vision and he had a clear view of the deck. (Tr. 39, 47). There was a slight slope to the deck. (Tr. 40-41, 118). A steel cable that was described by him as part of a fall arrest system spanned the opening on the east side. (Tr. 40-41). The CO testified that, normally, the cable would be elevated by stanchions to keep it off the deck. Elevating the cable reduces the fall distance to an employee hooked up to a fall arrest system. The CO testified that a fall arrest system should limit a fall to six feet. This cable would not permit that fall limit to be exceeded because it was at foot level. (Tr. 41). The CO noted that the placement of the cable was a concern because, where the employees were working, they had nothing with which to tie-off. (Tr. 42). Also, the CO was concerned that the cable was just looped around the joists, and then went off in another direction at a 90-degree angle. (Tr. 45). In his view, the attachment did not appear to be very secure. (Tr. 46). There also was a cable placed along the south wall. No workers were tied-off to that cable.[2] (Tr. 42).

According to the CO, the employees accessed the deck via a ladder that was located next to an opening in the parapet. (Tr. 35-36). He was concerned that employees were not protected when getting off the ladder. (Tr. 66). His concern was that the ladder could shift or an employee could lose his footing. (Tr. 67). Therefore, employees need to tie-off immediately before getting off the ladder. (Tr. 44, 67). On cross-examination, he admitted that he did not actually see an

[1] A welding unit is basically an electrode with a rod. It runs on A/C power and is used for deck welding. (Tr. 32).
[2] The Secretary has not charged Tricon with any violation based on an alleged deficiency in the fall arrest system.

access ladder, but was told that there was one in place. (Tr. 82). He also testified that he had no direct evidence that employees were not wearing a harness when climbing the ladder. (Tr. 103). Other than when climbing the ladder, Mr. Vivian had no direct evidence that any employee would approach any closer to the edge than the welder. (Tr. 85).

Employees had been working on the deck for a couple of hours. (Tr. 69). The shift started at 7 a.m., and the CO arrived at the site around 9:45 a.m. (Tr. 69). According to Mr. Vivian, the entire deck constituted a hazardous area because it was elevated and had no protection around the east and west openings and along the parapet wall on the north and south side. (Tr. 44-45). Mr. Vivian was also concerned that the deck itself presented a tripping hazard because it was not smooth, but rather had ridges. In his opinion, an employee could get his shoe or boot stuck in the ridges. (Tr. 46).

Foreman Lonnie Moore explained to the CO that work on the deck was almost done. They had to finish up some welding work. Although Mr. Vivian did not see any welding taking place, it was his understanding that an employee performed welding on the deck that day. (Tr. 48). Mr. Moore also explained to the CO that Tricon had a fall protection policy that required 100% tie-off. (Tr. 49, 59). Although the CO could not remember what Mr. Moore meant, he testified that a 100% tie-off policy means that employees are required to be tied-off 100% of the time, regardless where on the deck they were working. (Tr. 49). At least one employee admitted to the CO that he was not tied off while working in the center area of the deck. (Tr. 49). However, Mr. Moore told the CO that he thought that it was acceptable not to wear fall restraints because they were working in the middle of the deck, away from the edges. (Tr. 58).

The CO testified that, based on his knowledge and experience, an employee is exposed to a fall hazard anytime he is on an elevated surface that has unprotected edges or sides. (Tr. 61, 83, 110). He explained that a number of things can happen. For example, noting that there was no warning line on the deck, he testified that people tend to travel around and if no measures are taken to keep them restrained or in a controlled area, they can come close to an edge or unprotected wall. Walking back and forth around the deck to get tools can pose a hazard. Weather could be a factor with high winds or rain that creates a slick surface. He also opined that a potential piece of unsecured decking could be loose. (Tr. 64-65). Furthermore, he observed that at least one person was wearing a welding helmet that could have obstructed his vision. However, he did not see any welding occur. (Tr. 48). Welding helmets are only down when

welding and they don't obscure vision when the visor is in the up position. (Tr. 96-97).

