

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD  
OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

CFE, INC.,

RESPONDENT.

DOCKET NO. OSHANC 2000-3884  
OSHA INSPECTION NO. 302875711  
CSHO ID NO. M8486

**ORDER**

APPEARANCES

Complainant:

Linda Kimbell

North Carolina Attorney General's Office

Respondent:

Steven L. Ellington

Executive Vice President of Respondent

BEFORE

Administrative Law Judge: Charles R. Brewer

THIS CAUSE coming on for hearing and being heard before the undersigned Charles R. Brewer, Administrative Law Judge, presiding at the September 8, 2000, hearing in Raleigh, North Carolina, pursuant to a notice of hearing dated August 14, 2000. At the outset of the hearing, Complainant moved to amend the citation to allege an inspection date of December 14 through December 22, 1999. The Respondent objected to the amendment. The amendment was allowed, and Respondent was given an opportunity to continue the hearing in light of the amendment but elected to proceed at that time.

Thereafter, the parties entered into the following stipulations:

1. Citation was timely issued on February 23, 2000.
2. The inspection was lawfully conducted in that the inspection was consented to and all appropriate procedures were followed by the inspector in the inspection.
3. Respondent is a roofing and sheet metal contractor whose business includes all scopes of roofing work including repairs.
4. Respondent had installed the roof on the facility in question beginning May 5, 1999. The main installation was completed on or about May 11, 1999. At the time of the inspection, the installation was complete, and Respondent had employees at the site doing "punch list" work items including seeking leaks and repairing a metal edge on a parapet.
5. There were four employees on the roof at the time of the inspection--two were "chasing the leaks", and two were repairing the metal edge on the parapet. One of the four employees worked on both of these missions (Mr. Edgar Brown served as team leader).
6. The two employees "chasing the leaks" had been on the roof 90 minutes when the inspector arrived and saw them.
7. Inspection was conducted pursuant to a special emphasis inspection by the North Carolina Department of Labor for Wake County Roofing Work.
8. The other two employees working on the metal edge repair were on the roof less than 90 minutes before the inspector's arrival.
9. The height of the roof was 13 feet from the work level. The height of the parapet was stepped from 12 1/2 inches to 17 inches.
10. The proposed penalty was appropriate and accurately calculated. This stipulation is not to be construed as a concession by the Respondent that the violation, if it exists, would be denominated as "serious".
11. This was the third time employees of Respondent had returned to the roof to repair the parapet since May 11, 1999.
12. The Safety and Health Review Board has jurisdiction to consider this matter.

A final stipulation was entered early in the course of the testimony of the Complainant's first witness, Maria Holmes. It was stipulated at that time that four employees were on the roof without fall protection in violation of standards.

### GENERAL DISCUSSION

The Respondent was cited in Citation 1, Item 1 with a serious violation of 29 CFR 1926.501(b)(10) alleging that "Employee(s) engaged in roofing activities on low slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels were not protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or combination of warning lines system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system or warning line system and safety monitoring system...Exploris Children's Museum (corner of Blount and Morgan Street) Raleigh, NC, where four employees were observed working on a flat roof, that was approximately 13 feet off the ground, without fall protection." The citation proposes a penalty of \$500 and indicated that the violation was immediately abated. The sole question presented for decision in this matter is whether or not the conduct of these employees constituted isolated employee misconduct. The Respondent was allowed to submit written arguments on the issue of isolated employee misconduct following the hearing and that submission was timely received by the undersigned. Inasmuch as isolated employee misconduct is an affirmative defense, the burden of proof of establishing this defense rests with the Respondent.

### FINDINGS OF FACT

Having heard and considered the sworn testimony adduced at the hearing the undersigned makes the following Findings of Fact:

1. As a result of the four employees being on the roof without fall protection there was a possibility of an accident which would be a 13 foot fall.
2. The surface below the roof was concrete.
3. There is a substantial probability that had an accidental fall occurred that bones would be broken.
4. The Respondent's fall protection program is adequate.
5. Edgar C. Brown (hereinafter "Brown") was formerly in the installation crew but is now in maintenance. In December of 1999 he was in maintenance and on the roof.

Brown was the "team leader" who oversaw the job in question to guarantee compliance with safety procedures. Brown is no longer designated a team leader.

6. Brown testified, and the undersigned finds as fact, that fall protection is mandatory in the Respondent corporation; however, on December 14, 1999, Brown did not recall being told to use the fall protection.

7. The Respondent's van contained items of fall protection, to wit four safety harnesses. If more than four went out on a job, additional safety harnesses would be issued.

8. The Respondent's work took Brown to the very edge of the roof.

9. There was an air conditioning unit on the roof that could have been used as anchorage.

10. Brown was a team leader on other projects in maintenance prior to the inspection in question here. There were a number of such jobs, and his duties as team leader had been explained to him. Brown attended seminars and training for his work; however, no special training was given him as a result of his designation as a "team leader."

11. Brown had the authority to require the employees to wear fall protection. The fall protection was not used because the Respondent's employees did not expect to be on the roof very long.

12. Brown had come to do maintenance on this building as a team leader on a previous occasion. On the earlier occasion, the project in which Brown was team leader in maintenance on this building was a full day project and fall protection was used.

13. The question of fall protection was not brought up nor discussed because they did not expect to be there as long as they were according to the testimony of Brown which the undersigned finds as a fact.

14. Brown had received training as to how to use the harness and to assess the distance of a possible fall.

15. Brown was not given the authority by the Respondent to either set or change policy; he was required to follow policy as set by management.

16. As part of preemployment training, Brown watched a video which showed the company's fall protection policy. He saw it again when he switched to maintenance.

The training video which Brown saw was admitted into evidence as Respondent's Exhibit No. 1.

17. It is the team leader's responsibility to insure that fall protection is used.

18. Disciplinary action has been taken; all four employees were given written warnings. This is part of the formal disciplinary system of the company for the employees.

19. The manager of the maintenance department testified that to his knowledge no employee had been dismissed by the Respondent for safety violations.

20. The safety manual of the Respondent permits numerous safety violations prior to termination of employment.

21. The Respondent's policy requires fall protection 100% of the time regardless of the duration of the project.

22. Edgar Brown testified when recalled as a witness for the Respondent that he understood that fall protection is required 100% of the time.

23. Of great importance is the testimony of Robert J. Pringle, who is employed by the parent company to the Respondent corporation. He has been employed for nine years as director of safety and health, which is his sole function. Mr. Pringle testified and the undersigned finds as a fact that the "team leader" on a project is the "competent person" for OSHA purposes on the project.

#### CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the undersigned Concludes as Law that Brown's knowledge that the four employees including himself were not using fall protection on this project as "team leader" on this maintenance project is imputed to the company. Brown as the "competent person" on this work project in behalf of the company is in such a position with the company that his actions and knowledge are imputed to the company and cannot therefore form the basis for isolated employee misconduct. Further, the undersigned concludes as a matter of law that the violation is a serious violation.

Based on the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW the undersigned finds that the Respondent is in serious violation of 29 CFR 1926.501(b)(10) and a penalty of \$500 is hereby assessed against the Respondent as a

result thereof. The penalty shall be payable within 30 days of the receipt by the Respondent of this order.

This the 26th day of September, 2001.

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Charles R. Brewer

Administrative Law Judge