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. FAMA CONSTRUCTION, LLC, Respondent.	OSHRC Docket No. 19-1467

REMAND ORDER

Before: ATTWOOD, Chairman; and LAIHOW, Commissioner.

BY THE COMMISSION:

Following an inspection of a residential roofing project in Dawsonville, Georgia, the Occupational Safety and Health Administration issued Fama Construction, LLC, a roofing contractor, two citations alleging a total of three violations of various construction standards.[1] On January 10, 2023, Administrative Law Judge John B. Gatto granted the Secretary's motion for summary judgment and affirmed both citations.[2] Fama filed a Petition for Discretionary Review, arguing that the judge erred in granting the Secretary's motion. For the following reasons, we set aside the judge's decision and remand this case for further proceedings consistent with this order.

[1] Citation 1, Item 1 alleges a serious violation of 29 C.F.R. § 1926.20(b)(2) for failing to conduct frequent and regular inspections of the worksite, materials, and equipment. Citation 1, Item 2 alleges a serious violation of 29 C.F.R. § 1926.100(a) for failing to use head protection. Citation 2, Item 1 alleges a repeat violation of 29 C.F.R. § 1926.501(b)(13) for failing to use fall protection.

[2] The Secretary proposed a total penalty of $153,778 for the alleged violations and the judge reduced the penalty amounts he assessed for the affirmed violations. We note, however, that one of the assessed penalty amounts—"$5,8347"—is jumbled in both places where it appears in the judge's decision.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish there is no genuine dispute as to any material fact.[3] Fed. R. Civ. P. 56(a); *Trico Techns. Corp.*, 17 BNA OSHC 1497, 1500-01 (No. 91-0110, 1996); *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 2159 & n.2 (No. 87-214, 1989) (consolidated). The party moving for summary judgment has the burden of proof. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). "When determining if there is a genuine factual dispute, the fact finder must resolve all ambiguities and draw all reasonable inferences in favor of the non-moving party." *Ford Motor Co.—Buffalo Stamping Plant*, 23 BNA OSHC 1593, 1594 (No. 10-1483, 2011) (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002). Accordingly, "not only must there be no genuine dispute as to the evidentiary facts, but there must also be no controversy as to the inferences to be drawn from them." *Ford Motor Co.*, 23 BNA OSHC at 1594.

Here, the Secretary argued in his motion for summary judgment that "there is no genuine issue of material fact as to Fama's status as the employer of the [exposed] roofers" and, in the alternative, that "Fama was, at minimum, a controlling employer of the . . . worksite."[4] In response to the motion, Fama claimed that it was neither the employer of the exposed workers nor was it "liable as a controlling employer because it was not the general contractor, [and not] the employer with general supervisory authority over the worksite, [or] the employer in the best position to assure correction of the hazard." In granting the Secretary's motion for summary judgment, the judge did not analyze whether Fama was the employer of the exposed workers. Rather, he concluded that there was no genuine dispute of material fact regarding Fama's status as a controlling employer and that, as a controlling employer, no dispute that Fama was liable for the alleged violations.

"On a multi-employer worksite, a controlling employer is liable for a contractor's violations if the Secretary shows that [the controlling employer] has not taken reasonable measures

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[3] Federal Rule of Civil Procedure 56(a) provides, in relevant part, that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). *See* 29 C.F.R. § 2200.40(j) (applying FRCP 56 to motions for summary judgment in Commission proceedings).

[4] We note that the Secretary's motion was titled "Complainant's Renewed Motion for Summary Judgment" because he had previously filed a motion for summary judgment, which was denied.

to 'prevent or detect and abate the violations due to its supervisory authority and control over the worksite.' " *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129, at *4 (OSHRC Feb. 1, 2019) (citing *Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994)); *see Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1709 (No. 96-1330, 2001) (consolidated) (finding that a controlling employer at a multi-employer worksite is "responsible for taking reasonable steps to protect the exposed employees of subcontractors"), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003). It is well-established that a controlling employer has a "secondary safety role" and therefore its "duty to exercise reasonable care 'is *less than* what is required of an employer with respect to protecting its own employees.' " *Suncor*, 2019 WL 654129, at *4, 6-7 (citing *Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1781 (No. 03-1622, 2009), which quotes OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy X.E.2 (Dec. 10, 1999) (emphasis added)); *see, e.g.,* MEP X.E.2 ("[T]he controlling employer is not normally required to inspect for hazards as frequently . . . as the employer it has hired.").

We find that the record supports the judge's conclusion that "there is no genuine issue of material fact in dispute that Fama is a controlling employer with regard to the cited worksite under the multi-employer worksite doctrine." *See, e.g., McDevitt Street Bovis Inc.,* 19 BNA OSHC 1108, 1109-10 (No. 97-1918, 2000) (finding evidence of employer's control at a multi-employer worksite includes its authority to demand compliance with safety requirements, stop subcontractor's work, and remove subcontractors from the worksite). In evaluating, however, whether there was a genuine dispute of material fact with respect to Fama's liability as a controlling employer, the judge did not apply the correct legal framework. While he recited the Commission's governing precedent that a controlling employer's compliance obligation is limited to taking "reasonable measures" to protect the exposed employees of another employer, the judge failed to analyze Fama's liability under that framework to determine whether there is any genuine factual dispute regarding the company's liability. Rather, the judge held Fama to the more stringent standard required of an employer whose own employees are exposed to the alleged violative conditions. We therefore remand this case to the judge to evaluate whether there are any issues of material fact regarding Fama's liability as a controlling employer under the correct legal

framework.[5] *Summit Contracting Grp., Inc.,* No. 18-1451, 2022 WL 1572848, at *4 (OSHRC May 10, 2022) (explaining that "[i]f a controlling employer has actual knowledge of a subcontractor's violation, the controlling employer has a duty to take reasonable measures to obtain abatement of that violation . . . [and] [i]n the absence of actual knowledge, the pertinent inquiry is whether the controlling employer met its obligation . . . to exercise reasonable care, i.e., to take reasonable measures to prevent or detect the violative conditions."); *Suncor*, 2019 WL 654129, at *7 (controlling employer's duty should be assessed "in light of objective factors—the nature of the work, the scale of the project, and safety history and experience of the contractors involved"). In doing so, the judge should specifically evaluate Fama's liability as a controlling employer at the cited worksite based only on the facts and record evidence in this case.[6]