The CO noted that, at least a year before the steel erection standards were promulgated, OSHA received an inquiry about the general fall protection standards of Subpart M. The inquiry asked for the criteria to be used in determining when employees were working close enough to an unguarded edge to require fall protection. In a Letter of Interpretation in reply to the inquiry, the Secretary stated that there was no safe distance where fall protection was not required. (Tr. 62, Ex. GX-6).

Mr.Vivian testified that the citation was issued because the work met the definition of steel erection, the deck was both a walking and working surface and there was no guardrail or safety net system in place. (Tr. 51-53). Although there was a fall arrest system, including a horizontal lifeline, it was not complete because employees were not wearing a full body harness and lanyard attached to a life line. (Tr. 54). At least two employees did not have a harness. (Tr. 54). At least one of those employees was captured on the video. (Tr. 85, Ex. GX-1)

The CO testified that Tricon did not have a work rule that effectively prohibited employees from getting close to the deck's edges. (Tr. 66). Although he believed that the potential was there, he had no knowledge of actual employee exposure to the edge of the deck. (Tr. 103). He knew that, at some point, there was going to be work at the edge, so at some point they would have to approach it. (Tr. 104)

Mr. Vivian testified that Tricon Foreman Lonnie Moore had knowledge of the violation. He was on the deck, observing the work and was aware that at least one person was not tied-off. (Tr. 67-68). The CO explained that the exposed employees were Dave Kahtava, Shawn Dolos and Mr. Moore, all of whom were working on the deck.

Considering the height of the deck and the hard concrete surface below, he classified the violation as serious because, if an employee fell from the deck, the results would be death or serious injury. (Tr. 69). According to Mr. Vivian, it would not have been difficult to install a fall arrest system. Only a few additional attachments were needed and installation would have taken, at most, a couple of hours. (Tr. 71). However, the CO testified that he was not aware of any stanchion system that could be used on joists similar to those being used at the site. (Tr. 79).

A penalty of $2,295 was proposed. The CO considered that, while there was a serious probability of death or serious physical injury in the event of an accident, the probability of an accident was lesser, based on the duration of exposure and the number of employees exposed.

Also, a 40% credit was given because, with nine employees, Tricon was a small employer. (Tr. 71-72). It has been inspected several times, but never received any citations. Therefore, a 10% credit was given for its good safety history. Finally, credit was given for good faith because Respondent had a written safety program in place. The CO opined that Tricon appeared to be a safe employer. (Tr. 73).

Steven S. Pierce

Steven S. Pierce is president and CEO of Tricon Industries, a steel erection company he founded in 1995. (Tr. 121). On this job, Tricon was contracted to put up the steel frame, install bar joists, bridge and deck the frame, put in wind screens,[3] handrails and stairs. The job was expected to take four to five weeks. (Tr. 142). Although the roof sloped slightly at ¼ inch per foot, the slope was so slight that you would not realize it if you were walking uphill or downhill. (Tr. 143, 168). According to Mr. Pierce, Tricon requires 100% fall protection whenever employees come within six feet of an unguarded edge that exposes them to a fall of 15 feet. (Tr. 125, 127-128, 143). They are trained in that policy and it is enforced. (Tr. 128). To his understanding, employees on May 5th followed the company policy and no unprotected employee was exposed to being within six feet of an unprotected side or edge more than fifteen feet above the ground. (Tr. 144).

Mr. Pierce testified that Tricon employed Miller Safety, which essentially is the SESAC,[4] (the Steel Erectors Safety Association of Colorado) to help them write and administer their safety policy and to help them ensure that they were doing everything in compliance with OSHA regulations. (Tr. 122). The SESAC is a group of steel erectors that have been trained in cutting-edge fall protection matters, and it conducts safety inspections of its members. (Tr. 123). Tricon is a member of the SESAC. (Tr. 123). It has been subject to unannounced inspections by the organization four to five times a year and has never been found to have any safety violations. (Tr. 123, 160). Respondent has also been inspected by general contractors and insurance companies. (Tr. 132). OSHA previously inspected Tricon, but never issued any citations. (Tr. 134).

Tricon's safety policy was put in place shortly after the company was formed and it has been modified over the years. Mr. Pierce testified that his employees are trained in the safety

[3] A windscreen is put up around a mechanical HVAC unit. It serves to buffer the unit so it can provide air intake, as well as soften the look of the building for people that might live in the area and have to look at the unit on the building. (Tr. 166).

