United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ALL STAR REALTY CO., INC., Respondent.	OSHRC Docket No. 12-1597

ON BRIEFS:

Alek Felstiner, Attorney; Scott Glabman, Senior Appellate Attorney; Heather Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Richard B. Aldridge, President; All Star Realty Co.
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

After two individuals were observed working at a strip mall, one of whom was on the roof of a building without fall protection or a proper ladder, the Occupational Safety and Health Administration issued a citation to All Star Realty Company, which had a contract to tear down the building. Administrative Law Judge Sharon D. Calhoun vacated the citation, and the Secretary sought review of the judge's decision. Because we find that the Secretary has failed to show that All Star employed either of the two individuals observed at the site, we vacate the citation.

BACKGROUND

All Star, which is in the construction and demolition business, was awarded a contract for a strip mall demolition project in Birmingham, Alabama. In accordance with its usual practice, it

engaged subcontractors rather than hire employees itself to do the demolition project. Work on the project had not yet begun when All Star's owner and president, Richard Aldridge, was approached by two brothers who had previously performed odd jobs for Aldridge on his farm. The brothers said they were looking for work, and Aldridge told them that his "dad needs a roof on his shed at his home, and I'm about to tear these buildings down and you can use some of this metal [roofing] to save him money, and just charge him labor." Aldridge also testified that he told the brothers they could have the roofing material "[o]nly after I knocked the buildings down and it was safe to get it."

Thereafter, an OSHA compliance officer drove by the strip mall and saw one of the brothers ("F.M.") on the roof of a building and the other brother on the ground below. F.M. was using a hand tool to remove metal roofing from the roof framing, which had a 6/12 pitch and was 22 feet above the ground. A 24-foot-long, portable extension ladder was being used to access the roof, and no fall protection was at the site. The CO initiated an inspection and questioned F.M. who, according to the CO, stated that he: (1) had begun working at the strip mall that day; (2) worked for Aldridge; (3) had worked for "Aldridge Construction" for two years; (4) was paid by Aldridge via check; and (5) had last been paid seven days earlier. F.M. then phoned Aldridge, who arrived at the site and explained to the CO that his company, All Star, had been hired to tear down the strip mall, but that the brothers were not his employees. Based on this inspection, OSHA issued All Star a citation alleging serious violations of two provisions of the fall protection standard and two provisions of the stairways and ladders standard.[1]

Following a hearing, the judge concluded that All Star was the brothers' employer, but she nonetheless vacated the citation on the ground that the Secretary failed to establish that the company had knowledge of the violative conditions. On review, the Secretary contends that the

[1] The cited provisions are 29 C.F.R. § 1926.501(b)(11) ("Each employee on a steep roof with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems with toeboards, safety net systems, or personal fall arrest systems."); 29 C.F.R. § 1926.503(a)(1) ("The employer shall provide a training program for each employee who might be exposed to fall hazards."); 29 C.F.R. § 1926.1053(b)(1) ("When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access . . . ."); and 29 C.F.R. § 1926.1060(a) ("The employer shall provide a training program for each employee using ladders and stairways, as necessary.").

judge's ruling on knowledge was error,[2] while All Star maintains—as it has from the outset of these proceedings—that the brothers were not its employees.

DISCUSSION

"[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035, 2004-2009 CCH OSHD ¶ 32,804, p. 52,506 (No. 97-1631, 2005) (consolidated). In determining whether the Secretary has satisfied this burden, the Commission applies the common law agency doctrine enunciated in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), which focuses on "the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 323 (internal quotation marks and citation omitted). *See Sharon & Walter Constr. Co.*, 23 BNA OSHC 1286, 1289, 2009-2012 CCH OSHD ¶ 33,103, pp. 54,896-97 (No. 00-1402, 2010) (applying *Darden*). Many factors are relevant to this inquiry, including the work location, who set the work hours, who provided the tools being used, the duration of the relationship between the parties, and the method of payment. *Darden*, 503 U.S. at 323-24. But "the primary focus is whether the putative employer controls the workers." *Allstate Painting*, 21 BNA OSHC at 1035, 2004-2009 CCH OSHD at p. 52,506.

