

Secretary of Labor,

Complainant,

v.

Davis Brothers Construction Co.,

Respondent.

OSHRC Docket No. 02-1012

Appearances:

Dane L. Steffenson, Esq., Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia  
For Complainant

Michael G. Murphy, Esq., Holland and Knight, LLP, Orlando, Florida  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

**DECISION ON FEE AND EXPENSE APPLICATION**

Davis Brothers Construction Co. seeks attorneys' fees and expenses in accordance with the Equal Access to Justice Act, 5 U.S.C. § 504, 29 C.F.R. § 2204.101, *et seq.*, (EAJA), for costs incurred in its defense against a citation and proposed penalty issued by the Secretary on June 18, 2002. For the reasons stated below, Davis Brothers's application is denied.

**Background**

Davis Brothers was hired as a shell contractor to oversee the construction of the shells of buildings at the Pinnacle Palms apartment project in West Palm Beach, Florida (Tr. 197, 365-367). After an inspection by Occupational Safety and Health Administration (OSHA) compliance officers Angel Diaz and Michele Sotak, the Secretary issued a citation alleging a repeat violation of § 1926.501(b)(1) for failing to provide an employee with fall protection when he was working near the edge of the roof on a 56-foot tall building. The central exhibit to the Secretary's case was a photograph taken by Sotak of an employee standing on top of building at the site.

The undersigned issued a decision in this matter on June 20, 2003, vacating the citation. The decision became a final order of the Review Commission.

On August 29, 2003, Davis Brothers filed an application for attorneys' fees and expenses totaling approximately \$30,635.00, plus fees and expenses incurred after the application (which resulted in an additional claim of approximately \$ 1,465.00).

The Secretary filed a response objecting to Davis Brothers's application on September 29, 2003. Davis Brothers filed a reply on October 16, 2003.

### **The Equal Access to Justice Act**

The EAJA provides :

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

Commission Rule 2204.106(a) provides in pertinent part:

The position of the Secretary includes, in addition to the position taken by the Secretary in the adversary adjudication, the action or failure to act by the Secretary upon which the adversary adjudication is based. The burden of persuasion that an award should not be made to an eligible prevailing applicant because the Secretary's position was substantially justified is on the Secretary.

Commission Rule 2204.201(a) provides in pertinent part:

The application shall show that the applicant has prevailed and identify the position of the Secretary that the applicant alleges was not substantially justified.

### **Eligibility**

The party seeking an award for fees and expenses must submit an application within 30 days of the final disposition in an adversary adjudication. 5 U.S.C. § 504(a)(2). Davis Brothers timely filed its application.

The prevailing party must meet the established eligibility requirements before it can be awarded attorney's fees and expenses. Commission Rule 2204.105(b)(4) requires that an eligible employer be a "corporation . . . that has a net worth of not more than \$7 million and employs not more than 500 employees." Commission Rule 2204.105(c) provides, "For the purpose of eligibility, the net worth and number of employees shall be determined as of the date the notice of contest was filed." Commission Rule 2204.202 (a) requires the applicant to "provide with its application a detailed exhibit showing the net worth of the applicant as of" the date of the notice of contest "that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether

the applicant qualifies under the standards in this part.”

Davis Brothers submitted the affidavit of its human resources manager Suzanne Gilbert, who averred that Davis Brothers employed 39 employees on June 22, 2002, the date of the notice of contest (Exh. B). The company also submitted the affidavit of CPA Martin A. Dytrych, who has acted as Davis Brothers’s accountant since 1993. Dytrych avers that on June 22, 2002, the net worth of Davis Brothers was \$3,053,000.00. Attached to Dytrych’s affidavit are the detailed financial statements for Davis Brothers for the years 2000, 2001, and 2002 (Exh. C).

Davis Brothers has established that it employed fewer than 500 employees and had a net worth of less than \$ 7 million at the time it filed its notice of contest. It has met the eligibility requirements of the EAJA.