[4] Mr. Pierce opined that Mr. Miller, of Miller Safety is the director and owner of the SESAC. (Tr. 159-160).

policy by Mr. Moore, Ned Jensen and himself. (Tr. 124). Employees also receive outside training from Miller Safety, with whom they have a continuing relationship. (Tr. 124). Nobody has ever expressed problems with Tricon's safety protection program. (Tr. 133). Training starts when someone is hired. Employees are required to fully understand the company safety policy. They do not have to take the policy home and study it, but they have to agree to comply with the policy. The most important thing they teach is the six-foot rule. (Tr. 165). An employee can be discharged for any reason when it comes to the safety policy. (Tr. 164). If an employee is seen violating the rule, he is usually warned one time. If he is caught violating the rule again, he is terminated. (Tr. 166). Since its founding, the company suffered two injuries. One of the injuries involved Mr. Pierce himself when he fell off the outside edge of a building. His fall protection arrested the fall. (Tr. 129). The other accident involved a college student who suffered a four foot fall when he tripped on a bar joist. (Tr. 133).

Mr. Pierce testified that Tricon's six foot rule was derived from the OSHA steel erection standards of Subpart R and from working with Miller Safety. (Tr. 161). He has used this definition for sixteen years. Although he never looked to see if the definition of exposure was consistent with anything in the OSHA regulations, it is his understanding that the regulations require fall protection when employees are within six feet of a leading edge that could result in a fall hazard of fifteen feet or more. (Tr. 162-163). He explained that employees would know when they are within six feet of the edge because they are working on deck sheets that are either two or three feet wide. The employee simply counts the number of sheets and, knowing whether the sheets are two or three feet wide, determines if they are within six feet of the edge. (Tr. 163). Mr. Pierce stated that training and common sense prevent employees from crossing over into the six-foot zone. (Tr. 163). He stressed that employees undergo daily training daily from himself, Lonnie Moore, or Ned Jensen. (Tr. 163). When asked if the six-foot rule made allowance for human error, Mr. Pierce replied that "human error is everywhere." (Tr. 175)

Mr. Pierce testified that he had no problem with the way the cable was looped on the deck, and has used that system on other jobs. (Tr.132). According to Mr. Pierce, the first thing that they do when they get a job is to prepare a hazard analysis. (Tr. 135). As the company safety officer, he prepares the assessment.(Tr. 136, Ex. RX-2). The hazard analysis is presented to the general contractor and, sometimes, revisions are requested. (Tr. 137). Tricon holds safety meetings, including weekly written meetings. They also have contractors meetings where they

meet with everyone on the site. (Tr. 138) Ultimately, it is the foreman who determines if employees are exposed to a fall hazard of fifteen feet or more. (Tr. 171). Mr. Pierce testified that he has the power to hire, fire and discipline employees for the company. (Tr. 172).

Mr. Pierce was onsite all morning. This crew had been together for five or six years and performed work similar to this job every day. (Tr. 155). This crew has never had any accidents or injuries. (Tr. 156). Although not every employee was wearing a safety harness, they all carried them, and their personal protective equipment, into the building when they arrived at work. (Tr. 145, 153-154). Mr. Pierce testified that a full set of tools is carried in the harness. (Tr. 154). The harnesses contain a minimum of two spud wrenches, a sleever bar, four clamps, tape measures, chalk box, and a welding pouch with a welding rod. Mr. Pierce requires employees to carry a fully loaded harness when they go up on the roof. He explained that he did not want them spending time going up and down the ladder to get these tools. (Tr. 167). A typical harness equipped with tools weighs between 40 and 60 pounds. In contrast, an empty harness weighs only three to four pounds. (Tr. 154-155). Mr. Pierce testified that there is no company policy authorizing employees to remove their belts when they are on a roof. (Tr. 172).