We also find the judge erred in rejecting Fama's alleged affirmative defense of economic infeasibility on summary judgment grounds. According to Fama, compliance with the cited provisions would require it to hire an additional supervisor at a cost of $50,000 per year, an amount it claims would cause it to go out of business. In support of its argument, Fama points to a sworn statement given by its owner and three years of the company's tax returns. The judge summarily rejected Fama's assertion, stating "that for summary judgment purposes, Fama did not properly

[5] If the judge determines that Fama is not liable as a controlling employer under the correct legal framework, he will then need to determine if, as the Secretary has alleged, there is no genuine factual dispute regarding Fama's liability as an exposing employer (i.e., no dispute that Fama is the employer of the exposed workers *and* failed to meet its obligations as an exposing employer). *See S. Pan Servs. Co*., 25 BNA OSHC 1081, 1085 (No. 08-0866, 2014) ("[A]n employer whose own employees are exposed to a hazard or violative condition — an 'exposing employer' — has a statutory duty to comply with a particular standard even where it did not create or control the hazard."), *aff'd*, 685 F. App'x 692 (11th Cir. 2017) (unpublished).

[6] In his decision, the judge references another case he presided over involving Fama, which was recently affirmed by the Eleventh Circuit. *See Fama Constr., LLC. v. U.S. Dept. of Labor*, No. 19-13277, 2022 WL 2375708 (11th Cir. June 30, 2022). The Eleventh Circuit found in that case, which was not decided on summary judgment grounds, that there was "[s]ubstantial evidence to support [the judge's] finding that Fama 'did not meet its duty to exercise reasonable care' " as a controlling employer, but neither affirmed nor reversed the judge's finding that the workers were in fact Fama's employees. *Id.* at *5. We note that the record in that case has not been made part of the record here and therefore, as the judge himself noted, has no bearing on his consideration of the Secretary's summary judgment motion. *See* Fed. R. Civ. P. 56(c)(1)(A) ("A party asserting that a fact cannot be or is genuinely disputed must support that assertion by . . . citing to particular parts of materials in the record . . . .") Indeed, the prior case involved violations that occurred at two different worksites with different work crew leaders who had different employment contracts with Fama.

support its economic infeasibility claim and therefore, has not established a genuine issue of material fact exists regarding economic infeasibility." But as noted above, in the context of a summary judgment motion, the burden is not on Fama to establish that there are disputed material facts. Rather, the burden is on the Secretary as the moving party to establish that there are none. *Celotex Corp. v. Catrett,* 477 U.S. at 325 (explaining that "the burden on the moving party may be discharged by 'showing' . . . that there is an absence of evidence to support the non[-]moving party's case"); *Anderson v. Liberty Lobby, Inc*., 447 U.S. at 255. And, as noted, the judge is required to view "the facts in the light most favorable to" Fama, the non-moving party. *Lee v. Ferraro*, 284 F.3d at 1190; *Skrtich v. Thornton*, 280 F.3d 1295, 1299 (11th Cir. 2002). Thus, if the judge on remand determines that the violations should be affirmed after analyzing the record in this case under the correct legal framework, he must then consider Fama's alleged economic infeasibility defense under the correct legal standard and determine whether the Secretary has met his burden of establishing that there are truly no disputed issues of material fact regarding the defense.

For all these reasons, we set aside the judge's decision and remand this case for further proceedings consistent with this order. If the judge determines that the Secretary's motion for summary judgment should be denied because he has not met his burden of proving that there are no material facts in dispute, we direct the judge to hold a hearing on the merits.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: March 29, 2023

Some personal identifiers have been redacted for privacy purposes.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. FAMA CONSTRUCTION, LLC, Respondent.	OSHRC Docket No. 19-1467

MEMORANDUM OPINION AND ORDER[1]

Attorneys and Law firms

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Andrew N. Gross, Attorney, HB Next Corporation, Lawrenceville, GA, for Respondent.

JUDGE: John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

Pending in the court in the above-styled action (*Fama II*) is the Secretary of Labor's renewed[2] motion for summary judgment, which asserts that in light of the Eleventh Circuits[3] opinion in *Fama Construction, LLC v. U.S. Department of Labor*, No. 19-13277, 2022 WL

[1] The court issued an Errata Order on January 11, 2023, which amended footnote 1.

[2] The court concludes that even if there is a genuine dispute as to whether or not the workers were Fama's employees, it will not affect the outcome and is therefore not a genuine material fact in dispute since the court concludes, *infra*, that Fama was a controlling employer.

[3] Under the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Georgia, where Fama also has its principal place of business, both in the Eleventh Circuit. In general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has applied the precedent of that circuit in deciding the case, "even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The court therefore applies the precedent of the Eleventh Circuit in deciding the case.

2375708 (11th Cir. June 30, 2022) (*Fama I*) affirming this court's decision that Fama was a controlling employer, the court should grant summary judgment to the Secretary. For the reasons indicated *infra*, after having reviewed all arguments and evidence submitted by the parties, and relevant law, and being otherwise fully informed, the court concludes there is no genuine material fact in dispute and therefore, the Secretary's motion for summary judgment is **GRANTED**.