### **Prevailing Party**

Section 504(a)(2) of 5 U.S.C. provides:

A party seeking an award of fees and other expenses shall within thirty days of the final disposition in the adverse adjudication submit to the agency an application which shows that the party was the prevailing party.

The Review Commission stated in *K.D.K. Upset Forging, Inc.*, 12 BNA OSHC 1856, 1857 (No. 81-1932, 1986):

Although the term is not defined in the EAJA, an applicant is considered to be the “prevailing party” . . . if it has succeeded on any of the significant issues involved in the litigation, and if, as a result of that success, the applicant has achieved some of the benefit it sought in the litigation.

In the instant case, the citation was vacated. The Secretary concedes in her answer to Davis Brothers’s application that Davis Brothers was the prevailing party.

### **Substantially Justified**

In its answer to Davis Brothers’s EAJA application, the Secretary argues that she established the applicability of the cited standard, noncompliance with the cited standard, employer knowledge of the violative condition, and that Davis Brothers was the controlling employer on the multi-employer worksite. According to the undersigned’s Decision, the only element the Secretary did not establish was employee exposure. Therefore, the Secretary argues, she established four out of the five required elements, making her case substantially justified.

As Davis Brothers points out in its reply, the Secretary has misconstrued the meaning of “substantially justified.” The Secretary has listed the individual elements of a violation on a multi-

employer worksite, claimed victory on four of the five, and declared her position substantially justified because she proved the majority of the elements. The term “substantially justified,” however, goes to the Secretary’s action in prosecuting this case, not to its reliance on specific evidence for each individual element of a single item.

The Secretary must prove that its position in bringing this case was substantially justified. “The test of whether the Secretary’s action is substantially justified is essentially one of reasonableness in law and fact.” *Mautz & Oren, Inc.*, 16 BNA OSHC 1006, 1009 (No. 89-1366, 1993). The reasonableness test comprises three parts. The Secretary must show: (1) that there is a reasonable basis for the facts alleged, (2) that there exists a reasonable basis in law for the theory it propounds, and (3) that the facts alleged will reasonably support the legal theory advanced. *Gaston v. Bowen*, 854 F.2d 379, 380 (10<sup>th</sup> Cir. 1988).

The Secretary cited Davis Brothers for violating § 1926.501(b)(1), which provides:

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.

The citation alleges:

On or about April 2, 2002, an employee was exposed to a fall hazard of approximately 56 feet while working next to the edge of a roof without a fall protection system.

At the hearing the undersigned granted the Secretary’s motion to amend her complaint to allege that the employee was exposed to a fall of approximately 8 feet to the interior of the building (Tr. 234).

Davis Brothers identifies the following three positions of the Secretary’s as not being substantially justified:

- (1) The position taken by the Secretary regarding the identity of the photographed employee;
- (2) The position taken by the Secretary regarding whether the photographed employee was exposed to a fall of 56 feet; and
- (3) The position taken by the Secretary regarding whether the photographed employee was exposed to any fall hazard.

### **Identity of the Photographed Employee**

In its application Davis Brothers states:

The position taken by the Secretary regarding the identity of the Photographed Employee was not substantially justified. The COs have never spoken to the Photographed Employee. They did not attempt to speak to him on the day that he was observed nor did they attempt to speak to him or ascertain his identity when they visited the site 2 days later. The COs observed a total of three employees on the roof of building C and they were not able to ascertain what work any of the three were performing. The Secretary's principal theory of the case was that the Photographed Employee was carrying and placed a beam and would have been exposed to either a fall over the edge of the building or a fall to the next lower level on the interior of the building. However the testimony of the senior Compliance Officer cannot even support the theory that the Photographed Employee was carrying a beam; his testimony supported the theory that the Photographed Employee may have been employed by the plumber or the electrician. The junior Compliance Officer also could not identify the work being done by the Photographed Employee.