The deck was approximately 100 feet by 65 feet. (Tr. 147, Ex. RX-3). Employees accessed the deck from the ground by an access ladder. The ladder from the ground to the deck was tied off. (Tr. 149). Mr. Pierce explained that, to access the deck from the ladder, an employee climbs the ladder until he is chest high on the ladder. Maintaining three-point contact with the ladder, he swings around and latches the lanyard onto the safety cable. The employee then goes up to the top of the deck. (Tr. 153). Employees wore two lanyards so that when moving from the ladder onto the deck, they could keep one lanyard attached while connecting the second lanyard. (Tr. 175). Although he was onsite, Mr. Pierce was not on the deck on the morning of May 5th, and did not have personal knowledge if the employees tied off when they accessed the roof. (Tr. 171). Similarly, not being on the deck, he had no personal knowledge if the employees were wearing their tools. (Tr. 175). However, he worked with the crew earlier that day and they were all wearing harnesses and lanyards and were carrying full sets of tools. (Tr. 176).

Problems with masonry on the deck prevented the deck from being completed. (Tr. 149). There were three-foot openings at the far ends of the north wall. The openings existed because the masons had to put plates in the wall so they could weld perimeter angle to the plates. Then, they would put in the deck and weld the decking to the perimeter angle. (Tr. 150). Until the

masons did this work, there was no work in the three-foot section that Tricon employees could do. (Tr. 150, 158). While waiting for the masons, the Tricon employees were working on the layout on the roof screens. (Tr. 150, 154). This required the employees to use a tape measure, a square, and a black marker to lay out the holes. (Tr. 167). They also did some welding on the roof frame. (Tr. 154) Both the screen layout work and the welding took place toward the center of the deck. (Tr. 156). The closest any of the crew would come to any unguarded deck edge was twelve feet. (Tr. 156). Mr. Pierce acknowledged that the Secretary's video tape showed an employee approaching the welder. (Tr. 157, Ex. RX-1). He estimated that the welder was six to seven feet from the unguarded edge. (Tr. 157). However, he reiterated that it was not reasonably predictable that any employee would have been working within six feet of the exposed edge. (Tr. 158). It was his opinion that no employee was exposed to a fall in excess of fifteen feet. (Tr. 159).

The masons did not schedule the work for May 5, 2011. Therefore, the mason had his employees doing odd jobs, such as cleaning up around the scaffolding. (Tr. 150). Decking and edge angles were stored on the deck. This decking was laid perpendicular to the decking already installed and screwed down. (Tr. 151). A safety cable was laid along the perimeter and attached on the second joist. (Tr. 152, Ex. RX-3). Mr. Pierce explained that the cable is always put on the second joist so employees do not have to go out beyond the six foot exposure limit. (Tr. 153). The hazard analysis talks about the deck falling or blowing off. (Tr. 168, Ex. RX-2). Mr. Pierce explained that if a wind gust comes up, you want to make sure that everything on the roof is secured and that there is no possibility of wind or anything else knocking the deck down. (Tr. 169). An average piece of decking is 3 feet by 25-to-30 feet and weighs 180 pounds. (Tr. 170). He has seen occasions where employees were hit by flying sheets of decking and required 40 to 50 stitches. (Tr. 169). Decking can be pulled up by a 25 mph wind. (Tr. 170). This was a windy location. (Tr. 169). There were six pieces of uninstalled decking on the roof and all were secured. (Tr. 170).

Lonnie Moore

Lonne Moore is a foreman for Tricon. He has worked for the company for seventeen years and was working at the Infiniti job site at the time of the inspection. He worked with the same crew for five or six years. (Tr. 178). They were on the job for three to four weeks. (Tr. 181).

On the day of the inspection he, with two other crew members, started in the detail and delivery bay by putting in bracers and kickers on the screen and site screen. When they finished that, they went to do some layout. (Tr. 179). He testified that the crew accessed the deck by climbing the access ladder while maintaining three-point contact. Mr. Moore explained that to maintain three-point contact, the ladder is secured at the top and bottom. When you get to the top, you take your hook and clip it onto the line that runs left to right, without being on the roof. (Tr. 181, Ex. R-3). Once you are standing on the deck, you take the second lanyard and, while still hooked on the first line, hook the second lanyard to the other line that runs east to west. Mr. Moore estimated that you hook onto the second line when approximately ten feet from the wall. (Tr. 182). Once you are a far enough distance from exposure, you unhook and walk straight to the center. (Tr. 183). When on the deck, the only time the crew hooked up was when they were getting off and were exposed to the unguarded edge. (Tr. 184). To leave the roof, the process is reversed. (Tr. 186).