II. UNDISPUTED FACTS[4]

Fama is a company that provides roofing services. (Sec'y's SUMF ¶ 9; Greenfield Decl. ¶13). Fama is owned by Francisco Martinez (Sec'y's SUMF ¶10; Martinez Dep. 8:16-18.) Martinez manages the company with [redacted], Cynthia Osorio. (Sec'y's SUMF ¶ 11; Greenfield Decl. ¶ 13). Fama held the exclusive roofing contract for townhomes at Riley Place. (Sec'y's SUMF ¶ 12; Greenfield Decl. ¶ 13). Fama offered the work on March 20, 2019, to a crew including Antonio Cardenas and Carlos Galicia. (Sec'y's SUMF ¶ 13; Greenfield Decl. ¶¶ 13, 15; Ex. C). Cardenas and Galicia are longtime workers for Fama—their relationship with the company goes back over ten years (Sec'y's SUMF ¶ 14; Greenfield Decl. ¶ 11). At the time of the inspection, the leader of the work crew was Antonio Ortega. (Sec'y's SUMF ¶ 15; Greenfield Decl. ¶15; Ex. C).

[4] The Secretary filed Complainant's Statement of Material Facts in Support of Its Renewed Motion for Summary Judgment (Sec'y's SUMF) ¶¶ 1-80, along with declarations and deposition materials in support thereof. Fama filed Respondent Fama's Response to the Secretary's Statement of Material Facts (Resp't's Resp. to Sec'y's SUMF), which did not address Sec'y's SUMF ¶¶ 1-13, 15-21, 23-30, 32-36, 38, 40, 42-46, 51, 54, 56-59, 62-64, and 67-79, which are all deemed undisputed. As to SUMF ¶¶ 14 and 22, the court deems them undisputed, except as to the Secretary's use of the term "worker." As to SUMF ¶¶ 31, 37, 39, 41, 47, 49, 50, 52, 53, 55, 60, 61, 65, and 66, Fama did not support each of its numbered responses with a citation to evidence in the record proving such fact is in dispute, as required by the court's Procedures and Practices in Conventional Cases, and therefore, the court concludes they too are undisputed. Fama also filed Respondent Fama's Material Facts Statement in Response to the Secretary's Motion for Summary Judgment, (Resp't's SUMF) ¶¶ 1-34. Resp't's SUMF ¶¶ 2-8, 10, 11, 13-16, and 18-23 were supported by citations to evidence from the trial record in *Fama I*, and therefore, were not supported by citations "to particular parts of materials in the record" as required by Rule 56(c)(1)(A) of the Federal Rules of Civil Procedure. Therefore, Fama has failed to show Resp't's SUMF ¶¶ 2-8, 10, 11, 13-16, and 18-23 are undisputed. Resp't's SUMF ¶¶ 32-33 were not supported by any citation to the record as required by the court's Procedures and Practices in Conventional Cases, and therefore, the court concludes Fama has failed to show they are undisputed. Fama's remaining Resp't's SUMF were properly supported by citations to the current record but the court concludes those facts were not material ones.

The inspection was initiated on March 20, 2019, by OSHA Compliance Safety and Health Officer[5] Marc Greenfield after he drove by the residential construction site at Riley Place and observed a worker moving shingle packets on the roof of a townhome unit approximately 25 feet above ground without fall protection. (Sec'y's SUMF ¶¶ 1-2; Greenfield Decl. ¶¶ 4, 5; Ex. B, pp.1, 3, 4, 6, 7). In the course of the resulting inspection, Greenfield observed another worker operating a shingle elevator from the ground without a hardhat. (Sec'y's SUMF ¶ 4; Greenfield Decl. ¶ 6, Ex. B, pp.1-2). Based on his observations, Greenfield believed falling shingles from the workers on the roof above posed a danger to the worker on the ground. (Sec'y's SUMF ¶ 5; Greenfield Decl. ¶ 6). Greenfield also observed the roofers working without fall protection for about 5 minutes and the shingle elevator operator working without a hardhat for about 5 minutes. (Sec'y's SUMF ¶ 6; Greenfield Decl. ¶ 9). The workers scattered when Greenfield approached, but he recognized two of them—Cardenas, the worker on the ground without a hardhat—and Galicia, the worker on the roof without fall protection. (Sec'y's SUMF ¶ 7; Greenfield Decl. ¶¶ 10-11). Greenfield also knew Cardenas and Galicia were associated with Fama. (Sec'y's SUMF ¶ 8; Greenfield Decl. ¶ 11).

Greenfield determined Fama was an employer engaged in residential construction activities—a fact Fama admits in its Answer to the Secretary's Complaint. (Sec'y's SUMF ¶ 44; Greenfield Decl. ¶ 22; Compl. ¶ 2; Answer ¶ 2). Osorio admitted to Greenfield that Fama did not conduct any inspections of its worksites. (Sec'y's SUMF ¶ 45; Greenfield Decl.¶ 16; Ex. C). Fama's contract with Ortega required Ortega to conduct safety inspections of worksites. (Sec'y's SUMF ¶ 46; Ex. G, p.3). When Greenfield interviewed Ortega, Ortega denied understanding the English contract he had signed, denied he was present at the worksite the day of the inspection, and claimed it was Fama's responsibility to ensure the workers comply with OSHA regulations. (Sec'y's SUMF ¶ 47; Greenfield Decl. ¶¶ 18-19; Ex. J). Ortega and Cardenas also separately told Greenfield that the workers on site cannot tell each other what to do. (Sec'y's SUMF ¶ 48; Greenfield Decl. ¶¶ 18-19; Ex. J).