Davis Brothers's argument regarding this position is without merit. The Decision devotes 2½ pages to this issue in a section captioned, "For Whom Did the Employee Observed on Building C Work?" (Decision, pp.4-7). The Decision explicitly concludes that the photographed employee was an RMC employee who was under the supervisory control of Davis Brothers, and it explicitly states that this conclusion is based on the testimony of Salvatore Messina, the general contractor's project superintendent, and Davis Brothers foreman Chris Veller. The testimony of the compliance officers was not relied on in reaching this conclusion. The Decision states (p. 7): "Based upon Messina's detailed testimony and upon Veller's statements, it is determined that the employee seen in Exhibit C-9 on the roof of Building C was an RMC employee engaged in decking at the time the photograph was taken." The section following this statement finds that Davis Brothers exercised supervisory control over RMC's employees so as to be responsible for violations under the multi-employer worksite doctrine (Decision, pp. 7-10). The Secretary's position on this issue was not only substantially justified, it was proven at the hearing.

### **Exposure of the Photographed Employee to a Fall of 56 Feet**

In its application Davis Brothers asserts:

\_\_\_\_\_ The Secretary's position regarding exposure to a fall of 56 feet was not substantially justified. Both of the COs testified that they could not tell how close to the edge he was and the only witness who saw the roof deck stated that it was not complete to the edge preventing access to a fall to the ground. Similarly, the Secretary's position regarding exposure to a fall of 8 feet was not substantially justified. The COs could not see the edge of the interior deck to determine how close the Photographed Employee was to it, nor did they observe the interior deck in its incomplete state to make a judgment as to how close the Photographed Employee was standing.

Compliance officers Diaz and Sotak were driving on Interstate 95 when they observed two employees working atop a building without any apparent fall protection (Tr. 22). They proceeded to the site, where they went to the top of Building A accompanied by Messina. While looking across to Building C, approximately 300 feet away, they observed an employee carrying an object. The building was 56 feet tall (Tr. 47-52-53). Sotak took a picture of the employee (Exh. C-9). Messina called Veller and said, “Chris, you’ve got one of your guys up on the roof that’s not tied off. You need to get him down” (Tr. 152).

These are the facts in the Secretary’s possession at the time she issued the citation and at the commencement of the hearing on February 27, 2003:

(1) Davis Brothers was the subcontractor overseeing the construction of building shells. The cited standard applied to the cited conditions.

(2) An employee was observed on top of an unguarded roof (a walking/working surface) without apparent fall protection. The terms of § 1926.501(b)(1) appeared to be violated.

(3) The unguarded roof was 56 feet above the ground. The employee appeared to be exposed to a 56 foot exterior fall.

(4) The employee was in plain view of anyone on or near the worksite. The employer knew or with reasonable diligence could have know the employee was on the roof.

(5) Both the project and superintendent and the foreman for Davis Brothers referred to the employee as one of Davis Brothers’s workers. Davis Brothers had supervisory control over the employee.

This information is sufficient to establish a *prima facie* case that Davis Brothers was in violation of § 1926.501(b)(1) on the day of the inspection. Up until the end of the first day of the hearing the Secretary was substantially justified in her position that Davis Brothers had supervisory control over an employee exposed to a 56 foot fall due to failure to use fall protection.

But, as the Secretary notes in her answer to Davis Brothers’s application, “[t]he factual twist presented at trial was whether there was plywood between the employee and the edge of the building” (Answer, p.7). The Decision states (p. 11):

As the hearing progressed, the evidence mounted establishing that the photographed employee was not actually at the edge of the roof. . . . When Messina went to the roof of Building C at the end of the work day on April 2, he discovered that the employee could not have been at the edge of the roof. Any fall would be from the decking to the 6<sup>th</sup> floor 8 feet below (Tr. 133, 138).

At the end of the first day of the hearing, the undersigned asked counsel for the Secretary to clarify his position, signaling that she believed the evidence for the 56-foot fall had been weakened by the evidence that the roof was not decked to the perimeter (Tr. 225-226):

Judge Spies: I want to know—and you can tell me in the morning if you like—but I would like to know what is the Secretary contending as far as the violation? Are you saying it's an internal fall to 8 feet? Are you saying it's a 56-foot fall which the citation states? Like I said, you can answer me now or you can answer me in the morning, but I would like to know the Secretary's contentions.