Mr. Moore also testified that employees know when they are within six feet of the edge by looking down and counting the number of three-foot-wide deck sheets between themselves and the edge. (Tr. 192). He indicated that he trained himself to do that, but would not say whether employees were explicitly trained in this method. (Tr. 192). Company policy is that you do not go near a six-foot zone without proper equipment. Employees know where the six-foot zone begins by using common sense and by reading the sheets of decking. (Tr. 194-195). Also weld marks on joists are often close to the six-foot mark. (Tr. 195). Mr. Moore also noted that to provide fall protection, a parapet wall should be about waist high, or a minimum of 39 inches. (Tr. 197-198).

Mr. Moore testified that there was nothing on the roof to obstruct the crew's vision. (Tr. 184). Also, there were perimeter angles stacked in the middle of the roof that could present a tripping hazard. (Tr. 184-185). These angles, which were awaiting installation, were made of ¼ inch thick steel, were 20 feet x 3 ¾ inches and each weighed about 100 lbs. (Tr. 185, 188). According to Mr. Moore, they are not a wind catch and it would take hurricane force winds to move them. (Tr. 188). There also was a welder on the decking that could not be installed. (Tr. 186).

Mr. Moore did not believe that the corrugated flutes or ridges of the decking constituted a tripping hazard. He stated that to trip on them, "You'd have to really be not paying attention."

(Tr. 188-189). These flutes were 1.5 inches wide and half an inch deep. (Tr. 189). He never caught his foot on one on a flat roof, which he considered this deck to be. (Tr. 189).

No member of his crew was ever out of his sight. (Tr. 186). Nobody approached closer than six feet to the edge unless they were tied off for ladder access. (Tr. 186). He emphasized that there was no work that would have placed them within six feet of an unguarded edge. (Tr. 186). Mr. Moore identified the employee who approached the welder as Shawn Dolos. He went to start the welder so they would have power. (Tr. 189). Based on the three-foot wide sheet of decking next to the welder, he estimated that the machine was 9-to-10 feet from the edge. (Tr. 190). If the welder was not working, power was available from the general contractor's power below the deck. (Tr. 190). If they had to diagnose the problem with the welder, he would put on a retractable lanyard that hooks onto his harness. Such a lanyard was available. (Tr. 191). Mr. Moore estimated that, on a small project like this, the welder would have to be moved more than twice. (Tr. 193).

Mr. Moore further explained that the cable has to be attached to something capable of holding 5000 pounds. You cannot attach to masonry. Therefore the only thing they had available were trusses, which is where they attached the cables. (Tr. 183-184).

Mr. Moore testified that a typical work belt and harness consists of a spud holder which can carry up to three spuds, a sleever bar holder, up to three bolt bags, a double lanyard, and tools. (Tr. 179-180). He also carried a sledgehammer, chalk box, markers, tape measure, welding rod pouch with rods, hooks, shop pack, and double lanyard which, by itself, weighs three pounds. (Tr. 193). He estimated that a loaded harness weighs 35-to-40 pounds. (Tr. 193).

All crew members had their harnesses with them. At some point, however, they were removed. (Tr. 192). He explained that although this was not the usual practice, it was done here because they are heavy and there was no exposure to a fall when doing layout. (Tr. 192). The harnesses were placed in the center of the deck, near where they were working. (Tr. 194). The harness did not present a tripping hazard because they knew where they were and they were placed in an area away from where they were working. (Tr. 194).

DISCUSSION

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The parties also stipulated that at all times relevant to this action, Tricon was an employer in a business affecting interstate commerce. It is undisputed that Tricon was the employer of the three employees working on the deck. Accordingly, I find that Tricon was an employer engaged in a business affecting commerce within the meaning of Section 3(3) and 3(5) of the Act, 29 U.S.C. §§652(3) & (5).

