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. 17-1173 OSHRC Docket No. 17-1180

DECISION AND ORDER

COUNSEL:

Jonathan Hoffmeister, Attorney, Office of the Solicitor, U.S. Department of Labor, Atlanta, GA, for Complainant.

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

JUDGE:

John B. Gatto, United States Administrative Law Judge.

I. INTRODUCTION

On December 9, 2016, the Secretary, through the Department of Labor's Occupational Safety and Health Administration (OSHA), conducted inspections of two residential construction sites in the Devonshire Park subdivision in Lawrenceville, Georgia. As a result of the inspections, OSHA issued[1] citations under two different inspection numbers to Fama Construction, LLC,[2] on June 6, 2017, pursuant to the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 651-678, with proposed penalties totaling $199,179.00. The

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 4–2010 (75 FR 55355). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein. The bringing of legal proceedings and the determination of whether such proceedings are appropriate in a given case are delegated exclusively to the Solicitor of Labor. *See* Order No. 4–2010 (75 FR 55355).

[2] The Court notes that prior to the issuance of the citations, Fama Construction, LLC was administratively dissolved by the Georgia Secretary of State, but Fama Construction Group, LLC, which appears to have the same registered principal office and owner, is an active entity. (*See* https://ecorp.sos.ga.gov/BusinessSearch.) However, neither party has moved to substitute the named Respondent.

Commission docketed the cases under Docket No. 17-1173 (for Inspection Number 119133, Lot 63) and Docket No. 17-1180 (for Inspection Number 1197730, Lot 8). After Fama contested the citations, the Secretary filed formal complaints with the Commission seeking orders affirming the citations and proposed penalties.[3] The two cases were subsequently consolidated for trial. The parties stipulated jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c), and that Fama is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (*Pretrial Order,* Attach. C, ¶¶ E.1 & 2). The Court held a bench trial in Atlanta, Georgia.

Inspection Number 1197733 concerns work performed by a two-man work crew on a house on Lot 63 in the Devonshire Park subdivision. Inspection Number 1197730 concerns work performed by a four-man work crew on a house on Lot 8 in the subdivision. The Secretary issued the citations to Fama, whom he considers the employer of the two work crews working on the Lot 63 and Lot 8 houses.[4] The Secretary cited Fama for violating the same three construction standards in each case, but with different characterizations[5] and penalties. In both cases, the Secretary cites Fama for violations of 29 C.F.R. § 1926.102(a) (eye and face protection); § 1926.501(b)(13) (duty to have fall protection); and § 1926.1053(b)(1) (ladders).[6]

The central issue in this case is whether Fama can be held responsible for the violative conditions at the worksites, either as the actual employer of the work crews or as a controlling employer under the multi-employer worksite doctrine. Fama contends it only secures roofing

---

[3] Attached to the complaints and adopted by reference were the citations at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[4] The *Pretrial Order,* dated November 14, 2018, lists five "legal issues to be tried." The first issue is "Whether the workers at the worksites were Fama employees." (*Pretrial Order*, ¶ 11.1.) The Court subsequently granted the Secretary's motion to amend the order to add another issue, "Whether Fama was a controlling employer at the worksite and failed to exercise reasonable care to detect and prevent violations at the worksite."

[5] Under section 17 of the Act, violations are characterized as "willful," "repeated," "serious," or "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. §§ 666(a), (b), (c). A serious violation is defined in the statute; the other two degrees are not. *Id.* § 666(k).

[6] The Lot 8 violations were characterized as willful, while the Lot 63 violations of the same standards were characterized as serious and repeat. Greenfield explained the reason for the differing characterizations.

> It wasn't willful on [Lot 63] because I did not get to speak to the supervisor on the other lot. On [Lot 8], I did get to speak to the supervisor. Otherwise, on the lot, it most likely would have been classified as a willful on the other lot with Mr. Alberto. . . . [I]t's a little difficult to recommend a willful violation if you don't get to speak to the supervisor at all because, you know, you have a higher burden – at least I do as a compliance officer -- to recommend a violation like that, and not being able to know what the supervisor has to say about it, it has to be taken into account. So since I didn't speak to Mr. Martinez, because he left the site and I didn't get to speak to him after that, I didn't recommend it on that.

