



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

CENTRAL BUILDING & PRESERVATION
L.P.,

Respondent.

OSHRC DOCKET NO. 03-1297

APPEARANCES:

For the Complainant:

Susan Witz, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:

Charles T. Rivkin, President, CTR, Inc., Chicago, Illinois

Before: Administrative Law Judge: Benjamin R. Loye

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Central Building & Preservation L.P. (Central), at all times relevant to this action maintained a place of business at 230 North Michigan, Chicago, Illinois, where it was engaged in tuck-pointing and related activities. Central admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 15, 2003, the Occupational Safety and Health Administration (OSHA) initiated an inspection at Central's North Michigan work site. As a result of that inspection, Central was issued a citation alleging a violation of 29 C.F.R. §1926.501(b)(1) of the Act. By filing a timely notice of contest Central brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On February 10, 2003 a hearing was held on this matter in Chicago, Illinois. No briefs were requested, and this matter is ready for disposition.

Alleged Violation of §1926.501(b)(1)

Serious Citation 1, item 1 alleges:

29 CFR 1926.501(b)(1): Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level was not protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems:

a. On or about May 15, 2003, at the addressed jobsite, employees working at approximately two hundred and sixty-eight (268) feet and four (4) inches above the ground on the twenty-fourth (24th) floor deck, mixing mortar and staging equipment/materials in preparation (sic) for work on the “parapet” wall measuring twenty-five (25) inches in height were exposed to falls due to unprotected sides and edges.

Facts

The facts in this case are admitted (Tr. 4). OSHA Compliance Officer (CO) Sturtecky testified that on May 15, 2003, he observed two of Central’s employee’s on the 24th floor deck of the Old Carbide building at 230 North Michigan (Tr. 11, 18; Exh. C-1, C-2, C-3; *see also* testimony of CO James Martineck, Tr. 85). The employees were mixing mortar for the tuck-pointing operations taking place on scaffolds above and below the deck (Tr. 12, 18, 38, 42; Exh. C-1; *see also* testimony of CO James Martineck, Tr. 86). At the time of the inspection, one of the employees was seen leaning over a parapet wall, talking to employees working on a scaffold below (Tr. 12-13, 26-27). Central’s foreman, Lupe Duran, told CO Sturtecky that he assigned the two employees to work in the area (Tr. 20). No fall protection system was provided by Central, though the employees were partially protected by the parapet wall, which was approximately 24 to 25 inches tall and 16 inches wide and stepped up to approximately 38 inches for short runs along the south side of the deck (Tr. 15, 87; Exh. C-1, C-2, C-3). Approximately 70 linear feet of the edge were inadequately protected (Tr. 14-15; Exh. C-1, C-2, C-3). The employee leaning over the side was within six inches of this parapet (Tr. 26-27, 87; Exh. C-3). According to Sturtecky, the 19 feet of parapet on the west side of the deck was only 15 to 17 inches high (Tr. 24, 34). The second employee was working within a foot of the west parapet (Tr. 26, 87; Exh. C-1). Foreman Duran agreed to, and did install guardrails between the higher sections of parapet (Tr. 20-21, 106; Exh. R-2, R-3).

Discussion

The cited standard provides:

Unprotected sides and edges. Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Central admits that it was in technical violation of the standard, but believes that the violation should be classified as *de minimis*, because its employees were not exposed to a hazard (Tr. 5). Central bases its argument on CO Sturtecky's testimony that it is OSHA's policy not to cite unprotected edges¹ where a wall or parapet is less than 39 inches *if* the height of the parapet plus its width equals 48 inches (Tr. 45), and on *HST Roofing, Inc.*, 19 BNA OSHC 1965, 2002 CCH OSHD ¶32,585 (No. 01-0014), in which Administrative Law Judge Irving Sommer found that the Secretary failed to prove that HST employees were exposed to a hazard.

This judge notes that CO Sturtecky found that the height plus the width of Central's parapet wall did not equal 48 inches, and determined that, under the plain language of the standard, as well as OSHA policy, Central should be cited (Tr. 46, 50).

Further, *HST Roofing, Inc.* is inapposite. In that case Judge Sommer found that the Secretary failed to prove that the parapet on the cited roof was less than 39 inches high. The COs' testimony as to the height of the parapet walls in this matter was uncontradicted. Moreover, in *HST Roofing, Inc.*, the evidence showed that HST employees did not work in those areas of the roof where the parapet was absent. In this case, two COs photographed employees working a foot or less from the inadequately guarded edges.

A violation is *de minimis* when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987). Under these circumstances, where Respondent failed to provide fall protection for employees working within a foot of a 15 to 17 inch parapet on the edge of a 24th story deck, this judge cannot find that Respondent's noncompliance bears a negligible relationship to employee safety.² It is clear that the parapet Central relies on provided only partial fall protection on the south, and none on the west side of the cited deck. The condition could have resulted in a fatal fall and so must be classified as serious.

Penalty

The fall hazard to which the cited employees were exposed was at least 190 feet and, should an accident have occurred, would certainly have resulted in death (Tr. 4-5, 23). CO Sturtecky testified that

¹ *Unprotected sides and edges* means any side or edge (except at entrances to points of access) of a walking/working surface, e.g., floor, roof, ramp, or runway where there is no wall or guardrail system at least 39 inches (1.0 m) high. 29 C.F.R. §1926.500(b) *Definitions*.

² Additionally, this judge notes that the Court of Appeals in the Seventh Circuit has held that the *de minimis* classification cannot be used to override the Secretary's rule-making decisions. *Caterpillar, Inc. v. Herman*, 131 F.3d 666, 668 (7th Cir. 1997).

the employees were exposed for three to four hours that morning, and that there was a good probability of an employee falling as the work area was cluttered and it was a windy day (Tr. 26, 29, 88). Based on the high gravity of the violation, the CO proposed a penalty of \$5,000, which was reduced by 50% due to Central's small size, 75 employees, and the fact that it had received no other OSHA citations within the past three years (Tr. 28, 58). No other violations were observed during the inspection, and the CO concluded that Central's workplace was otherwise safe (Tr. 32-33, 90).

Based on the record I find that the proposed penalty is appropriate; \$2,500.00 will be assessed.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR 1926.501(b)(1) is AFFIRMED, and a penalty of \$2,500.00 is ASSESSED.

/s/
Benjamin R. Loye
Judge, OSHRC

Dated: April 8, 2004