Citation 1, item 1

Citation 1, item 1 alleges a serious violation of 29 C.F.R. §1926.760(a)(1) and proposes a penalty of $2,295. The cited standard provides:

> **§ 1926.760 Fall protection.**
>
> (a) *General requirements.* (1) Except as provided by paragraph (a)(3) of this section, each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

Applicable Law

To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer knew or could have known of the existence of the hazard with the exercise of reasonable diligence. *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994)

Tricon does not dispute that the standard applies. It also does not dispute that the edges of the deck were unguarded and that a fall from the deck would result in a fall of 15 feet or more. However, Tricon vigorously disputes the assertion that its employees were exposed to a hazard. It points out that the evidence establishes that one employee came no closer than six-to-seven feet from the edge when approaching a welder machine. Other than that one instance, the evidence demonstrates that the employees' work assignment required them to work in the middle

of the deck, which was 100 by 65 feet. In the course of that work, they approached no closer than twelve feet from the edge. Moreover, employees were tied off when getting on or off the deck from the access ladder. Tricon contends that the evidence fails to establish that employees were either actually exposed to the unprotected deck edge or that any such exposure was reasonably predictable.

The Secretary asserts that, when working on an unguarded deck, there is no safe distance from an unprotected edge. Rather, the entire deck constitutes a zone of danger. Therefore, it did not matter where on the deck employees were working. As long as the edge of the deck was unguarded, employees were within the zone of danger and were required to be tied-off.

Discussion

To establish employee exposure to a violative condition, the Secretary must prove that it was reasonably predictable that either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger employees. *Fabricated Metal Products*, 18 BNA OSHC 1072, 1073-1074 (No. 93-1853, 1997); *Gilles & Cotting, Inc*., 3 BNA OSHC 2002, 2003 (No. 504, 1976).

Definition of Zone of Danger

The central issue here is whether the Secretary can decree that the mere presence of an employee on a deck with an unprotected edge establishes that the employee is within the "zone of danger."

The Secretary points out that a May 12, 2000 Letter of Interpretation evaluated an inquiry from the SESAC regarding the use of control lines in place of certain forms of fall protection under 29 C.F.R. §1926.500 of Subpart M. OSHA reiterated the preamble to Subpart M at 59 Fed. Reg. 40683 (August 9, 1994) that "OSHA determined in the rulemaking that there is no safe distance from an unprotected side or edge of a walking/working surface that would render protection unnecessary. (Ex. GX 6, p.2). Although the letter related to another standard, the Secretary asserts that the same logic applied to Subpart M applies to the steel erection standards of Subpart R.

Tricon argues that this interpretation is inapplicable to the steel erection standards of Subpart R. It points out that, when promulgated, the Secretary stated that steel erection is

covered "exclusively" by Subpart R. 66 Fed.Reg. 5196, 5200 (January 18, 2001). Tricon further notes that, as OSHA states at the beginning of every interpretive letter, Letters of Interpretation cannot create additional employer obligations. Respondent argues that would be precisely the effect of applying the letter to steel erection.

I recognize that the Commission must defer to the Secretary's "reasonable" interpretation of a standard. *Martin v. OSHRC (CF&I)*, 499 U.S. 144, 150 (1991). Here, however, the Secretary's official interpretation does not apply to the cited standard but, rather, standards of another Subpart.

Also, under Subpart M, the Secretary's position that the entire working/walking surface constitutes a "danger zone" has exceptions. In *Seyforth Roofing Co.*, 16 BNA OSHC 2031 (No. 90-0086, 1994) the employer was cited for violating 29 C.F.R. §1926.500(g)(1),[5] which then required that employees performing roofing work on a low-pitched roof more than sixteen feet above the ground or next level be provided with fall protection. As here, the Secretary took the position that the entire walking/working surface constituted the "danger zone" and, therefore, that employees were exposed to a fall hazard no matter how far from the unguarded edge they might be. Rejecting the premise, the Commission noted that, under 29 C.F.R. §1926.500(g)(2), the fall protection requirements of 29 C.F.R. §1926.500(g)(1) do not apply "where employees are on the roof only to inspect, investigate, or estimate roof level conditions," the type of work in which employees in that case were involved. *Seyforth* is relevant because it demonstrates that, under Subpart M, the Secretary's blanket "zone of danger" rule had exceptions that depended on the nature of the work being performed. Thus, the Secretary determined that the nature of the work of employees who were on the roof only to "inspect, investigate, or estimate roof level conditions" allowed for a more limited "zone of danger" than employees engaged in other activities.

