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 AND ORDER

Davis Brothers Construction Company contests a one-item citation issued by the Secretary on June 18, 2002. The Secretary issued the citation following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officers Angel Diaz and Michele Sotak on April 2, 2002, at Davis Brothers's worksite in West Palm Beach, Florida.

The citation initially alleged that Davis Brothers committed a repeat violation of § 1926.501(b)(1) by failing to provide an employee with fall protection when he was working near the edge of a roof on a 56-foot tall building.

A hearing was held in this matter on February 27 and 28, 2003, in West Palm Beach, Florida. The parties have filed post-hearing briefs. Davis Brothers contends that the worker observed by the compliance officers was not one of its employees and that it did not violate the terms of § 1926.501(b)(1). Davis Brothers also contends that, if a violation of the standard did occur, it was the result of unpreventable employee misconduct. [1]

[1] In its answer, Davis Brothers raised the affirmative defenses of greater hazard and infeasibility in addition to that of employee misconduct. In its post-hearing brief, Davis Brothers addresses only the employee misconduct defense. Based on the record and on Davis Brothers's abandonment of the other affirmative defenses, the company's claims of greater hazard and infeasibility are deemed to be without merit.

For the reasons set out below, it is determined that Davis Brothers was not in violation of § 1926.501(b)(1).

Stipulated Facts

The Secretary and Davis Brothers agreed to the following stipulations in their joint response to the undersigned's pre-hearing order:

1. Davis Brothers is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act.
2. The principal place of business of Davis Brothers is 951 Broken Sound Parkway NW, Suite 150, Boca Raton, Florida, where it is engaged in construction as of the date of the alleged violation.
3. The worksite that is at issue in this action is located at 601 Executive Drive, West Palm Beach, Florida.
4. On April 2, 2002, subcontractor RMC was performing decking work for Davis Brothers at the worksite.
5. On April 2, 2002, Chris Veller was Davis Brother's superintendent at the worksite.
6. The cited standard, § 1926.501(b)(1), applied to work being done on the seventh floor of Building C at the worksite by Davis Brothers or by Davis Brothers's subcontractors.
7. Davis Brothers had a signed contract with RMC which required RMC to provide the labor, fall protection, and supervision for the scope of the work that RMC performed on the project.

Background

Davis Brothers is a shell contractor, hired by the general contractor to oversee the construction of a building's skeleton, including decking. Although in the past Davis Brothers employeed its own construction crews, more recently Davis Brothers performs no physical labor on the project but hires specialty subcontractors to do the work. It employs subcontractors to construct the skeletons of buildings for general contractors. From late 2001 through the late April 2002, Davis Brothers was constructing the shells of buildings on the Pinnacle Palms apartment project in West Palm Beach, Florida (Tr. 197, 365-367). The Pinnacle Palms project consisted of 152 units in four

apartment buildings, plus a club house, on several acres of land (Tr. 148). The general contractor for the project was BJ&K. Davis Brothers subcontracted with RMC to perform the decking work (Tr. 296, 370, 410). Davis Brothers has a long-standing relationship with RMC. It signs yearly contracts with RMC for multiple projects that will take place in that year (Exh. R-4).

Davis Brothers had two full-time employees on the site in the weeks prior to the inspection and on the day of the inspection. Chris Veller was Davis Brothers's superintendent, and Carlos Lopez was a carpenter and laborer for the company (Tr. 136, 193).

The Pinnacle Palms project was visible from Interstate 95. On April 2, 2002, compliance officers Diaz and Sotak were driving on Interstate 95 when they noticed two employees on the roof of Building C. As they approached the worksite, they saw a third employee atop Building A (Tr. 22). The compliance officers drove to the entrance of the project and met with Salvatore Messina, BJ&K's superintendent, who granted them access to the worksite (Tr. 23).

Diaz and Sotak proceeded to the roof of Building A with Messina and observed employees of the subcontractor Metalite installing trusses (Tr. 24, 96). While atop the roof of Building A, the compliance officers looked across to the seventh floor roof deck of Building C, approximately 300 feet away (Tr. 147). Building C was taller than Building A (Tr. 65). The compliance officers observed an employee on the roof of Building C carrying a 5- to 6-foot long object. Sotak photographed the employee (Exh. C-9; Tr. 25, 75-76, 103). Messina called Davis Brothers superintendent Veller, who was on a lower floor in Building C, 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). The employee on the roof left shortly after the call.