Here, we disagree with the judge that the Secretary has established an employment relationship between All Star and the brothers. Apart from the fact that the strip mall was going to be an All Star worksite, there is virtually no evidence that All Star controlled the brothers when they were found at the site at the time of the inspection. Indeed, the record contains no evidence that the company prescribed work hours, work methods, or any other aspect of the activities the CO observed. *Compare Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1867, 2004-2009 CCH OSHD ¶ 32,877, p. 53,197 (No. 02-0865, 2007) (finding employment relationship where "supervisors provided first-line direction and meted out discipline to its contract security

[2] We agree that the judge erred in her knowledge analysis. According to the judge, constructive knowledge was lacking because "[n]o one from [All Star's] management was at the jobsite," and "Aldridge did not know the [brothers] were [there]." Constructive knowledge, though, depends on "whether, with the exercise of reasonable diligence, [the employer] could have discovered the [violative condition]." *Donohue Indus., Inc.*, 20 BNA OSHC 1346, 1348-49, 2002-2004 CCH OSHD ¶ 32,679, p. 51,500 (No. 99-0191, 2003). Therefore, neither Aldridge's absence from the strip mall alone, nor his lack of actual knowledge, would establish a lack of constructive knowledge. However, because we find, as a threshold matter, that the Secretary has failed to establish an employment relationship between All Star and the brothers, we need not address whether knowledge was otherwise established.

personnel"), *aff'd*, 296 F. App'x 211 (2d Cir. 2008) (unpublished). This is because the record establishes that Aldridge never even authorized the brothers to remove the metal roofing from the strip mall building's roof in the first place. On the contrary, he told them they could have the material only after All Star had taken the strip mall down, and he "was as surprised that they were up [on the roof] as [the CO] was."[3] That the brothers disregarded the one thing Aldridge asked of them further supports a finding that All Star lacked any control over them whatsoever.

The Secretary has produced so little evidence of control that when we apply the remaining *Darden* factors to this record, the evidence either weighs clearly against an employment relationship or is equivocal at best. Regarding the provision of tools, there is no evidence that the ladder or hand tool the brothers used on the day of the inspection belonged to All Star—in fact, the CO testified that she saw no demolition equipment at the site, which is consistent with the company's contention that it had not yet begun its work. As to the duration of the relationship, the only evidence cited by the Secretary is the CO's testimony that F.M. said he had worked for "Aldridge Construction" for two years. But Aldridge's unrebutted testimony establishes that the brothers' previous work consisted of odd jobs for Aldridge that took place on his farm. This suggests that the prior jobs were done for Aldridge personally, not for All Star. Moreover, the record is silent as to how many jobs the brothers did, how often they did them, and how long each job lasted.

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[3] The judge did not credit Aldridge's testimony in this regard because she found that "[t]here [was] insufficient credible evidence to substantiate [his] claim." We find that the judge's basis for rejecting Aldridge's testimony is at odds with the record. Aldridge's testimony that he told the brothers they could have the metal roofing only after the building was taken down is unrebutted—there is no evidence that the CO ever asked either brother if Aldridge gave the instructions he described, and no other witnesses, aside from the CO and Aldridge, even testified at the hearing. The judge discredited Aldridge's claim based on F.M.'s statement to the CO that "he was working for Aldridge," and the fact that "[the CO] testified confidently regarding what she was told by [F.M.]." But F.M.'s bare statement that he was working for Aldridge does not necessarily conflict with Aldridge's testimony regarding when the brothers could remove the roofing material, and so the CO's "confiden[ce]" regarding what F.M. said is irrelevant. Thus, we credit Aldridge's unrebutted testimony that he told the brothers they could have the metal roofing from the strip mall's roof only after the building was torn down. *See Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828 (5th Cir. 1975) (stating that "[t]he judge's 'decision' is merely a report, weighty of course," but "the Commission itself is charged with findings of fact"); *Metro Steel Constr. Co*, 18 BNA OSHC 1705, 1706-07, 1999 CCH OSHD ¶ 31,802, pp. 46,666-67 (No. 96-1459, 1999) (Commission is "in as good a position as the judge to determine the facts," given a credibility determination not based on demeanor or other factors "peculiarly observable by the judge").