Osorio and Martinez admitted in March 2019 that Fama had the power to stop unsafe behavior and to take workers down from a roof. (Sec'y's SUMF ¶ 28; Osorio Dep. 81:2-14, 82:2-

[5] "Compliance Safety and Health Officer" means "a person authorized by the Occupational Safety and Health Administration, U.S. Department of Labor, to conduct inspections." 29 C.F.R. § 1903.22(d).

8; Martinez Dep. 9:15-10:6, 32:1-11). Fama's contract with Ortega—the leader of the work crew that included Cardenas and Galicia— required the crew to comply with OSHA regulations, to utilize a safety program, and to conduct weekly toolbox safety talks. (Sec'y's SUMF ¶ 29; Ex. F, pp.3-5; Greenfield Decl.¶ 15). Fama could discipline workers or crew leaders for failing to comply with safety requirements, including imposing fines. (Sec'y's SUMF ¶ 30; Ex. F, pp. 3-6; Osorio Dep. 126:10-127:2). The safety policies that Fama required its work crews to follow went beyond OSHA's regulations, and included things like a prohibition against cell phone use while working on a roof. (Sec'y's SUMF ¶ 31; Osorio Dep. 99:14-18). Fama also expected workers to report safety concerns and injuries to Fama. (Sec'y's SUMF ¶ 32; Osorio Dep. 102:18-103:10; Ex. G). Martinez is the one that communicates with the builders on behalf of Fama and the workers. (Sec'y's SUMF ¶ 39; Martinez Dep. 8:14–9:14; 32:16–25; Ex. H). Jonathan Hubbard, the builder's superintendent on the worksite, indicated he believed the workers sent by Fama were "absolutely" Fama's employees and was unaware that Fama used subcontractors. (Sec'y's SUMF ¶ 40; Ex. H at 3). Cardenas informed OSHA that he also believed that he, Galicia, and Osorio were employees of Fama. (Sec'y's SUMF ¶ 41; Ex. I).

Fama admits it does not conduct safety inspections of its worksites. (Sec'y's SUMF ¶ 50; Osorio Dep. 76:13-77:2; Martinez Dep. 29:18-25). Fama was also required to conduct inspections of its worksites as part of the settlement of Inspection No. 1065667. (Sec'y's SUMF ¶ 23; Greenfield Decl. ¶ 16; Ex. E). Additionally, Fama was required to provide third party safety inspections of its worksites for a year, beginning within 90 days of full execution of that agreement on June 27, 2016, and was required to submit proof to the area office. (Sec'y's SUMF ¶ 24; Greenfield Decl. ¶ 16; Ex. E). As of March 20, 2019, the OSHA Area Office had received no proof that those inspections were conducted. (Sec'y's SUMF ¶ 25; Greenfield Decl. ¶ 16).

In their depositions, Osorio and Martinez both confirmed that Fama does not conduct investigations to make sure workers are working safely. (Sec'y's SUMF ¶ 27; Osorio Dep. 76:13-77:2; Martinez Dep. 29:18-25). Fama's violation of 29 C.F.R. § 1926.20(b)(2) was a serious one because when Fama fails to inspect jobsites for safety violations, workers are in danger of falling from high places and being hit by falling objects from above, which can result in death or serious physical harm. (Sec'y's SUMF ¶ 53; Greenfield Decl. ¶ 24).

Workers were subject to a possible danger of falling objects. (Sec'y's SUMF ¶ 58; Greenfield Decl. ¶¶ 21, 26). Other crew members were engaged in hauling shingles high above

Cardenas and created a danger that Cardenas would sustain a head injury if materials fell from the roof. (Sec'y's SUMF ¶ 59; Greenfield Decl. ¶¶ 21, 26). Fama failed to require protective helmets. Osorio testified in her deposition that Cardenas told her he was not wearing a hardhat because the hat kept falling off when he put material on the elevator, to which Osorio replied to Cardenas that he needed to wear the hardhat—no excuses. (Sec'y's SUMF ¶ 75; Osorio Dep. 71:15-24). Fama's violation of 29 C.F.R. § 1926.100(a) was a serious one because workers were in danger of being struck by falling objects from above, which can result in death or serious physical harm. (Sec'y's SUMF ¶ 54; Greenfield Decl. ¶ 24).

Workers were also engaged in residential construction activities 6 feet or more above lower levels. (Sec'y's SUMF ¶ 2; Greenfield Decl. ¶ 5; Ex. at pp.1, 3, 4, 6 and 7). Fama failed to ensure each employee engaged in residential construction activities 6 feet or more above lower levels was protected by guardrail systems, safety net system, or personal fall arrest system. (*Id.*). The work crew also admitted to not wearing fall protection harnesses on the day of the accident, because—they claimed—they did not wish to get tangled up while moving materials on the roof. (Sec'y's SUMF ¶ 73; Osorio Dep. 62:19-63:17). Osorio recognized that the crew's reason for non-compliance was not acceptable under OSHA's standards. (Sec'y's SUMF ¶ 74; Osorio Dep. 67:9-68:4). Fama's violation of 29 CFR 1926.50l(b)(l3) was a serious one since workers were in danger of falling from high places, which can result in death or serious physical harm. (Sec'y's SUMF ¶ 53; Greenfield Decl. ¶ 24). Fama received a citation for the same violation of 29 CFR 1926.50l(b)(l3) in a prior inspection, which became a final order of the Commission on February 19, 2018. (Sec'y's SUMF ¶ 67; Greenfield Decl. ¶ 32).

Since 2013, OSHA inspected Fama at least 7 separate times and in each inspection, OSHA issued a fall protection violation. (Sec'y's SUMF ¶¶ 16, 17; Greenfield Decl. ¶¶ 12, 14). All of OSHA's citations were affirmed as final orders. (Sec'y's SUMF ¶ 18; Greenfield Decl. ¶¶ 14, 20; Ex. D). Greenfield personally conducted or accompanied OSHA on inspections of Fama six times prior to March 20, 2019, and he had already met Galicia and Cardenas on Fama worksites at least three times previously. (Sec'y's SUMF ¶ 19; Greenfield Decl.¶ 14). Greenfield had previously spoken with Cardenas about the need to use fall protection and other safety requirements, and Cardenas indicated he understood the rules. (Sec'y's SUMF ¶ 20; Greenfield Decl. ¶¶ 12, 14).