Based upon their observations and interviews with Messina and Veller, Diaz and Sotak concluded that the employee on Building C was an RMC employee under Davis Brothers's supervision and control. They also concluded that the employee was exposed to a fall of 56 feet (Tr. 47, 52-53). Diaz and Sotak reviewed Davis Brothers's history with OSHA and discovered that the Secretary had issued citations of violations of § 1926.501(b)(1) twice in the previous 3 years (Tr. 54-55).

The Citation

The Secretary has the burden of proving her case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Repeat Violation of § 1926.501(b)(1)

Section 1926.501(b)(1) 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 plead that the employee was exposed to a fall of approximately 8 feet to the interior of the building, in addition to the 56-foot exterior fall alleged in the citation (Tr. 234).

For Whom Did the Employee Observed on Building C Work?

The Secretary contends that the employee observed on the roof of Building C was an RMC employee, under the supervisory control of Davis Brothers. Davis Brothers contends that the Secretary never identified the employee, and that the record does not support the inference that he worked for RMC. It is undisputed that the Secretary never interviewed or identified the employee. His name is unknown. The compliance officers viewed him briefly from a distance of 300 feet. They could not determine what type of work he was performing (Tr. 66, 102).

Diaz and Sotak saw the employee carrying a 5- or 6-foot object, which they thought could be a beam. From this, they guessed that he was completing the deck of the roof on Building C, a job

that would only be done by an RMC employee. Diaz testified, however, that the employee could have been carrying a length of pipe or electrical conduit (Tr. 75). Sotak did not think that the object was a piece of pipe or conduit (Tr. 103), but she conceded, "I couldn't tell exactly what he was doing. I knew he was carrying something. Exactly what he was doing I couldn't tell" (Tr. 93). The photographs entered as Exhibit C-9 are of little help. Sotak explained that the zoom lens on her camera was broken at the time of the inspection. The photographs she took are blurry and show little detail (Tr. 94).

Davis Brothers argues that the employee in question could have been one of the plumbing or electrical employees who were also working in Building C. Veller testified that the plumbing and electrical subcontractors were on the 7th floor of Building C on April 2 (Tr. 411, 414). The compliance officers returned to the site on April 4 and showed Veller the photographs of the employee that Sotak had taken. Veller stated, "He works for me" (Tr. 123). Davis Brothers contends that Veller was talking loosely and considered anyone working on the site to be working for him in the sense that he was the superintendent for the shell contractor.

This argument ignores Veller's other reported statements regarding the photographs, including, "That's my decking guy" (Tr. 53). At the hearing, Veller testified that the photographed employee "looked like a man from RMC" (Tr. 213).

BJ&K superintendent Messina accompanied the compliance officers on the day of the inspection and identified the worker on the roof of Building C as "a decking man" under the supervision of Davis Brothers (Tr. 30). At the hearing, Messina explained why he believed the employee was performing decking work (Tr. 133):

> Well, at the time and looking at the picture again, he was setting beams down. You have to place your beams in place first before you can put your plywood decking down. So, he's got a beam in his hand, and he was getting ready to set the beam so he could finish decking out the building. That's what makes me think he was not at the edge [of the roof] because you couldn't be at the edge if there was no plywood.

Messina was questioned about the employer of the photographed employee (Tr. 135-136):

Q. Now, who do you believe employed this guy who was laying down the beams?

A. The people who did the deck work was a subcontractor of Davis Brothers.

Q. And, is that the people that you believe employed this guy?

A. Yes, because Davis Brothers has no employees on the job doing that kind of work. We're a general contractor. We oversee the work of the project. Our subcontractors have subcontractors that they oversee, so Davis Brothers had nobody doing the actual work out there. They just had subcontractors, but they work under Chris.

Q. I believe in your earlier testimony, you talked about this guy being an employee of Davis Brothers or one of Davis Brothers's guys?