Regarding method of payment, the Secretary points to two statements: the CO's testimony that F.M. told her that he had "worked for [Aldridge] for two years, and . . . was paid by check," and Aldridge's testimony that the brothers "could get [the metal roofing]" from this jobsite, which the Secretary contends was payment-in-kind. But even if F.M. had previously received checks,[4] there is no evidence that they were from All Star. In fact, according to the CO, F.M. said he was paid "by Mr. Aldridge," and the only record evidence of the nature of the prior work performed by either brother—Aldridge's testimony—shows that it consisted of "odd jobs" "at [Aldridge's] farm." In addition, the record does not show that Aldridge authorized the brothers to "get" the metal roofing as payment-in-kind. Rather, Aldridge's uncontradicted testimony was that the roofing was for his father—he specifically told the brothers that they could "use some of this metal [roofing] to save [Aldridge's father] money." And even if the roofing were payment-in-kind, it would constitute payment by the job, rather than by the amount of time worked, suggesting a non-employment relationship. *See* Restatement (Second) of Agency § 220 (1958) (stating that "method of payment . . . by the time" suggests a master-servant relationship, while "by the job" suggests that "one acting for another is . . . an independent contractor"); *see also Darden*, 503 U.S. at 322-23 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989), and following its adoption of the common law agency doctrine); *cf. Timothy Victory*, 18 BNA OSHC 1023, 1027, 1995-1997 CCH OSHD ¶ 31,431, p. 44,449 (No. 93-3359, 1997) (finding Secretary's assertion of employment of sea urchin divers not substantially justified where, in addition to other factors, divers were given a portion of their catch rather than paid a set rate for their labor).

As for the final *Darden* factors, there is no evidence that All Star had the authority to assign the brothers additional work (despite the Secretary's dubious argument that the potential repair of Aldridge's father's shed was a *company* "assignment"), that any assistants were hired or paid, that the brothers were given any employee benefits, or that any tax treatment suggested an employment arrangement. *See Darden*, 503 U.S. at 323-24. At bottom, the record shows that Aldridge was simply doing the brothers (and his father) a favor by offering the brothers the opportunity to salvage materials from his company's worksite for use on a potential job for his father. The brothers disregarded the one condition Aldridge placed on his offer by prematurely

[4] F.M. never provided the pay stub he promised to the CO.

going to the strip mall and removing the material from the roof themselves, but this did not make them All Star's employees.[5]

ORDER

We vacate Citation 1, Items 1a, 1b, 2a, and 2b.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: February 3, 2014

[5] We are troubled by the dearth of evidence of an employment relationship between All Star and the brothers. Additionally, we are concerned that the Secretary has taken liberties with the record. For example, several times in his brief the Secretary suggested that Aldridge explicitly told the brothers to remove the metal roofing from the strip mall's roof. In support of all but one of these statements, the Secretary cites page 52 of the hearing transcript. But on page 52 is Aldridge's unequivocal testimony that he told the brothers "they could get [the metal roofing], but only after I knocked the buildings down," and just five pages later is Aldridge's testimony that he "told [the brothers] they could get some metal to work at my father's shed but only after I tore the buildings down and it was safe." And while mischaracterization of the record is troubling enough, the Secretary also speculates, without any evidentiary foundation, that "a group of people" Aldridge testified he could "call on" to help with work might be "employees whose income All Star does not report and whose benefit taxes the company does not pay." (Sec'y Br. at 12-13.)