Fama was aware it was not conducting inspections and was aware of prior safety violations by Cardenas and Galicia. (Sec'y's SUMF ¶ 50; Greenfield Decl. ¶ 23). In addition, Fama did

nothing to ensure that workers were complying with the safety requirements of Ortega's contract beyond verbally reminding crews that safety was their responsibility. (Sec'y's SUMF ¶ 51; Osorio Dep.123:18-125:63). Discipline was a remote risk to workers because by not inspecting, Fama was not witnessing unsafe activity. (Sec'y's SUMF ¶ 52; Osorio Dep.125:7-125:17).

III. DISCUSSION

Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure[6] "[a] party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought." Fed. R. Civ. P. 56(a). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(e).

Thus, "the purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888–89 (1990). "[R]egardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the [ ] court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.*, U.S. at 885 (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986).

[6] Rule 56 is made applicable to Commission proceedings through section 12(g) of the Act, which mandates that "[u]nless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure." 29 U.S.C. § 661(g). Commission Rule 40(j) provides that "[t]he provisions of Federal Rule of Civil Procedure 56 apply to motions for summary judgment." 29 C.F.R § 2200.40(j). Thus, Rule 56 of the Federal Rule of Civil Procedure governs the disposition of this motion.

"[A] party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)). Thus, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Lujan*, U.S. at 884 (quoting *Celotex,* 477 U.S. at 322). "Where no such showing is made, "[t]he moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Id.* (quoting *id.,* at 323).

"Of course, a party seeking summary judgment always bears the initial responsibility" of informing the Court "of the basis for its motion, and identifying those portions of" the depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials, "which it believes demonstrates the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (internal quotation marks omitted). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)); *see also Anderson*, 477 U.S. at 255. "The mere existence of a scintilla of evidence in support of the [nonmovant's] position [is] insufficient." *Ogwo v. Miami Dade County School Board*, 702 F. App'x 809, 810 (11th Cir. 2017) (quoting *Anderson*, *supra*).

Thus, "in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."' *Tolan*, 572 U.S. at 651 (citing *Anderson*, *supra*). However, a Court must resolve any factual issues of controversy in favor of the non-moving party "only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied." *Lujan*, 497 U.S. at 888.

A "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. If there is any evidence in the record from which a reasonable inference in favor of the

nonmoving party can be drawn, summary judgment is improper. *Celotex*, 477 U.S. 317. Conversely, if a review of the entire record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial and summary judgment is appropriate. *Matsushita Elec. Ind. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*, at 244. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*, at 248. Further, "the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.*, at 248 (*quoting First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)).

Multi-Employer Citation Policy

As the Eleventh Circuit noted in *Fama I*, the Secretary's multi-employer citation policy, with its controlling employer rule, "provides that '[a]n employer who has general supervisory authority over [a] worksite,' must 'exercise reasonable care to prevent and detect violations on the site.'" *Fama I*, 2022 WL 2375708 at *4 (quoting OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy § X.E.1–2 (Decl. 10, 1999)). Under longstanding Commission precedent, "an employer may be held responsible for the 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." *StormForce of Jacksonville, LLC*, 2021 WL 2582530 at *3 (No. 19-0593, 2021) (internal quotation marks and brackets omitted).

Fama argues the *Fama I* is not controlling because "the Eleventh Circuit's decision in *Fama I* expressly noted that it did not consider a challenge to validity of OSHA's multi-employer citation policy because Fama did not challenge it in *Fama I*." (Resp't's Mem. in Resp. to Sec'y's Mot. for Summ. J. at 1.) However, in the present case, "Fama does challenge OSHA's interpretation of §654(a)(2), and the procedural validity of OSHA's multi-employer citation policy." (*Id.*)

While it is true Fama did not challenge the validity of the multi-employer policy in *Fama I* at trial or on appeal before the Commission and was therefore precluded from raising it on appeal,

the Eleventh Circuit nonetheless held that even if Fama was not barred "from arguing that it could not be held liable as a controlling employer for safety violations by another company's employees, we would not be persuaded by its argument, which relies on *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 (5th Cir. 1975)."[7] *Fama I*, 2022 WL 2375708 at *4. "That decision preceded OSHA's adoption in 1976 of the multi-employer citation policy, which provides for liability based on supervisory authority over a jobsite." *Id.* "As a result, the Southeast Contractors decision could not, and did not, hold the yet-to-be-adopted policy invalid." *Id.* (citing e.g., *Watts v. Bell-South Telecomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced.")). Thus, the Eleventh Circuit found "[s]ubstantial evidence supports the conclusion that Fama was the roofers' controlling employer." *Fama I*, 2022 WL 2375708 at *1.

Even assuming, *arguendo*, Fama is correct that *Fama I* is not controlling, the court is bound by longstanding Commission precedent. In 1976, the Commission first announced its multi-employer worksite doctrine. *See Anning–Johnson Co.*, 4 BNA OSHC 1193 (No. 3694, 1976) and *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976). As the Commission has noted, the "grounding of the multi-employer citation policy in § 5(a)(2) of the Act has long been recognized by both the courts and the Commission." *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1203 (No. 05-0839, 2010), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished).