A. Yes, like Davis Brothers is one of my guys. If you don't understand what I'm trying to say–if I could express myself, in construction there may be a hundred guys on the job. As far as I'm concerned, I'm the project superintendent, they're working for me. So I say, "That guy works for me."

Q. Everyone is working for you?

A. Well, basically. So, I said, "That guy works for Chris."

Q. Because he's a subcontractor to Davis Brothers?

A. Yes, but he works for him.

Messina walked the entire project every night before he left. On April 2, he went to the roof of Building C after the compliance officers left (Tr. 138):

Q. So, based upon what you saw when you went to the roof of Building C, based upon your observation of the employee, did you reach a conclusion as to what he was doing up there?

A. Yes, it was what I said. He was just putting the beams in place, getting ready to deck it.

As the general contractor's project superintendent, Messina was involved in the day-to-day scheduling and construction process for the Pinnacle Palms apartments. Based upon his 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.

Did Davis Brothers Exercise Supervisory Control Over RMC's Employees?

The Review Commission has held that an employer on a worksite with multiple employers may possess sufficient control over the entire worksite "to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors." *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1185 (No. 1275, 1976). The Review Commission has held that an employer is responsible for violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite. *Centex-Rooney Construction Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992). This duty applies to an employer even if its own employees are not exposed to the hazard. *Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992).[2]

Davis Brothers's office is located in Boca Raton, Florida, and the worksite at issue in this case was located in West Palm Beach, Florida. Florida is located in the Eleventh Circuit, to which this case could be appealed. "Where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has generally applied the precedent of that circuit in deciding the case–even though it may differ from the Commission's precedent." *Kerns Brothers Tree Service*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). In *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000), the Commission held that case law decided by the former Fifth Circuit rejecting the multi-employer worksite doctrine does not preclude application of the Review Commission's precedent regarding the doctrine in the Eleventh Circuit.[3] This case

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[2] Davis Brothers argues that the multi-employer worksite doctrine applies to general contractors and that, as the shell subcontractor, it did not possess the degree of control over the worksite that a general contractor has. As the shell contractor, Davis Brothers subcontracted with the specialty subcontractors to perform the work. Davis Brothers performed no actual work on the project--it oversaw the scheduling and adequacy of the work done by its subcontractors (Tr. 135-136). BJ&K did not directly oversee the work done by the Davis Brothers's subcontractors (Tr. 180-181). Messina testified that if he had a problem with the decking, he would go to Veller, not to RMC's foreman (Tr. 137). The written contracts into which the specialty subcontractors entered were with Davis Brothers, not BJ&K (Exhs. C-19 & R-4). The relationship between Davis Brothers and RMC was the equivalent of a relationship between a general contractor and a subcontractor. The multi-employer worksite doctrine applies to Davis Brothers.

[3] Decisions of the former Fifth Circuit entered before October 1, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206, 1209 (11th Cir. 1981) (en banc). Having reviewed cases in both the Former Fifth and in the Eleventh Circuits, *McDevitt* concluded that it was ambiguous whether or not the Eleventh Circuit would consider itself bound by the decision in the Former Fifth.

will be analyzed under the multi-employer worksite doctrine as developed under Commission precedent.

OSHA Directive, CPL 2-0.124 ("Multi-Employer Citation Policy") was issued by the Secretary on December 12, 1999. While OSHA CPLs and other directives are not binding on the Commission, the Commission has looked to them in the past as an aid in interpreting standards. *Drexel Chemical Company*, 17 BNA OSHC 1908, 1910, footnote 3 (No. 94-1460, 1997).

The CPL sets out a two step process to determine whether an employer should be cited under the multi-employer worksite policy. The first step is to determine whether the employer in question was a creating, exposing, correcting, or controlling employer. Only if the employer falls into one of these categories can it be cited under the policy. Step two is to determine whether the employer met its obligations with respect to OSHA requirements. CPL 2-0.124, ¶ X.A.1 and 2.

The Secretary argues that Davis Brothers was a controlling employer with regard to RMC. Davis Brothers argues that it did not have authority over RMC sufficient to make it a controlling employer under the multi-employer worksite doctrine.