Mr. Steffenson: I can answer you now, I believe. It was yesterday about 3:00 p.m. when Mr. Diaz arrived in West Palm with a document that Mr. Murphy had Fed Ex'd to the OSHA Ft. Lauderdale Office for him to bring to me that I first learned that they would even assert that this might somehow constitute scaffolding, might only expose an employee to an 8-foot fall, and not be a fall off of the building.

Nevertheless, the citation stands as a citation for a fall hazard greater than 6 feet, and the Secretary will contend that regardless of whether this employee was going to fall 8 feet to the next level or 56 feet off the edge of the building, which I think there is a violation for both, there is a violation to substantiate this citation. And based on Mr. Diaz's testimony, the factors for the penalty would not change.

Judge Spies: I haven't heard any motion to amend, and your citation at this point talks about 56 feet. So, I would like to know that the pleadings are being reflected in the testimony. You get other motions, "Well it was tried by consent."

I don't want to deal with that if I don't have to. If it appears to me that something is being tried, I would like it to be clear to everyone. So, you—I think you should move to amend if that's what you intend to do, and I think you should look at that this evening.

At the beginning of the hearing the next day, Mr. Steffenson moved to amend in the alternative that the photographed employee was exposed to an interior fall of 8 feet. When asked for his basis for this late amendment, Mr Steffenson stated (Tr. 233):

It was brought up at trial. During the entire investigation, both on site that day, discussions after that day with OSHA, discussions between counsel during depositions, there has never been any mention that the Defendants contend that there was a fall other than 56 feet that the employee would be exposed to.

The standard under which they were cited calls for a violation when there is a fall greater than 6 feet. We're not amending the facts to suggest—we're not asking to amend the Complaint to add new facts. We're talking about the same employees, standing in the same position of the building where he was on that day.

And the Respondent was on full notice, obviously, since it's their defense now, that the employee was only exposed to an 8-foot fall as opposed to a 56-foot fall.

The second day of the hearing, the great majority of the testimony dealt with the photographed employee's exposure to an 8-foot interior fall. Once the Secretary's position regarding the 56-foot fall became doubtful due to Messina's testimony and the undersigned's indication that she considered it of questionable merit, the Secretary switched her argument to focus on this alternate theory. The Secretary was substantially justified in her position that the photographed employee was exposed to a 56-foot fall through the end of the first day of the hearing. On the second day of the hearing, she no longer actively pursued that theory. While she did argue that the employee was exposed to the exterior fall in her brief, the question of exposure to the 56-foot fall is so intricately intertwined with the question of exposure to the 8-foot fall, that it cannot be separated from it. As the Secretary noted, exposure to an 8-foot fall violates the terms of § 1926.501(b)(1) just as much as exposure to a 56-foot fall does—only the gravity of the violation changes.

It is determined that the Secretary's position regarding exposure to 56-foot fall was substantially justified during the portion of this proceeding that she relied on it.

#### **Exposure of the Photographed Employee to a Fall of 8 Feet**

In its application Davis Brothers states:

With respect to a fall of 8 feet, the COs can offer no testimony as to how near the edge of the interior decking the Photographed Employee was standing because they could not see the edge of the decking. When the COs recommended that a citation should be issued to Davis Brothers, it was based upon their opinion that the Photographed Employee was exposed to a fall over the edge of the building. However, the COs admitted at trial that they could not tell how close to the edge the employee was standing. . . . Neither of the COs know how much of the roof was decked when they observed the employee; they were not able to see the edge of the decking on the interior of the building, and could not determine if the Photographed Employee was exposed to a fall to the next level down in the building.