In *McDevitt Street Bovis., Inc.*, 19 BNA OSHC 1108, 1110 (No. 97-1918, 2000), the Commission also addressed whether Eleventh Circuit precedent precluded the Commission from applying its own multi-employer precedent on controlling employer liability and roundly rejected the notion. *Id.* at 1110-12. Likewise, recently in *Summit Contracting Grp., Inc.*, 2022 WL 1572848, at *2 (No. 18-1451, 2022), the Commission noted that "the Eleventh Circuit has neither decided nor directly addressed the issue of multi-employer liability." *Id.*

This court is compelled to follow Commission precedent since a Commission judge is not free to decide cases in ways that directly conflict with Commission precedent. *See Gulf & W.*

[7] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. *See* Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995. The Eleventh Circuit has adopted the case law of the former Fifth Circuit handed down as of September 30, 1981, as its governing body of precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981). This body of precedent is binding unless and until overruled by the Eleventh Circuit en banc. *Id.*

Food Prods. Co., 4 BNA OSHC 1436, 1439 (No. 6804, 1976) (consolidated) (orderly administration of Act requires that administrative law judges follow Commission precedent). *See also Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 4409, 1976) (Commission requires its judges to follow precedents established by the Commission, unless reversed by the Supreme Court); *Maxwell Well Serv. Inc., d/b/a Circle M Well Servicing*, 13 BNA OSHC 2109, 2110 (No. 87-1534, 1989) ("Commission's judges are bound by Commission precedent."). *Accord Accu-Namics, Inc. v. Occupational Safety & Health Review Comm'n*, 515 F.2d 828, 834 (5th Cir. 1975) (the statutory scheme contemplates that the Commission is the factfinder, and the judge is an arm of the Commission for that purpose).

As indicated *supra*, Osorio and Martinez admitted Fama had the power to stop unsafe behavior and to take workers down from a roof. And Fama's contract with Ortega required the crew to comply with OSHA regulations, to utilize a safety program, and to conduct weekly toolbox safety talks. Fama also had the ability to discipline workers or crew leaders for failing to comply with safety requirements, including imposing fines. The safety policies that Fama required its work crews to follow went beyond OSHA's regulations, and included things like a prohibition against cell phone use while working on a roof. And Fama also expected workers to report safety concerns and injuries to Fama. Martinez is also the one that communicates with the builders on behalf of Fama and the workers. The builder's superintendent on the worksite also believed the workers sent by Fama were "absolutely" Fama's employees. Cardenas also believed that he, Galicia, and Osorio were employees of Fama.

These provisions conferred sufficient authority on Fama to qualify as a controlling employer under the Multi-Employer Citation Policy. Further, even without the authority conferred by the Ortega contract, Fama's admission of actual control over safety, along with the (rare) examples of Fama exercising that authority, clearly establishes that Fama is a controlling employer. (*See* Osorio Dep. 81:2–14) (Fama employees will stop workers from engaging in unsafe activity they witness, including removing them from a roof for not wearing fall protection); *id.* 82:2–8 (Fama expects workers to follow instructions of Martinez); *id.* 94:7–95:7 (calling/texting roof crew leader reminders to wear harnesses and hard hats on a monthly basis)). As such, there is no genuine dispute of material fact that Fama was a controlling employer with an obligation to protect the roofing workers even if they were not Fama's employees.

"On a multi-employer worksite, a controlling employer is liable for a contractor's violations if the Secretary shows that it has not taken reasonable measures to 'prevent or detect and abate the violations due to its supervisory authority and control over the worksite.'" *Suncor*, 2019 WL 654129, at *4 (*quoting Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994); *see Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1709 (No. 96-1330, 2001) (consolidated) (noting that general contractor at multi-employer worksite "was responsible for taking reasonable steps to protect the exposed employees of subcontractors"); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1976) (holding general contractor "responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity"). Based upon the undisputed facts *infra*, the court concludes the Secretary has established there is no genuine issue of material fact in dispute that Fama is a controlling employer with regard to the cited worksite under the multi-employer worksite doctrine.

The Act

The Eleventh Circuit has held the Act sought to assure that "'every working man and woman in the Nation [had] safe and healthful working conditions.'" *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149, 1151 (11th Cir.1994) (*quoting* 29 U.S.C. § 651(b)). "To implement its statutory purpose, Congress imposed dual obligations on employers. They must first comply with the 'general duty' to free the workplace of all recognized hazards." *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013) (*citing* 29 U.S.C. § 654(a)(1)). "They also have a 'special duty' to comply with all mandatory health and safety standards." *Id.* (citing *id.* at § 654(a)(2)).

In the Eleventh Circuit, the Secretary will make out a *prima facie* case for the violation of an OSHA standard by showing "(1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and ... (4) that the employer knowingly disregarded the Act's requirements." *Fama I*, 2022 WL 2375708, at *3 (citation omitted). To satisfy the third element, the Secretary bears the burden of showing that the cited respondent is the employer of the exposed workers at the site." *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016). However, an employment relationship "is not the only basis for liability when a company fails to take reasonable steps to protect worker safety. "*Fama I*, 2022 WL 2375708, at *3. The court notes that when the Secretary asked Fama in an Interrogatory to state, "all facts…upon which Respondent relies in support of its position that it did not commit the

violations contained in this docket," Fama listed no facts disputing the allegations of violations. (Sec'y's SUMF ¶ 71; Ex. K).

Citation 1, Item, 1

Citation 1, Item, 1 asserts Fama violated 29 CFR 1926.20(b)(2) when it "did not initiate and maintain programs which provided for frequent and regular inspections of the job site, materials and equipment to be made by a competent :person(s):" (Compl. Ex. A.) 29 C.F.R. § 1926.20(b)(2) appear in Part 1926 of 29 C.F.R., entitled "Safety and Health Regulations for Construction." 29 C.F.R. § 1910.12(a) provides that "[t]he standards prescribed in Part 1926 of this chapter ... shall apply ... to every employment and place of employment of every employee engaged in construction work." "Construction work" is defined to be "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b). The court concludes there is no genuine material fact in dispute that Fama is engaged in construction work, and therefore, that 29 C.F.R. § 1926.20(b)(2) applies.