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. All Star Realty Company, Incorporated d/b/a All Star Realty & Construction, Co.[6] Respondent.	OSHRC Docket No. **12-1597** Simplified Proceedings

Appearances:

Brian D. Mauk, Esquire, U. S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For Complainant

Richard Aldridge, President, All Star Realty & Construction, Co., Clay, Alabama
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

All Star Realty Company, Incorporated d/b/a All Star Realty & Construction, Co. (All Star) contests a four-item citation issued to it by the Secretary on July 9, 2012. The citation alleges serious violations related to the Occupational Safety and Health's (OSHA) fall protection, ladders and training standards. Occupational Safety and Health Compliance Officer (CSHO) Phyllis Battle recommended the citation based on her inspection of a jobsite at Roebuck Parkway[7] in Birmingham, Alabama, where the Secretary alleges All Star was working on May 4, 2012. OSHA proposes a penalty of $2,000.00 for grouped items 1(a) and 1(b) alleging violations

[6] At the hearing, Richard Aldridge, owner and president of Respondent testified that the proper name of the business is All Star Realty Company, Incorporated (Tr. 48). According to Aldridge, business cards for the company include the word "Construction" to inform others they are also in the construction business (Tr. 48). Therefore, the style of this matter is hereby amended to specify the correct legal entity cited.

[7] The inspection site is identified as Roebuck Parkway, Birmingham, AL on the Citation and Notification of Penalty; however the descriptions of the violations refer to the inspection site as Center Point Parkway, Birmingham, AL (See Citation and Notification of Penalty). The testimony at the hearing identified the inspection site as Roebuck Parkway. Based on the hearing testimony and exhibits, the undersigned concludes that Roebuck Parkway and Center Point Parkway refer to the same inspection site.

of 29 C.F.R. § 1926.501(b)(11) for failing to protect employees from falling from a steep roof, and 29 C.F.R. § 1926.503(a)(1) for failing to train employees regarding fall hazards. Additionally a penalty of $2,000.00 is proposed for grouped items 2(a) and 2(b) alleging violations of 29 C.F.R. § 1926.1053(b)(1) for a ladder not extending at least 3 feet above the landing, and 29 C.F.R. § 1926.1060(a) for not training employees on fall hazards associated with work being performed using ladders. The Secretary proposes total penalties of $4,000.00 for these alleged violations.

All Star timely contested the citation. This case was designated for Simplified Proceedings under Subpart M (§§ 2200.200-211) of the Commission's Rules of Procedure. The undersigned held a hearing in this matter on Thursday, December 6, 2012, in Birmingham, Alabama. For the reasons discussed below, the undersigned vacates Citation No. 1, Items 1(a), 1(b), 2(a) and 2(b).

Jurisdiction

At the hearing, Respondent disputed that jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act (Tr. 9-10). The parties stipulated, however, that at all times relevant to this action, All Star was an employer engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 8, 10).

All Star was established by Richard Aldridge and was incorporated in the state of Alabama in 1978 (Tr. 49). Aldridge is the owner and President of All Star (Tr. 49). Other officers of the corporation include Aldridge's brother, who is the vice president, and Aldridge's sister, who is the secretary-treasurer (Tr. 49). All Star initially was engaged in real estate construction of homes and commercial buildings (Tr. 50). It currently engages in remodeling and demolition work (Tr. 50). Aldridge hires subcontractors to perform work for the business (Tr. 54). Subcontractors were hired by Aldridge to perform the demolition work at the cited location (Tr. 54).

The Act applies to a "person engaged in a business affecting commerce who has employees." 29 U.S.C. § 652(5), *see Don Davis,* 19 BNA OSHC 1477, 1479 (No. 96-1378, 2001). Section 3(4) defines "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." All employees are covered under the Act, including a company's president and vice president when

they are performing work for the employer. *D & H Pump Service, Inc.*, 5 BNA OSHC 1485 (No. 16246, 1977); *Hydraform Products Corp*., 7 BNA OSHC 1995 (No. 78-527, 1979). All Star is a corporation. Its president performed work for the company as evidenced by the hiring of contractors to perform work on behalf of the business. The undersigned finds All Star is an employer with employees in a business affecting interstate commerce. Therefore, jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Act.