Davis Brothers once again relies on the testimony of the compliance officers to the exclusion of other, more informative witnesses. While Diaz and Sotak's investigation did little to further the Secretary's case, the testimony of others on the site, especially Messina, supported most of the Secretary's position that Davis Brothers was in violation of § 1926.501(b)(1). The undersigned accepted Messina's testimony that it was more likely than not that the photographed employee was an RMC employee and that he was engaged in decking.<sup>1</sup>

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<sup>1</sup> The Secretary contends that the Decision is contradictory in finding that the employee was engaged in decking but then referring to him as "a nameless employee engaged in an unknown activity" (Decision, p. 15). Nothing testified to by the compliance officers helped to establish the employee's identity or job assignment. It was concluded that

At the hearing, Davis Brothers did not dispute that employees were in the process of decking the roof of Building C and that the next level down was 8 feet below the decking. In fact, Davis Brothers attempted to show that the decking support was a form of scaffolding, to which the scaffolding standards should apply, rather than § 1926.501(b)(1). Veller testified that RMC's employees did not tie off when placing decking (Tr. 442, 449). Philip Bradley, roaming supervisor for RMC, testified that RMC was not required to tie off when placing decking "because the fall hazard is not great" (Tr. 247).

Given this information, a reasonable person could conclude that the photographed employee was exposed to a fall of 8 feet. The employee was identified as an RMC employee. RMC did not require its employees to tie off when exposed to falls greater than 6 feet, contrary to the requirements of § 1926.501(b)(1). It reasonably could be assumed that, at some point, the employee would be at the edge of the decking as he placed what was speculated to be an aluminum beam. The Secretary was substantially justified in taking the position that the photographed employee was exposed to a fall of 8 feet.

The Secretary's failure to meet her burden of proof on the issue of exposure was not because her position was not substantially justified; it was because the evidence she adduced was ultimately too speculative to be convincing. Messina speculated that the photographed employee was carrying an aluminum beam. Bradley testified regarding how RMC generally performs its decking work. But no one knows for certain what the employee was doing on the decking or where he was standing. The Secretary's case fails for the same reason that Davis Brothers's claim that the decking was scaffolding failed: there is no actual evidence of how the roof looked at time of the compliance officers' inspection. No one who testified at the hearing was on the roof at the time the employee was photographed. Messina saw the roof at the end of the day, but took no photographs of it and could not state conclusively what its configuration was (Tr. 154-155):

Judge Spies: Would you describe again for me what you saw on that roof when you

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the employee was engaged in decking based on Messina's deduction that this was the case. But even Messina, who was the most knowledgeable witness regarding the worksite, was not entirely certain what the employee was doing (Tr. 165): "I believe—I think that's true, but, you know, I'm not a hundred per cent sure—I believe he was setting one of the aluminum beams down there. I believe. You know, I can't be a hundred percent accurate from that distance, but that's what I believe he was doing." Although it was concluded that it was more likely than not that the employee was engaged in decking, the record does not establish what exactly he was doing, thus the employee (who was never named) was engaged in "an unknown activity." The fact that "[n]othing concrete is known about the employee" (Decision, p.14) is attributable to the cursory investigation conducted by the compliance officers. Their failure to thoroughly investigate the conditions on the roof of Building C significantly hampered the Secretary's case.

went back up there on that roof deck?

Messina: Well, from what I remember—

Judge Spies: Yes.

Messina: And it's not a hundred percent anymore—

Judge Spies: Right.

Messina: —that area where he was standing, there was a section of it where there was no plywood yet, and I believe there were a couple of beams, but there were some beams on the deck still. They may have belonged in that area; I don't remember.

(Tr. 166):

Judge Spies: If you can visualize it at this point a year ago, when you made your walk-up at the end of the day and you saw Building C, how far from the edge was the undecked portion?

Messina: I really—I would be lying to you if I tried to figure how far back it was, but there were sheets of plywood missing out of there.

The employee was on the roof decking and the decking was 8 feet above the lower level. From this, the Secretary wanted the undersigned to extrapolate that the employee was exposed to an 8-foot fall. While the Secretary was substantially justified in taking this position, it was determined in the Decision that there was insufficient evidence in the record to reach that conclusion.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with FRCP 52(a).

#### **ORDER**

Based upon the foregoing decision, it is hereby ORDERED that:

Davis Brothers's application for attorneys' fees and expenses is denied.

/s/ Nancy J. Spies  
NANCY J. SPIES  
Judge

Dated: December 18, 2003