That standard requires Fama to initiate and maintain a program to "provide for frequent and regular inspections of the job sites, materials, and equipment to be made by competent persons designated by the employers." 29 C.F.R. § 1926.20(b)(2). As the undisputed facts recounted *supra* indicate, Fama did not have a program providing for frequent and regular inspections of the worksite, materials, and equipment. And Fama admits it does not conduct safety inspections of its worksites. Fama was also required to conduct inspections of its worksites as part of the settlement of Inspection No. 1065667. Additionally, Fama was required to provide third party safety inspections of its worksites for a year, beginning within 90 days of full execution of that agreement on June 27, 2016, and was required to submit proof to the area office, and as of March 20, 2019, OSHA had not received any proof that those inspections had been conducted.

In their depositions, Osorio and Martinez both confirmed that Fama does not conduct investigations to make sure workers are working safely. Therefore, the court concludes there is no genuine material fact in dispute that Fama violated 29 C.F.R. § 1926.20(b)(2). There is also no genuine material fact in dispute that Fama's violation of 29 C.F.R. § 1926.20(b)(2) was a serious[8]

[8] A "serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666(k).

one because when Fama failed to inspect jobsites for safety violations, workers were in danger of falling from high places and being hit by falling objects from above, which could result in death or serious physical harm.

Citation 1, Item, 2

Citation 1, Item, 2 asserts Fama violated 29 CFR 1926.lO0(a) when "[e]mployees working in areas where there was a possible danger of head injury from impact, or falling or flying objects, or from electrical shock and burns, were not protected by protective helmets[.]" (*Id.*) The court concludes there is no genuine material fact in dispute that 29 C.F.R. § 1926.100(a) applies since workers were subject to a possible danger of falling objects. As indicated *supra*, other crew members were engaged in hauling shingles above Cardenas and created a danger that Cardenas would sustain a head injury if the shingles fell from the roof. The court also concludes there is no genuine material fact in dispute that Fama violated 29 C.F.R. § 1926.100(a) when it failed to require protective helmets. Osorio testified in her deposition that Cardenas told her he was not wearing a hardhat and Osorio replied back to Cardenas that he needed to wear the hardhat—no excuses. There is also no genuine material fact in dispute that Fama's violation of 29 C.F.R. § 1926.100(a) was a serious one because workers were in danger of being struck by falling objects from above, which can result in death or serious physical harm.

Citation 2, Item, 1

Citation 2, Item, 1 asserts Fama committed a Repeat violation of 29 CFR 1926.50l(b)(l3) when "[e]ach employee(s) engaged in residential construction activities 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501 (b)[.]" (*Id.*) There is no genuine material fact in dispute that 29 CFR 1926.50l(b)(l3) applies since workers were engaged in residential construction activities 6 feet or more above lower levels. There is also no genuine material fact in dispute that Fama violated 29 CFR 1926.50l(b)(l3) when it failed to ensure each employee engaged in residential construction activities 6 feet or more above lower levels was protected by guardrail systems, safety net system, or personal fall arrest system.

The work crew also admitted to not wearing fall protection harnesses on the day of the accident. Osorio recognized that the crew's reason for non-compliance was not acceptable under OSHA's standards. There is no genuine material fact in dispute that Fama's violation of 29 CFR

1926.50l(b)(l3) was a serious one since workers were in danger of falling from high places, which can result in death or serious physical harm. There is also no genuine material fact in dispute this violation was a Repeated one since there is no dispute Fama received a citation for the same violation in a prior inspection, which became a final order of the Commission on February 19, 2018. "A violation is repeated if, at the time it occurred, 'there was a Commission final order against the same employer for a substantially similar violation.'" *Bunge Corp. v. Sec'y of Labor*, 638 F.2d 831, 837 (5th Cir.1981) (quotation marks and citation omitted).

Since 2013, OSHA inspected Fama at least 7 separate times and in each inspection, OSHA issued a fall protection violation. All of OSHA's citations were affirmed as final orders. Greenfield personally conducted or accompanied OSHA on inspections of Fama six times prior to March 20, 2019, and he had already met Galicia and Cardenas on Fama worksites at least three times previously. Greenfield had previously spoken with Cardenas about the need to use fall protection and other safety requirements, and Cardenas indicated he understood the rules.

Knowledge of Violations

There is no genuine material fact in dispute that Fama had knowledge of these three violations because the company was aware it was not conducting inspections and was aware of prior safety violations by Cardenas and Galicia. Fama did nothing to ensure that workers were complying with the safety requirements of Ortega's contract beyond verbally reminding crews that safety was their responsibility. And discipline was a remote risk to workers because by not inspecting, Fama was not witnessing unsafe activity.

Economic Infeasibility Claim

As to Fama's economic infeasibility claim in its amended Answer, Fama asserts that enforcing OSHA regulations would require the hiring of additional supervisory personnel that Fama asserts it cannot afford. (Sec'y's SUMF ¶ 77; Fama's Am. Answer; Ex. L). Martinez asserted, without any support, that the cost of hiring a competent supervisor to oversee the work of labor subcontractors would be at least $50,000. (Sec'y's SUMF ¶ 78; Ex. L, ¶ 6). Based on that $50,000 estimation and three years of tax returns, Fama asserts that it could not afford hiring a supervisor and doing so would affect its ability to win contract bids, causing it to go out of business. (Sec'y's SUMF ¶79; Ex. J, ¶¶ 7-10; Fama Redacted Tax Returns from 2017-2019, Ex. M). Martinez did not address the reason he believes Fama would have to hire new personnel to be compliant with the cited OSHA regulations. (Sec'y's SUMF ¶ 80; Ex. L). The court concludes that

for summary judgment purposes, Fama did not properly support its economic infeasibility claim, and therefore, has not established a genuine issue of material fact exists regarding economic infeasibility.