The CPL lists four types of control that result in a controlling employer categorization: (a) control established by contract, (b) control established by a combination of other contract rights, (c) architects and engineers, and (d) control without explicit contractual authority. CPL 2-0.123, ¶ X.E.5.a-d.

Control Established by Contract

The CPL provides (Paragraph X.E.5.a, emphasis in original):

> In this case, **the Employer Has a Specific Contract Right to Control Safety:** To be a controlling employer, the employer must itself be able to prevent or correct a violation or to require another employer to prevent or correct the violation. One source of this ability is explicit contract authority. This can take the form of a specific contract right to require another employer to adhere to safety and health requirements and to correct violations the controlling employer discovers.

Exhibit R-4 is a copy of the contract between Davis Brothers (Contractor) and RMC (Subcontractor). The contract gives Davis Brothers broad authority over scheduling and the manner in which the work is performed. Davis Brothers has the right to reject work it finds inadequate, and

to terminate the subcontractor or exact penalties from it. With regard to safety, the contract provides in pertinent part (Exhibit R-4, p. 5, emphasis in original):

> **Subcontractor** will adhere to all OSHA requirements.
>
> **Subcontractor** shall comply with applicable OSHA, State, County and local safety laws, regulations and ordinances in addition to complying with safety measures set forth by the **Contractor**.
>
> **Subcontractor** shall take all reasonable safety precautions with respect to his Work and shall comply with all safety measures initiated by the **Contractor** and will abide by all applicable laws, ordinances, regulations, rules, and orders of any public authority for the safety of persons or property in accordance with the requirements of the Contract Documents.
>
> **Subcontractor will inspect the building, before he sends his workforce into that building, for any unsafe conditions and be ultimately responsible for his own workplace safety.**
>
> **Subcontractor** must *immediately* report to **Contractor** any injury (large or small) to **Subcontractor's** employees or agents.
>
> All workmen must wear approved work shoes and any other protective gear needed to perform their duty. This includes all fall protection gear.
> . . .
>
> **Subcontractor** shall maintain the jobsite clean and free of waste material, debris and trash. Clean up on a daily basis is mandatory. All construction waste material, debris and trash must be placed into the on site dumpster if provided or with approval placed in front of the building. There is a $50.00 fine for the first offense, termination of the contract for the second offense. If **Contractor** has to clean jobsite, **Subcontractor** will be charged for the expense of cleaning jobsite.

The contract also establishes Davis Brothers's broad control over the subcontractor (Exhibit R-4, p. 2):

> The **Subcontractor** may be ordered in writing by the **Contractor**, without invalidating this Contract, to make changes in the Work within the general scope of this Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.
>
> . . .

> If the **Subcontractor** at any time shall refuse, fail or neglect to supply adequate and competent supervision or a sufficiency of properly skilled workmen or materials of the proper quality or quantity, or fail in any respect to prosecute the "Scope of Work" with promptness and diligence . . . the **Contractor** shall have the option . . . to provide any such labor or materials and to deduct the cost thereof from any money due or money which becomes due thereafter to the **Subcontractor** by the **Contractor.** The **Contractor** shall also be at liberty to terminate the Contract . . .

Davis Brothers not only had contractual control over RMC's finished work, it had contractual control over the manner in which RMC performed the work. If Davis Brothers believed that RMC needed a larger crew, or more materials, it could demand that RMC supply them or face financial penalties or termination. The contract provides a specific penalty for housekeeping violations. The wording of the contract leaves little doubt that Davis Brothers had the authority to compel RMC to abate any other safety violations it detected. Davis Brothers was a controlling employer over RMC under the multi-employer worksite doctrine.

Does the Cited Standard Apply?

Davis Brothers stipulated in its joint response with the Secretary to the pre-hearing order that § 1926.501(b)(1) "applied to work being done on the seventh floor of Building C at the worksite by Davis Brothers or by Davis Brothers's subcontractors." At the time of the stipulation, the Secretary had cited Davis Brothers because on April 2, 2002, an employee was allegedly "exposed to a fall hazard of approximately 56 feet while working next to the edge of a roof without a fall protection system."

