
SECRETARY OF LABOR,
Complainant,

v.

FPC, INC., and its successors

Respondent.

OSHRC DOCKET
NO. 99-0506

APPEARANCES:

Raquel Tamez, Esq., Office of the Solicitor, U.S. Department of Labor,
Dallas, Texas

Jon L. Tankersley, Esq., Thompson, Knight, Brown, Parker & Leahy, L.L.P.,
Houston, Texas

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

In this action the Secretary of Labor seeks to affirm a serious citation issued to the Respondent for the alleged violation of a safety regulation adopted under the Occupational Safety and Health Act of 1970. The matter arose after a compliance officer for the Occupational Safety and Health Administration inspected a Respondent worksite, concluded that the company was in violation of the regulation, and recommended that the citation be issued. The Respondent disagreed with this conclusion and filed a notice of contest. After the Chief Judge of this Commission ordered the issues be tried under the E-Z Trial procedure, a hearing was held in Houston, Texas.

The citation alleged that:

Citation 1 Item 1 Type of Violation: SERIOUS

Each employee engaged in construction activities near wall opening 6 feet or more above lower levels were not protected by guardrail systems, safety net systems, or personal fall arrest system.

- a) Second floor balcony of building 25. Employees clearing second floor balcony without fall protection.

in violation of the regulation found at 29 CFR 1926.501(b)(14) which provides:

(14) *Wall openings.* Each employee working on, at, above, or near wall openings (including those with chutes attached) where the outside bottom edge of the wall opening is 6 feet (1.8 m) or more above lower levels and the inside bottom edge of the wall opening is less than 39 inches (1.0 m) above the walking/working surface, shall be protected from falling by the use of a guardrail system, a safety net system, or a personal fall arrest system.

The salient facts may be briefly summarized. The Respondent is a general contractor, and in November 1998, it was engaged in the construction of an apartment complex in Houston, Texas. In response to a complaint concerning worker safety at the company's workplace on Wilshire Place Road in that city, the Occupational Safety and Health Administration dispatched two compliance officers to investigate the allegation. On November 17, 1998, the representatives arrived at the worksite and from a distance noted that balconies over six feet above ground level were without guard rails. Respondent's construction superintendent informed them that they could not inspect the premises without a warrant. After obtaining a warrant, the agents returned to the property, again noticing unguarded balconies. At that time, accompanied by officials of the Respondent and subcontractor, they inspected the building site.

According to the lead compliance officer, the upper floors of the apartment complex had no guard rails. He observed men working on the second floor throwing trash off the balcony. There was no fall protection. During the inspection OSHA people took pictures of the work scene and spoke with one of the individuals on the balcony.

In addition to the compliance officer, the Secretary called upon a former employee of the Respondent who worked at the complex at the time of the inspection. This worker's English was

minimum, and he was assisted at the hearing by an interpreter. He confirmed that there were no guard rails or other protective equipment on the second floor of the building as shown on the pictures. He also furnished a signed statement to the OSHA officer to the effect that at the time of the inspection he was cleaning trash from the second floor and throwing it down into a dumpster.

The Respondent's construction superintendent, director of human resources, and independent safety consultant took issue with the information supplied by the compliance officer and former employee. They asserted that no employee was near the edge of the balcony. In fact, the company collected trash by a forklift which slid up to the balcony.

In this case there is no dispute that Respondent's employees were working on the Wilshire project, and that there was no fall protection equipment on the second balcony which was more than six feet above ground level.

In its brief the Respondent argued that its witnesses were more credible than the compliance officer and a former employee. As noted, Respondent's officials did not see anyone working close to the balcony edge. The brief faulted the compliance officer's testimony and pointed out many alleged inconsistencies in his version of the facts.

With this diversity of opinion, I am placing more reliance upon the compliance officer's version of the facts because he observed the infraction on two occasions before the formal inspection; because he saw an employee of the Respondent dropping trash from the balcony to the dumpster; because the employee testified that he cleared trash from the balcony; because the employee confirmed his testimony with a written statement to the same effect; and because there were no guard rails or other protective fall safety equipment on the premises.

Based upon the foregoing discussion, I find that at its worksite at Wilshire Place Road, specifically at the second floor balcony of building 25, employees engaged in construction activity near a wall opening six feet or more above ground level were not protected by a guard rail system, safety net system, or personal fall arrest system. I conclude the Respondent was in violation of the regulation found at 29 CFR 1926.501(b)(14). The citation is therefore affirmed.

Since there did not appear to be any quarrel with respect to the penalty, the recommended penalty of \$4,000.00 is AFFIRMED.

Sidney J. Goldstein
Judge, OSHRC

Dated: March 6, 2000