In this regard, the preamble to the steel erection standards of Subpart R, the Secretary observed that "steel erection activities are different from other construction activities." 66 Fed.Reg. 5243 (January 18, 2001). Under Subpart R, would employees on the deck "only to inspect, investigate, or estimate" deck level conditions be exempt from the rule as they are under Subpart M? On that basis alone, it would not be appropriate to consider either the preamble to Subpart M, or the Letter of Interpretation of May 12, 2000, as binding on standards in Subpart

[5] Subpart M has subsequently been amended.

R. Accordingly, I find no basis to defer to the Secretary's interpretation of "zone of danger" for the cited standard in Subpart R based on her interpretation of a fall protection standard promulgated under Subpart M.

Finding that the Secretary's interpretation of "zone of danger" set forth in Subpart M is not binding upon Subpart R, it remains to be determined if the Secretary's definition of "zone of danger" in regards to the cited standard is entitled to *CF&I* deference. I find that no such deference is required here.

Whether the Secretary has consistently applied her interpretation is a factor in determining the reasonableness of the Secretary's interpretation of a standard. *CF&I* at 157. Particularly relevant is *Fastrack Erector*s, 21 BNA OSHC 1109 (No. 04-0780, 2004)(ALJ). That case involved the same standard and similar facts as here. Employees were working on an unguarded deck 3 feet by 22 feet. The deck was unguarded at its narrow end. The evidence demonstrated that the employees never had occasion to be closer than six feet from the unguarded edge. Finding that the evidence established that employees were "at least" six feet from the edge, the Administrative Law Judge (ALJ) vacated the item. Importantly, the CO conceded that the issuance of the citation "might have been affected" had he known that employees would not come closer than six feet of the edge.[6] Nowhere in that case did the Secretary suggest that the entire deck constituted a "danger zone." Clearly, there does not appear to be any consistency in the Secretary's definition of the "danger zone" as it applies to the cited standard.

While the Secretary may announce her interpretation of a standard for the first time in a citation, the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties (*CF&I* at 158). Unlike the situation with Subpart M, the Secretary points to nothing in the preamble to Subpart R, nor to any Letter of Interpretation or other official documentation, that indicates that she considers the entire deck a zone of danger. Indeed, in *Fastrack Erectors,* the Secretary suggested that there was no exposure unless an employee came within six feet of an unguarded edge. This suggests that the steel erection industry has not received notice of the Secretary's interpretation. As noted,

[6] I recognize that the Secretary is not bound by the interpretations of its compliance officers. *Field & Associates, Inc.,* 19 BNA OSHC 1379, 1381 n.8 (No. 97-1585, 2001). Rather the relevance of the CO's statement in *Fastrack Erectors* is that it suggests an uncertainty and lack of consistency regarding the meaning of "zone of danger" as it relates to the cited standard.

supra, Tricon's Safety Policies and Procedures, prepared in conjunction with Miller Safety, which for the most part, is the SESAC, states that:

> "Exposed" in accordance with SESAC and industry custom, policy and practice means working within six feet of any unprotected side or edge, including but not limited to , holes, leading edges, and floors, mezzanines, roofs , etc.

(Ex. R-1 at p. 42).

Finally, I decline to conclude that the Secretary's burden of proof is automatically abrogated without considering the size and pitch of a given deck, the weather and other physical conditions, and duration of the employee's presence thereon. Indeed, under the Secretary's interpretation, an employee who steps on a deck for a few seconds to retrieve a tool, 100 feet from the nearest unprotected edge, would be required to be tied-off. I do not find that an interpretation that mandates such a result is reasonable, especially when it makes its first appearance in this litigation.

Accordingly, I find it inappropriate to defer to the Secretary's interpretation of "zone of danger," which is presented here for the first time, apparently, contradicts her previous position on this matter, provided no notice to employers and is unreasonable as a blanket rule.

