

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD**

**OF NORTH CAROLINA**

**WINSTON-SALEM, NORTH CAROLINA**

COMMISSIONER OF LABOR FOR  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2001-4051  
OSHA INSPECTION NO. 304260078  
CSHO ID NO. A-7988

v.

SHIELDS, INC.  
and its successors,

**ORDER**

RESPONDENT.

Administrative Law Judge: Ellen R. Gelbin

This matter came on to be heard and was heard before the undersigned Administrative Law Judge on January 11, 2002, in Winston-Salem, North Carolina. Complainant was represented by Katherine R. Everett-Perry, Assistant Attorney General, North Carolina Department of Justice, Labor Division. Respondent was represented by Matthew H. Bryant, Hendrick Law Firm, Winston-Salem, North Carolina.

Others attending the hearing for complainant were Eddie Allen, Safety Compliance Officer with the North Carolina Department of Labor, OSHA Division (OSHA); Linda Kimbell, Assistant Attorney General, North Carolina Department of Justice, Labor Division and, for observation only, Sonya Calloway, Assistant Attorney General, North Carolina Department of Justice, Labor Division. Others attending the hearing for respondent were Robert C. Moser, Vice President of Construction; Chris V. Lucas, Project Manager; and Timothy D. Clark, Foreman.

Complainant moved to amend Citation 1, Item 1 from a Repeat Serious violation to a Serious Violation and to amend the proposed penalty from \$6,300 to \$2,800. There being no objection from respondent, the motion was **GRANTED**.

**AFTER REVIEWING** the record file, after hearing the evidence and judging the credibility of witnesses, after hearing the arguments of counsel and after reviewing other relevant legal authorities, the undersigned makes the following:

## FINDINGS OF FACT

1. Complainant is charged by law with responsibility for compliance with and enforcement of the provisions of N.C. Gen. Stat. §§95-126 et. seq., the Occupational Safety and Health Act of North Carolina (OSHANC).
2. Respondent is a North Carolina Corporation, duly organized and existing under the laws of the State of North Carolina, which does business in the State of North Carolina and maintains a place of business in Winston-Salem, North Carolina. It is subject to the jurisdiction of the North Carolina Safety and Health Review Board.
3. Among other things, respondent is in the business of carpentry and dry wall.
4. In July, 2001, respondent was performing carpentry and dry wall construction on the addition to Pitt County Memorial Hospital, located at 2100 Stantonsburg Road, Greenville, North Carolina. (hereafter referred to as the "work site").
5. On July 24, 2001, Eddie Allen, Safety Compliance Officer (SCO) for the North Carolina Department of Labor, conducted a general scheduled comprehensive inspection of the work site.
6. The SCO held an opening conference with respondent's foreman, Timmy Clark. The SCO properly presented his credentials and informed Mr. Clark of the reason for and the scope of his inspection.
7. During the inspection, the SCO took notes and photographs and interviewed respondent's employees.
8. At the time of the inspection, respondent's employees were hanging dry wall in the penthouse. They were accessing the penthouse by walking across the roof of the neo-natal building of the hospital.
9. The roof over which respondent's employees walked was 20 feet above ground level.
10. At the time of the inspection, the edge of the roof was not protected by guardrails or safety nets and respondent's employees were not protected from falls from heights by personal fall arrest systems.
11. The SCO observed two of respondent's employees walking near the edge of the roof.
12. The SCO held a closing conference with Mr. Clark.
13. In order to enforce the Act, Complainant issued Citations on August 7, 2001, for a serious violation of 29 C.F.R. §1926.501(b)(1) (protection of employees from falls from unprotected heights).
14. The rectangular roof over which the employees walked was large and flat. Its dimensions exceeded 27,000 square feet. At its north west quadrant, the roof extended to form a walkway to the penthouse. The roof walkway was 24 feet wide and 40 feet long. Thus, where the roof walkway met the roof of the neo-natal building, it formed a right angle ("the corner"). The northern side of the

roof walkway was protected by a wall barrier. The southern side, facing the SCO, was without fall protection.

15. Respondent's employees were doing no actual work on the roof.
16. The SCO observed respondent's employees walk from the penthouse, along the walkway, around the corner and south toward where the SCO was standing.
17. The SCO's testimony was inconsistent in that, as respondent's two employees rounded the corner, the distance they were walking from the edge of the roof varied between "6 feet"; "5-6 feet"; "within 6 feet"; "3 feet"; and "within 3 feet."
18. The SCO was 148 feet away when he observed the employees round the corner.
19. The SCO took no photographs of respondent's employees walking around the corner.
20. The photographs the SCO took from 148 feet away do tend to show that, at a distance of 148 feet away, depth perception can be distorted - in that the walkway in the photograph looks only several feet wide when, in fact, it is 24 feet wide. The photographs also omit portions of the roof and corner and they omit the presence of a defined object against which to base a measurement, both of which might have assisted the finder of fact in this case.
21. The SCO took no measurements of where the employees were walking in relation to the edge of the roof.
22. During the hearing, the SCO incorrectly estimated discernable distances and widths of objects in the court room, which were much closer to the witness than 148 feet.
23. Respondent's foreman instructed his employees to stay 10 - 20 feet away from the edge of the roof at all times. He had never seen any of respondent's employees closer than 10 feet from the edge of the roof.
24. The undersigned was unable to determine whether respondent's employees were actually within a zone of danger while walking across the roof and walkway.

### **CONCLUSIONS OF LAW**

1. The foregoing findings of fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. Respondent is subject to the provisions and jurisdiction of the Act.
3. Complainant has failed to prove by a preponderance of the evidence that respondent committed a serious violation of 29 C.F.R. § 1926.501(b)(1) and, thus, Citation 1, Item 1 should be dismissed.

**BASED UPON** the foregoing **FINDINGS OF FACT** and **CONCLUSIONS OF LAW**, **IT IS ORDERED** as follows:

1. Citation 1, Item 1 is **DISMISSED**.

This the 1st day of February, 2002.

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Ellen R. Gelbin  
Administrative Law Judge