

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3419

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SECRETARY OF LABOR, :  
:   
Complainant, :  
:   
v. : OSHRC DOCKET NO. 99-1300  
:   
FUTURE HOME TECHNOLOGY, INC., :  
:   
Respondent. :  

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Appearances:

Marc G. Sheris, Esquire  
New York, New York  
For the Complainant.

John W. Willmot  
Port Jervis, New York  
For the Respondent, *pro se.*

Before: Chief Judge Irving Sommer

**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”). The Occupational Safety and Health Administration (“OSHA”) inspected the facility of Respondent, Future Home Technology, Inc. (“FHT”), located in Port Jervis, New York, on February 17, 1999 and April 9, 1999. As a result of the inspection, OSHA issued FHT a nine-item serious citation and a one-item “other” citation. FHT contested all of the citation items, which, with one exception, were resolved by a partial settlement agreement and order dated October 18, 1999. The remaining item requiring resolution, Item 1 of Serious Citation 1, alleges violations of 29 C.F.R. 1910.23(c)(1), which provides as follows:

Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

The hearing in regard to this item was held on May 18, 2000, in New York, New York. Both parties have filed post-hearing submissions.

### **Background**

FHT manufactures modular housing, and the subject facility consists of about 7800 square feet of manufacturing space. Within this space are two fixed platforms that are parallel to each other and 60 feet apart; these platforms run the length of the production line along which the modular home units move as they are assembled and worked on. Spanning the 60 feet between the fixed platforms are movable platforms that are situated on both sides of the lengths of the modular home units as they go down the production line. Employees use both the fixed and the movable platforms to work on the modular home units, and they work on top of the units as well. (Tr. 9-10; 15-18; 22).

OSHA compliance officer (“CO”) Michael Levy conducted the inspection accompanied by John Willmot, FHT’s safety manager. On February 17, 1999, as they were walking through the facility, the CO and Willmot observed employee Keith Biccum putting shingles on the flat wooden surface of a modular home unit.<sup>1</sup> The units are usually 60 feet long and thus span the length between the two fixed platforms; however, the unit Biccum was working on was only 42 feet long and there was an 18-foot gap between one end of the unit and the fixed platform on that side. Biccum was working in a kneeling position 6 to 12 inches from the gap without fall protection, which exposed him to a fall of 11.75 feet to the concrete floor below. The CO photographed the scene and pointed out the hazard to Willmot.<sup>2</sup> He then spoke to Biccum, who said that normally an aluminum “pick” was put between the two movable platforms when work was done on a shorter modular home unit; the pick was situated about 3.5 feet below the gap, such that a fall from the unit would be only that distance. Willmot told the CO that this was the best method, and the CO observed this method in use when he returned to the facility on April 9, 1999. (Tr. 13-27; C-1-2).

During his inspection on April 9, 1999, the CO and Willmot saw employee Pete Rodgers standing on one of the movable platforms looking at the modular home unit in front of him; Rodgers, a plumber, later told the CO he was checking the unit’s plumbing fittings. The platform was about 3 feet wide, and Rodgers, who was about 1.5 feet from the edge, had no fall protection and was

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<sup>1</sup>After a modular home unit is shipped to its final destination, the flat wooden surface sections are raised up to form a peaked roof and are then affixed to the unit. (Tr. 15).

<sup>2</sup>The CO also drew C-4, a diagram showing this scene. (Tr. 21-25).

exposed to a backwards fall of 8.25 feet to the floor below. The CO photographed Rodgers on the platform and discussed the hazard with Willmot, who indicated that stanchions with chains should have been put on the platform and that he did not know why they had not been.<sup>3</sup> (Tr. 27-37; C-3).

### **The Alleged Violations**

Item 1a of the citation alleges that on February 17, 1999, the employee installing roofing material was exposed to a fall hazard of approximately 11.75 feet. FHT contends the employee was not near the edge of the roof of the modular home unit, noting the CO's photos and his testimony that he did not measure the roof area and that the other employees he saw working near roof edges at the facility were protected by the portable picks. (Tr. 56). However, FHT's representative asked the CO at the hearing whether it was "possible" the employee was 2 to 3 feet from the edge, and the CO specifically testified that it was not possible and that the employee himself had told him that he was "right up" against the edge. (Tr. 56). FHT makes no other contentions in regard to this item and offered no evidence to rebut the CO's testimony, which establishes the alleged violation.<sup>4</sup> This item is accordingly affirmed, and, since an 11.75-foot fall onto a concrete floor could result in serious injury or even death, the violation was serious. (Tr. 48-49).