Background

CSHO Battle was driving on Roebuck Parkway in Birmingham, Alabama, on May 4, 2012, when she observed a fall hazard at what appeared to her to be a jobsite (Tr. 15). As a result, she stopped to conduct an inspection pursuant to the Local Emphasis Program on falls (Tr. 14, 43-44). The site was a strip mall which had been damaged by a recent tornado in the area (Tr. 19, 29). Battle concluded the strip mall was in the process of being torn down to be rebuilt (Tr. 29). She initiated her inspection at approximately 11:30 a.m. that day. There were only two people at the jobsite when Battle began her inspection.

When Battle arrived at the jobsite, she observed one individual without fall protection, on a 6/12 pitch roof which was 22 feet from eve to ground (Tr. 15, 23). This person was identified as Filipe Marquez (Tr. 16). He identified the person working on the ground as his brother (Tr. 17, 45). Marquez appeared to be removing material from the roof using a tool (Tr. 15). Battle also observed a ladder on the site that did not extend three feet above the upper landing surface (Tr. 34). Battle spoke with both individuals at the site. They told her they had begun working that morning (Tr. 25). Battle asked Marquez whom he worked for, he responded Aldridge, and that he worked for Aldridge Construction for two years (Tr. 17, 45). Marquez told Battle he had no fall protection on the site (Tr. 17). She also was informed that the ladder onsite was used by both individuals to access the roof (Tr. 21, 22). Battle inquired of the men whether they had received any fall protection and ladder training. They had not (Tr. 33, 35).

Marquez called Aldridge by telephone while Battle was onsite. Aldridge arrived at the site shortly thereafter. When Aldridge arrived, he told Battle the two individuals at the site did not work for him, although they had worked for him in the past (Tr. 27-28, 29). Aldridge also explained to Battle that the two men asked him if they could have some metal, and that they had come over to get the metal off the roof (Tr. 27-28).

As a result of Battle's inspection, OSHA issued the citation at issue in this matter.

Discussion

The issuance of the citation at issue in this matter is based on the two-prong premise that (1) All Star was engaged in work activity at the cited location and (2) that the two individuals at the site were employees of All Star. For the reasons that follow, the undersigned finds that All Star was engaged in work activity at the cited location. Further, the undersigned finds that the two individuals at the site were employees of All Star.

All Star was Engaged in Work Activity at the Cited Location

All Star secured a contract to remove the building at the cited location (Tr. 51). However, Aldridge contends All Star had not begun work at the jobsite at the time of the inspection as evidenced by the fact that it had no equipment onsite (Tr. 56-57). The undersigned disagrees. Although All Star may not have had its subcontractors on the jobsite pursuant to the contract, removal of the metal from the roof was authorized by Aldridge and had begun. Aldridge admits he authorized the Marquez brothers to get the metal so they could work on his father's shed (Tr. 57). He claims however, the men were to obtain the metal after the building was torn down (Tr. 57). There is insufficient credible evidence to substantiate this claim. Marquez told Battle he was working for Aldridge at the time of the inspection (Tr. 17). Work activity involving the removal of the metal from the roof was occurring at the jobsite. Battle testified confidently regarding what she was told by Marquez. The undersigned finds Battle's testimony regarding what Marquez told her to be reliable and credits it over Aldridge's testimony and Marquez's Affidavit to the contrary (Tr. 17, 26-27; Exh. R-1). The credible evidence supports a finding that All Star was engaged in work activity at the cited location at the time of the OSHA inspection.

