

What Six-Foot Rule? OSHA Construction Fall Standard Forces the OSH Review Commission to State It Does Not Exist

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The debate has raged for years. Is there a six-foot rule triggering fall protection requirements when an employee is within six feet of an unprotected edge? A construction fall protection standard adopted by the Occupational Safety and Health Administration (OSHA) does not expressly state there is such a six-foot rule, but many employers, industry safety experts, and even some OSHA inspectors have followed one as a rule of thumb.

The Commission Decision

The Occupational Safety and Health Review Commission has now jumped into the controversy and held that there is no rule that the requirement for fall protection in the construction fall protection standard at 29 C.F.R. § 1926.501(b)(1) begins when employees work within six feet of an unprotected edge.

Instead, the Commission held, the standard's requirement for guardrails, safety nets or tied-off safety harnesses is triggered when it is reasonably predictable that employees have been, are, or will be in the zone of the danger that the standard is intended to prevent. The extent of that zone, the Commission held, must be decided case by case, which it acknowledged would require a "fact-intensive inquiry."

The Commission further held that the employer failed to show that the construction industry had recognized a six-foot rule but that, even had the employer made such a showing, any such rule would be irrelevant because neither the construction standards nor any Commission decision recognizes it as a legal rule.

The decision came in the case of [*Secretary of Labor v. Gate Precast Co.*](#), No. 15-1347 (April 28, 2020).

Analysis

The Commission's decision may come as a surprise to construction industry employers, not to

mention many OSHA inspectors, who have long used a six-foot rule of thumb as the point at which fall protection is required. That rule of thumb was used in this case; a foreman instructed employees to, instead of using tied-off safety harnesses, remain behind a line of red tape strung six feet from an unprotected roof edge.

It is difficult to fault the Commission for its decision. As the Commission stated, the OSHA standard neither creates any six-foot rule nor enshrines construction industry practice into law.

One might fault OSHA, which could have stated a general rule in its fall-protection standard. As some judges have observed, it is sometimes more important to have a rule than to have a perfect rule. OSHA's standards could have set out a standard exposure distance and then created an exception for unusual circumstances presenting a falling hazard when employees work farther away from the edge than six feet. OSHA would have to prove that exception in the few cases that OSHA would invoke it. (In fact, the Commission found that the *Gate Precast* case presented just such an unusual circumstance.) Instead, OSHA created a standard that requires employers to guess, and lawyers to battle over, how close is too close in every case. The current rule may give OSHA flexibility in issuing citations, and aid the legal profession, but it does nothing for safety.

It can be argued that OSHA's standards misled the construction industry on this point and are the source of the common belief that there is a six-foot rule. Section 1926.502(g)(1)(i) creates a six-foot rule for control lines used in controlled access zones, which may be used in leading edge work, precast concrete construction work and residential construction work when employers can demonstrate that it is infeasible or creates a greater hazard to use conventional fall protection systems. OSHA has also set out a "Sample Fall Protection Plan" in Appendix E to Subpart M of Part 1926 that contains two sentences reflecting a six-foot rule. The first such sentence states: "Any workers not assisting in the leading edge construction while leading edges still exist (e.g. cutting the decking for the installers) shall not be permitted *within six feet* of the leading edge under construction." (Emphasis added.) The second sentence appears as follows:

Erection of Exterior Walls

During the construction and erection of exterior walls, employers shall take the following steps to protect workers:

* * *

A painted line *six feet from the perimeter* will be clearly marked prior to any wall erection activities to warn of the approaching unprotected edge; [Emphasis added.]

OSHA would likely say that the appendix sets out "non-mandatory guidelines" and thus states no rules at all, let alone rules binding on OSHA or the Commission. Moreover, OSHA would likely say that all of the above provisions, including § 1926.502(g)(1)(i), apply only to "[e]mployers engaged in leading edge work, precast concrete construction work and residential construction work who can demonstrate that it is infeasible or creates a greater hazard to use conventional fall protection systems." OSHA would point out that no such infeasibility or greater hazard defense was raised in *Gate Precast*.

That would be clever but illogical. That the above provisions set out a six-foot zone is not because a longer distance would be infeasible or pose a greater hazard. They do so because a six-foot rule generally makes safety sense. It was therefore perfectly reasonable for construction industry

employers to infer a six-foot rule from the above provisions.

There are other defenses and arguments that might be made in a future case raising this issue. But for now it is enough to say that the blame for this situation lies not with the Commission but with OSHA.

What does this mean for construction industry employers and safety professionals?

The Commission's decision makes site-specific hazard analyses all the more important. To protect workers, construction industry employers may want to make certain—regardless of the distance from the unprotected edge—that it is not reasonably predictable that an employee will fall over the edge. It may be helpful in this regard for employers not only to know where their employees will be, but to also know what they are expected to do. Employers may also want to make clear to employees that no one should deviate from their expected tasks without re-assessing the fall protection hazard and perhaps revising work plans. Although the Commission has held that the “six-foot rule” does not exist as a matter of law, it could still remain in fact but only if the employer knows the job tasks at hand and can say that, under the circumstances, employees keeping six feet away would remain outside the zone of danger presented by unguarded edge.

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