As the hearing progressed, the evidence mounted establishing that the photographed employee was not actually at the edge of the roof. Diaz and Sotak were looking up at the employee from a distance of 300 feet. Building A was three stories high while Building C was seven stories high. The employee's feet were not visible from that angle and the compliance officers could not judge how far the employee was standing from the edge of the roof. They declined to estimate the distance at the hearing (Tr. 30, 65, 101). Messina thought, based on his years in the construction industry, that the employee was 8 to 10 feet from the edge (Tr. 132).

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. The plywood decking had not yet been placed around the perimeter of the roof. Any fall would be from the decking to the

6th floor 8 feet below (Tr. 133, 138). The record establishes that the photographed employee was not exposed to a fall of 56 feet.

The second morning of the hearing, the undersigned granted the Secretary's motion to amend, alleging in the alternative that the employee was exposed to a fall of 8 feet (Tr. 234). In its post-hearing brief, Davis Brothers asserts that its stipulation that § 1926.501(b)(1) applied to the cited working conditions was based upon the Secretary's allegation that the employee was exposed to an exterior fall of 56 feet. Davis Brothers did not stipulate that the cited standard applies to an interior 8-foot fall. The undersigned agrees with Davis Brothers. The actual working conditions on the roof of Building C were substantially different from the conditions as represented by the Secretary in the citation and at the beginning of the hearing. Davis Brothers is not bound by a stipulation based upon an assumption of facts found to be erroneous.

Davis Brothers argues that there is a standard that is more applicable to the April 2 working conditions on the roof of Building C: § 1926.451(g)(1), a scaffolding standard. Section 1926.451(c)(1) provides:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level. Paragraphs (g)(1)(i) through (vii) of this section establish the types of fall protection to be provided to the employees on each type of scaffold. Paragraph (g)(2) of this section addresses fall protection for scaffold erectors and dismantlers.

Davis Brothers argues that the decking being placed on the roof of Building C was supported by scaffolding, and that the scaffolding standard only requires fall protection when the scaffold is more than 10 feet above a lower level. Because the decking was only 8 feet above the lower level, Davis Brothers argues, no fall protection was needed and it was in compliance with the applicable standard.

The problem with Davis Brothers's theory is that there is no evidence that the photographed employee was standing on scaffolding at the time the compliance officers observed him. There is some question whether RCM was actually using scaffolding to set the decking in place. Phillip Bradley is the roaming supervisor for RMC (Tr. 238). Bradley at first attempted to follow Davis Brothers's lead in claiming that the supporting scaffolding had a double purpose. As he was pressed on this characterization, Bradley hedged on the use of the I-beam and plywood structure:

A. Once you establish the first sheet [of plywood], you're standing on the plywood. Once you establish the first sheet of plywood, you would always lay the next piece of decking off of the plank.

Q. So, once you've established the plywood, once you have laid the first piece of plywood, are there times when the guys are still working off of beams when they are laying the rest of the decking?

A. Yes.

Q. When are those times?

A. Well, the beams go first, so guys are spreading beams. As soon as they have enough beams spread that will hold the plywood, the plywood starts. So the guys continue with the plywood as the other guys continue with the beams.

Q. All right, so you have one set of guys up there that are walking on beams and laying beams?

A. Well, they get laid up there. The beams get laid on top of the stringers. They are then walked out. Some plywood is laid. You start laying plywood and as you need more, the crane will give you more plywood, and it will give you more beams and you will keep continuing out the process. So the guys that are spreading beams are actually walking on plywood and on beams.

(Tr. 314-315).

After counsel for Davis Brothers objected to questions to Bradley from counsel for the Secretary regarding training in scaffolding, counsel for the Secretary responded:

Secretary's counsel: Well, my understanding is that [Davis Brothers] is claiming that the decking is scaffolding and –

A. Decking and scaffolding.

Judge Spies: Wait a minute. I have an objection. What are you trying to explore with the scaffolding in construction; who is qualified?

Secretary's counsel: Well, whether or not this is actually scaffolding, and if it's scaffolding, obviously, they would have competent people to erect the scaffolding and inspect the scaffolding, and scaffolding a scaffold.