IV. PENALTY ASSESSMENTS

The Act provides that an employer who commits a "serious" violation may be assessed a civil penalty in an amount up to $7,000 and an employer who commits a "repeated" violation may be assessed a civil penalty in an amount not to exceed $70,000. *See* 29 U.S.C. §§ 666(a), (b). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, requires the Department of Labor to annually adjust its civil money penalty levels for inflation no later than January 15 of each year. Therefore, at the time of the issuance of the citations on August 28, 2019, the maximum penalty for a serious violation was $13,260 and the maximum penalty for a repeated violation was $132,598. *See* 29 CFR §§ 1903.15(d)(2), (3) (2019); *see also* 84 FR 219, Jan. 23, 2019.

The Commission is empowered to "assess all civil penalties" provided in the Act, "giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(j). The Commission has held that "generally speaking, the gravity of a violation is the primary element in the penalty assessment." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citing Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992)). "Moreover, while gravity is normally the primary factor in assessing appropriate penalties, an employer's substantial history of prior violations may skew the importance of gravity in the final penalty determination." *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994).

As to the size of the company, in *Fama I*, the company employed fourteen to nineteen people, including office employees and work crews. *Fama Constr., LLC*, 2019 WL 3210613, at *27 (Nos. 17-1173, 17-1180, 2019).[9] The court concludes the same number of employees worked

[9] On the issue of whether the workers were employed by Fama, Fama stipulates "the relevant legal arguments and supporting evidence were adequately advanced in the filings in *Fama I*, both before the Commission [OSHRC Docket No. 17-1173 and 17-1180] and the Eleventh Circuit [2022 WL 2375708 (11th Cir. June 30, 2022)], and]were] incorporated by reference [into Fama's Memorandum in Response to the Secretary's Motion for Summary Judgment] so as not to unnecessarily clutter the record with extensive repetitive testimony and repeated argument."

for Fama in the present case. Although OSHA's proposed penalty assessments did not include a reduction for size, the court concludes based upon size, a 60% reduction is appropriate.

Fama is not entitled to a good faith reduction since it has not implement an effective workplace safety and health management system. As to its history of violations, the court finds an increase of 10% is appropriate for each violation given Fama's previous violations within the last five years, and its repeated, blatant disregard of the most basic construction standards, which is necessary to cause Fama to appreciate the vital importance of complying with OSHA regulations, *E.L. Davis Contrac. Co.*, 16 BNA OSHC 2046, 2053 (No. 92-35, 1994), and hopefully, to preclude their being assumed by Fama as simply another cost of doing business. *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994).The gravity and final penalty assessments will be addressed separately for each violation *infra*.

In Citation 1, Item 1 OSAH assessed the violation of 29 C.F.R. § 1926.20(b)(2) as high gravity based upon a high severity and greater probability, given the considerable danger inherent in roofing work and Fama's total abdication of its inspection duties. (Sec'y's SUMF ¶ 55; Greenfield Decl. ¶ 25). The court agrees with that assessment. OSHA proposed a fine of $13,127 for the violation. (Sec'y's SUMF ¶ 57; Greenfield Decl. ¶ 25). Giving due consideration to the appropriateness of the penalty with respect to the size, the gravity of the violation, lack of good faith, and history of repeat and willful violations, the court concludes a penalty of $5,8347 is appropriate.

In Citation 1, Item 2 OSAH assessed the violation of 29 C.F.R. § 1926.100(a) as moderate gravity based upon a high severity but moderate probability. (Sec'y's SUMF ¶ 63; Greenfield Decl. ¶ 29). The court agrees with that assessment. OSHA proposed a penalty of $9,377 for this violation. (Sec'y's SUMF ¶ 64; Greenfield Decl. ¶ 29). Giving due consideration to the appropriateness of the penalty with respect to the size, the gravity of the violation, lack of good faith, and history of repeat and willful violations, the court concludes a penalty of $4,167 is appropriate.

In Citation 2, Item 1 OSAH assessed the violation of 29 CFR 1926.50l(b)(l3) as high gravity based upon a high severity and greater probability. (Sec'y's SUMF ¶ 68; Greenfield Decl. ¶ 33). Considering the height of the roof, its apparent steepness, and the activity of hauling shingle packages which could distract or unbalance a worker from his footing, the court agrees with that

(Resp't's Mem. In Resp. to Sec'y's Mot. Summ. J. at 17).

assessment. OSHA proposed a fine of $131,274 for the violation of 29 CFR 1926.50l(b)(l3). (Sec'y's SUMF ¶ 70; Greenfield Decl. ¶ 33). Giving due consideration to the appropriateness of the penalty with respect to the size, the gravity of the violation, lack of good faith and history of repeat and willful violations, the court concludes a penalty of $58,343 is appropriate. Accordingly,

V. ORDER

IT IS HEREBY ORDERD THAT considering the evidence in the light most favorable to Fama, and believing such evidence put forth by Fama, and drawing all justifiable inferences in its favor, as required when deciding a summary judgment motion, the court concludes there is no genuine material fact in dispute and therefore, the Secretary's motion for summary judgment is **GRANTED**, the trial is cancelled, Citation 1, Items 1 and 2 and Citation 2 Item 1 are **AFFIRMED**, and the court assesses penalties of $5,8347, $4,167, and $58,343 for Citation 1, Item 1, Citation 1, Item 2, and Citation 2 Item 1 respectively.

SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: January 11, 2023
Nunc Pro Tunc to
January 10, 2023
Atlanta, GA