Employee Exposure

Having rejected the Secretary's assertion that the entire deck constituted a "zone of danger," the question remains whether Respondent's employees were in the "zone of danger." Respondent asserts that the "danger zone" is six feet from an unguarded edge. As noted, it produces no authority to support this assertion. However, as noted, in *Fastrack Erectors*, the ALJ threw out a citation for an alleged violation of the same standard because the evidence established that employees had no reason to approach closer than six feet to the edge. Indeed, the CO in *Fastrack Erectors* opined that had he realized this fact, he might not have issued the citation.

The instant deck was 100 by 65 feet. The evidence establishes that the only task the employees were performing was screen and layout work near the center of the deck. During the course of their work, employees would approach no closer than twelve feet from an unguarded edge. In one instance, an employee approached the welder which was no closer than six to seven

feet from the edge of the deck.[7] There is no evidence to suggest that it was reasonably predictable that employees had any reason or occasion to wander around the deck, or that in the course of their assigned working duties or their personal comfort activities while on the job, they would come any closer to the edge of the deck. Even if they were to perform other tasks later that day, there is no evidence to suggest that they would have violated Tricon's work rule and not have worn appropriate fall protection. Moreover, the evidence establishes that employees were be tied-off to a safety cable until they were either ten feet from the edge when accessing the deck or ten feet of the edge when leaving the deck.[8] Although it was windy, there is no evidence that employees were carrying anything that could serve as a wind catch. Furthermore, there is no evidence that it was or had been raining or that the deck was wet or slippery.[9]

The Secretary stresses that although it was expected that the crew knew that they were within six feet of an edge by counting the number of three foot decking sheets between themselves and the edge, Tricon failed to establish that it formally trained employee in this method, or that employees were ever trained to determine when they were within six feet of an unguarded edge. However, there is no evidence that employees ever violated the rule. Moreover, nothing in the citation alleges a failure to adequately train employees.

The evidence establishes that whenever employees could be expected to approach six feet of an unguarded edge they were required to wear fall protection. (Ex. R-1, p. 42). The only reason this crew was not wearing such protection is that it was not reasonably predictable that they would enter the "danger zone." There is no evidence that they did not understand the deck counting system used by Tricon. No crewmember was ever out of sight of Foreman Moore who understood the six-foot rule, knew how far six feet was, and understood that the any employee coming within two deck sheets of the edge had to be protected.

I do not find it necessary to set forth a general premise establishing the distance from an unguarded edge that constitutes a "zone of danger." Rather, I find that the distance could vary from the nature of the work and the physical and weather conditions on a deck. In that regard, I

---

[7] Mr. Moore estimated that the welder was 9-to-10 feet from the edge. (Tr. 190).

[8] Although the CO testified that employees were not tied off when using the ladder, this testimony was pure speculation. He never saw any employee use the ladder, (Tr. 66, 82, 103), and the evidence establishes that employees were tied off when accessing or leaving the deck. (Tr. 153, 181-184).

[9] This is not to suggest that, on an appropriate set of facts, an entire deck of the dimensions here could not constitute a danger zone. However, the burden would be on the Secretary to demonstrate that, even when approaching no closer than 12 feet from an unguarded edge, employees could fall from the deck. Here, the Secretary has made no such showing.

find that Respondent's six-foot[10] distance to be as arbitrary as the Secretary's "entire deck" theory. While it is hard to comprehend a situation where the "zone of danger" would be less than six feet, under the proper circumstances, a six foot rule may not be sufficient. What does matter is that it is the Secretary's burden to establish that the Tricon employees, in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, were in a zone of danger. *Fabricated Metal Products*; *Gilles & Cotting, Inc*., supra. Here, the Secretary has failed to make that showing and the citation must be vacated.

ORDER

Based on my findings of fact and conclusions of law set forth in this decision, it is ORDERED that:

Citation 1, item 1 for a violation of serious violation of 29 C.F.R. §1926.760(a)(1) and the Notification of Proposed Penalty are **VACATED.**

SO ORDERED.

/s/

The Honorable John H. Schumacher
U.S. OSHRC Judge

Dated: September 5, 2012
Denver, CO

[10] I note that, contrary to Mr. Vivian's testimony, the evidence does establish that Tricon has a work rule prohibiting employees from coming within six feet of an unguarded edge. (Tr. 66).