Judge Spies: Please don't belabor this, though. You might inquire as to the type of scaffolding it is. I didn't hear anybody say they got on it except maybe with a foot.

A. How about if I change it to a decking system, and we don't call it scaffolding?

Secretary's counsel: Okay. What is the purpose of the decking system?

A. To hold the deck in place.

Secretary's counsel: Does it have any other purpose?

A. No.

Secretary's counsel: Would you consider a primary purpose of this to be to support employees or materials?

A. Well, it's to support the deck, and the employees would stand on top of the deck.

Q. If you were not going to pour concrete on to this platform, would you need that scaffolding to hold that up once you set all of your beams?

A. If I wasn't going to pour concrete on top of it, I wouldn't be putting it up. Its only purpose is to hold the concrete.

(Tr. 318-319).

Davis Brothers has not shown that a work scaffold existed on the roof of Building C, much less that the photographed employee was standing on it. Davis Brother's contention that § 1926.451(g)(1) is a more applicable standard than the one cited is rejected. Section 1926.501(b)(1) applies to the cited conditions.

Did Davis Brothers Violate the Terms of the Standard?

Section 1926.501(b)(1) requires that an employee exposed to a fall hazard of 6 feet or more be protected by the use of a guardrail system, a safety net system, or a personal fall arrest system. It is undisputed that neither Davis Brothers nor RMC had a guardrail system or a safety net system in place on the roof of Building C. The compliance officers testified that the photographed employee was not tied off (Tr. 115), although the photographs are too blurry to be of use in verifying this. However, Messina, who emerged as the most credible and informative witness at the hearing, testified that it was his opinion that the employee had not been tied off (Tr. 119). Neither the employee witnesses from Davis Brothers nor RMC claimed outright that the employee was tied off.

It is determined that the photographed employee was not protected by the use of any of the approved means of fall protection.

Was the Employee Exposed to a Fall Hazard?

The question of exposure is a factual one. *Dic-Underhill, a Joint Venture,* 4 BNA OSHC 1489, 1490 (No. 3042, 1976).

> The Secretary may prove employee exposure to a hazard by showing that, during the course of their assigned working duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces, employees have been in a zone of danger or that it is reasonably predictable that they will be in the zone of danger. . . . The zone of danger is determined by the hazard presented by the violative condition, and is normally that area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent.
> *RGM Construction Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995).

None of the factors enumerated above are known about the photographed employee. It is unknown whether he was photographed while in the course of his assigned work duties or what his assigned work duties were. It is unknown where he was standing at the time he was photographed. Messina speculated that the employee was carrying a beam to perform decking, but that was in response to a request for his speculation. Nothing concrete is known about the employee. He was not interviewed and no one on the roof of Building C was interviewed during the inspection, and no one on the roof that day testified at the hearing. No photographs exist that show the configuration of the decking at the time the photograph was taken. The Secretary contends that her inability to identify the employee resulted from the RMC employees being sent home once it was known that OSHA was on the site. Although the Secretary claims Davis Brothers sent the employees home (Tr. 360), the record on this issue is not clear (Tr. 260, 416). Bradley testified that the RMC employees were gathered in the parking lot and available for interviews while the compliance officers were still on site (Tr. 260-262). The Secretary claims she was thwarted in her attempts to identify and interview the RMC employees. Davis Brothers contends that the compliance officers showed no interest in interviewing the RMC employees.

It is generally not difficult to prove exposure to a fall hazard, since the Secretary need only prove that an employee had access to the zone of danger, and not actual exposure to the hazard itself. But some specific evidence regarding the employee who was allegedly exposed must be adduced.

A violation must be predicated upon more than a blurry image of a nameless employee engaged in an unknown activity. The Secretary has failed to establish that the photographed employee was exposed to an interior fall hazard of 8 feet. The citation is vacated.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

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

Item 1 of the citation, alleging a repeat violation of § 1926.501(b)(1) is vacated, and no penalty is assessed.

/s/
NANCY J. SPIES
Judge

Date: June 30, 2003