The Two Individuals at the Site were Employees of All Star

All Star contends that the two individuals on the jobsite were not its employees. Section 652(6) of the Act provides the term "employee" means an employee of an employer who is employed in a business of his employer which affects commerce." The Commission utilizes the "economic realities test" as described in *Loomis Cabinet Co*., 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992) to determine whether an employer/employee relationship exists. The relevant factors for determining employer/employee status under the applicable "economic realities test" are: (1) whom the workers consider to be their employer; (2) who pays the workers' wages; (3)

who is responsible for controlling the workers' activities; (4) who has the power (as opposed to the responsibility) to control the workers; (5) who has the power to fire, hire, or modify the employment condition; (6) does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight; and (7) how are the workers' wages established. *Loomis Cabinet Co.*, *id.*, citing *Van Buren-Madawaska*, 13 BNA OSHC, 2157, 2158 (Nos. 87-214, 87-217, 87-450 thru 459, 1989) quoting *Griffin & Brand*, 6 BNA OSHC, 1702, 1703 (No. 14801, 1978). The "economic realities test" focuses on control. A slightly more specific analysis of control in determining the employment issue was set forth by the Commission in *Don Davis*, 19 BNA OSHC 1477, 1482 (No. 96-1378, 2001): control over the "manner and means of accomplishing the work" must include control over the workers and not just the results of their work. One who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set the worker's pay or work hours cannot be said to control the worker.

In the instant case the answers to each of these questions is All Star. The Marquez brothers considered All Star to be their employer. Their compensation was through All Star. The work activities were controlled by All Star. All Star had the power to control the workers, as well as their employment condition. All Star established the wages paid. Although Aldridge testified the Marquez brothers were at the jobsite without his knowledge, he admits that he authorized them to take the metal which was on the roof (Tr. 52). It is unclear as to the exact payment for their work; however some form of compensation was agreed upon whether in cash or "in kind". Workers being compensated "in kind" rather than in cash have been held to be employees. *Arlie R. Hawk General Contractor*, 4 BNA OSHC 1248 (No. 6688, 1976). Aldridge testified the metal was to be used for repairing a shed on his father's property, and he told the brothers about the metal on the building because they were looking for work (Tr. 52). According to Aldridge he was trying to help them get a small job for some gas money (Tr. 58). He told them to use the metal to repair his father's roof on his shed, and they could charge the father only for their labor (Tr. 52). Application of the "economic realities test" here shows the Marquez brothers were employees of All Star.

The Citation

The Secretary contends that All Star violated the following standards as follows:

Item 1a: Alleged Serious Violation of 29 C. F. R. § 1926.501(b)(11), alleges "On or about 05/04/12- Center Point Parkway, Birmingham, AL, employees removing metal roofing were not protected from falls of more than 20 feet".

Item 1b: Alleged Serious Violation of 29 C. F. R. § 1926.503(a)(1), alleges "On or about 05/04/12- Center Point Parkway, Birmingham, AL, employees had not been trained to recognize, control, minimize or eliminate fall hazards associated with the work being performed."

Item 2a: Alleged Serious Violation of 29 C. F. R. § 1926.1053(b)(1), alleges "On or about 05/04/12- Center Point Parkway, Birmingham, AL, the side rails of the extension ladder used by employees for accessing the roof did not extend at least 3 feet above the landing."

Item 2b: Alleged Serious Violation of 29 C. F. R. § 1926.1060(a), alleges "On or about 05/04/12- Center Point Parkway, Birmingham, AL, employees had not been trained to recognize, control, minimize or eliminate fall hazards associated with the work being performed using ladders."

The Secretary has the burden of establishing the employer violated the cited standards.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009). The first three elements of the Secretary's burden are essentially undisputed.

Applicability of the Standards

It is not disputed that the employees were engaged in removing metal roofing from the roof of the building, and that they used a ladder to access the building. This activity constitutes construction activity covered by Part 1926. The standards are applicable.