Item 1b alleges that on April 9, 1999, the employee checking plumbing fixtures was on an unguarded platform at a height of approximately 8.25 feet. FHT contends the cited standard does not apply to the movable platform that is the subject of this item; according to FHT, the platforms are mobile scaffolds or mobile work platforms which, pursuant to 29 C.F.R. 1910.29(3)(vii), do not require fall protection unless the work level is 10 feet or above. In support of its contention, FHT notes that 29 C.F.R. 1910.21(f)(17) defines the term "manually propelled mobile scaffold" as a "portable rolling scaffold supported by casters." FHT further notes that 29 C.F.R. 1910.23(g)(12) defines "mobile" as "manually propelled" and that 29 C.F.R. 1910.23(g)(13) defines "mobile work

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<sup>3</sup>C-4, the CO's diagram, also depicts this scene. (Tr. 35-37).

<sup>4</sup>FHT does not dispute the applicability of the cited standard. Regardless, I agree with the Secretary that the definition of "platform" set out at 29 C.F.R. 1910.21(a)(4), together with the Commission's decision in *Clement Food Co.*, 11 BNA OSHC 2120, 2126 (No. 80-607, 1984), establishes that the cited standard applies to the working surface that is the subject of Item 1a.

platform” as “[g]enerally a fixed work level one frame high on casters or wheels, with bracing diagonally from platform to vertical frame.”

The Secretary contends that the cited standard does apply to FHT’s movable platforms, noting first the definition of “platform” set out at 29 C.F.R. 1910.21(a)(4), as follows:

A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment.

The Secretary also notes the case law that has recognized her interpretation of “platform” under 1910.21(a)(4) as “any elevated surface designed or used primarily as a walking or working surface, and any other elevated surfaces upon which employees are required or allowed to walk or work while performing assigned tasks on a predictable and regular basis.” *See Superior Elec. Co. v. OSHRC*, 123 F.3d 199 (8th Cir. 1997), and cases cited therein. Finally, the Secretary notes that the movable platforms at FHT’s facility do not have “bracing diagonally from platform to vertical frame,” as required by 1910.23 (g)(13), *supra*, and that they are a permanent part of the operation and thus do not meet the definition of “scaffold” set out at 29 C.F.R. 1910.21(g)(15), as follows:

Any temporary elevated platform and its necessary vertical, diagonal, and horizontal members used for supporting workmen and materials.

I agree with the Secretary that the cited standard applies, based on the CO’s testimony, which FHT did not rebut, and on R-1-9, various photographs of the movable platforms in the facility. According to the CO, the platform system was designed specifically for FHT’s operations and cannot be used anywhere else. The movable platforms are supported by two vertical members that have no diagonal or other bracing, and the main weight-bearing load is on the ends of the platforms, where they are attached by wheels to tracks in the fixed platforms. The vertical members of the movable platforms have wheels that sit in grooves on the floor, and employees manually push the platforms up and down the production line as part of the manufacturing process; however, the platforms can only move backwards and forwards in the grooves, parallel to the fixed platforms, and otherwise remain in place in the facility. In addition, employees are up on the movable platforms daily to work on the home units; as the CO put it, they are “constantly” on the platforms. (Tr. 38-42; 54-61).

In view of the record, I conclude that the movable platforms are a permanent part of FHT’s manufacturing process, that they are “platforms” rather than “scaffolds” within the meaning of the relevant OSHA regulations, and that the Secretary has cited the appropriate standard in regard to this

item. I further conclude that the record establishes the alleged violation and that the violation was serious in that an 8.25-foot fall onto a concrete floor could cause serious injury or death. (Tr. 48-49). This citation item is therefore affirmed as a serious violation.<sup>5</sup>

Turning to the assessment of an appropriate penalty, these two subitems were grouped with a total proposed penalty of \$1,625.00. The CO rated the severity of the violations as high, since a fall from either platform could have caused death or permanent disability, but he rated the probability of an injury occurring as low because there was nothing on the platforms on which the employees might have tripped. The CO accorded the company reductions for size and good faith but not for history due to a prior inspection that had resulted in a citation. (Tr. 52-53). I find the proposed penalty of \$1,625.00 to be appropriate, and it is accordingly assessed.

#### **Conclusions of Law**

1. Respondent, Future Home Technology, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. 1910.23(c)(1).

#### **Order**

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1a and 1b of Serious Citation 1 are AFFIRMED, and a total penalty of \$1,625.00 is assessed.

/s/

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Irving Sommer  
Chief Judge

Date: 27 JUL 2000

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<sup>5</sup>In affirming Item 1b, I have noted the CO's testimony about how the condition could have been abated and the Secretary's assertion that FHT did not prove infeasibility of compliance. Although there is nothing in the record to indicate FHT is actually asserting such a defense, the CO's testimony clearly shows there was a feasible means of complying with the standard. (Tr. 42-46; C-5).