Noncompliance with the Terms of the Standards

It also is not disputed that the employees were not protected by fall protection while working on a 6/12 pitch roof, 22 feet from the lower level. Photographs taken by CSHO Battle depict an employee on the roof without fall protection in violation of § 1926.501(b)(11) (Exhs. C-2, C-3, C-4, C-6). All Star also does not dispute that the ladder used by the employees to

access the roof did not extend three feet above the upper landing surface, or that the ladder was not secured, in violation of § 1926.1053(b)(1). Battle observed and took photographs of the ladder. She testified that it neither was three feet above the upper landing surface, nor secured in any way (Tr. 22 ; Exh. C-3). Lastly, All Star does not challenge the Secretary's contention that the employees received no fall protection and ladder training. The employees told Battle they had received no such training as required by §§ 1926.503(a)(1) and 1926.1060(a) (Tr. 33). The Secretary has established the cited standards were violated.

Employee Access to the Violative Conditions

Access to the violative conditions is uncontroverted. Battle observed an employee working without fall protection and the employees told her they used the ladder to access the roof and that they had not been trained. The Secretary has established employee exposure.

Employer Knowledge

The only disputed element of the Secretary's case is whether All Star knew or could have known with the exercise of reasonable diligence of the violative conditions. The Secretary must establish actual or constructive knowledge of the violative conditions by All Star in order to meet her burden. In order to show employer knowledge of a violation the Secretary must show the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Engineered Form Co*.,12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). The Secretary contends "Respondent was well aware of these regulations and the need to protect employees on roofs. In fact, Mr. Aldridge testified that in the past, his business hired someone to conduct safety meetings. Though he expressly authorized these employees to remove the metal from the roof of this building, he did absolutely nothing to train or protect these employees while working on this roof." (Secretary's Brief, p. 6, citations and references omitted). The undersigned finds that this is insufficient to establish knowledge here. Aldridge, owner and president of All Star was not at the jobsite on the day of the inspection until after Battle had begun her inspection. Although he authorized the employees to remove the metal from the roof, according to Aldridge, he did not know the two men were at the jobsite on the day of the OSHA inspection. The undersigned finds Aldridge's testimony on this point to be credible.

The only employees of Aldridge onsite on the day of the OSHA inspection were the Marquez brothers. No evidence was presented at the hearing to indicate that either of the two was a foreman or even a lead man, from which either actual or constructive knowledge could be

imputed to All Star. An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Construction Inc*., 16 BNA OSHC 1995, 1998 (No 92-1022, 1994). "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp*. 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). See also *Dun Par Engineered Form Co*., 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer). The Secretary has not established actual knowledge through either of the Marquez brothers. No other employees were onsite from whom actual knowledge can be established.

When actual knowledge cannot be established, the Secretary can meet this element of her case by showing constructive knowledge. Here, however, there is insufficient evidence to establish even constructive knowledge. No one from management was at the jobsite. Further, Aldridge did not know the employees were at the jobsite. There is no basis for establishing constructive knowledge. The evidence is insufficient to establish that All Star had actual or constructive knowledge of the violative conditions. It is the Secretary's burden to adduce sufficient evidence to establish this element of her case. The Secretary has not met her burden of establishing a violation of the cited standards. The citation alleging violations of §§ 1926.501(b)(11), 1926.503(a)(1), 1926.1053(b)(1) and 1926.1060(a) is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1a of the Citation, alleging a serious violation of 29 C.F.R. § 1926.501(b)(11) is vacated and no penalty is assessed;

2. Item 1b of the Citation, alleging a serious violation of 29 C.F.R. § 1926. 503(a)(1) is vacated and no penalty is assessed;

3. Item 1b of the Citation, alleging a serious violation of 29 C.F.R. § 1926.1053(b)(1) is vacated and no penalty is assessed;

4. Item 2a of the Citation, alleging a serious violation of 29 C.F.R. § 1926.1060(a) is vacated and no penalty is assessed.

SO ORDERED.

/s/
SHARON D. CALHOUN
Judge

Date: February 4, 2013
Atlanta, Georgia