(Tr. 100-01.)

contracts, and the work crews were employees of subcontractors who are responsible for compliance with OSHA's standards. Fama also argues it had no knowledge of the violative conduct. It also disputes the willful and repeat characterizations cited by the Secretary.

After hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.[7] For the reasons indicated *infra*, the Court concludes Fama was the employer of the work crews at the cited worksites on December 9, 2016. In the alternative, the Court concludes Fama was a controlling employer of the work crews at the cited worksites and, based on the work crews' extensive history of noncompliance with the same standards at issue here, was required to inspect the worksites to satisfy its duty of reasonable care. For the reasons indicated *infra*, for both docket numbers the Court **AFFIRMS** each citation and item therein and the related violation characterizations and **ASSESSES** civil penalties in the amount of $3,984 for the serious violation, $55,770 for each repeat violation, and $55,770 for each willful violation.

II. BACKGROUND

Compliance Safety and Health Officer[8] Marc Greenfield works out of OSHA's Atlanta East Area Office. Prior to the inspections at issue here, he had conducted at least four inspections that resulted in citations being issued to Fama for safety violations committed by work crews (Tr. 27-28). On December 9, 2016, Greenfield was driving through the Devonshire Park subdivision where new houses were under construction. He observed workers on the roofs of two houses (Lot 8 and Lot 63) who were not tied off. He stopped and took photographs of the worksites (Exs. C-1 & C-2; Tr. 34-35, 40).

Greenfield then approached the house on Lot 63, where two men were working, one on the porch roof and one on the ground. The man on the roof came down and identified himself as Alberto and stated he worked for Fama, adding, "just like those guys on the other lot," indicating the four-man crew working on the house on Lot 8, diagonally across the street from Lot 63 (Tr. 46-47). Alberto identified the other man at the site as his supervisor, Daniel Martinez. As Greenfield and Alberto were talking, Martinez got in his truck and drove away. Greenfield observed the siderails of the portable ladder used to access the porch roof were not extended at least three feet above the roof. He also noted Alberto was wearing regular sunglasses and not

[7] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

[8] "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).

safety glasses while using a nail gun. Greenfield took more photographs and measurements of the ladder to document the violations (Ex. C-1; Tr. 41-43).

Greenfield next went to Lot 8, where he met Antonio Cardenas, who identified himself as the supervisor of the roofing crew (Tr. 44-45). Greenfield recognized Cardenas from previous inspections, during which Cardenas always stated he worked for Fama (Tr. 44-45). Greenfield observed fall protection, ladder, and safety glasses violations similar to the ones he noted at Lot 63 and took photographs to document them (Ex. C-2).

III. EMPLOYMENT RELATIONSHIP BETWEEN FAMA AND AFFECTED WORKERS

Greenfield has "done a number of inspections in which Fama Construction has been involved and has been cited for violations." (Tr. 27.) During those inspections, he has "run into the same workers, one, two, three—at least three or four times. One time . . . I accompanied the [Compliance Safety and Health Officer] that conducted the inspection, and it was the same crew." (Tr. 28.) Greenfield has encountered Antonio Cardenas several times (Tr. 28). The day of the inspections at issue, Greenfield once more met Cardenas, and noted,

> Mr. Cardenas, every time that I've ever dealt with him, states he's an employee of Fama Construction, LLC, and again, he stated he was an employee. And I even asked on the other lot if they were subcontractors or employees. And the lot with Mr. Alberto—he stated, "I am an employee. I am not a subcontractor." And Mr. Cardenas stated he's an employee, and when he comes to the office and speaks with the [OSHA Area Directors] and the people there, with interpreters, he stated he was an employee. But he stated he was an employee, and each time I've done an inspection, which he's been the supervisor of the crew, he's stated he was an employee . . [of] Fama Construction.

(Tr. 45-46.) When interviewing Alberto on Lot 63 the day of the inspections, Greenfield stated he "specifically asked him, are you a subcontractor or an employee of Fama, he emphatically stated he was an employee. And he said, just like those guys on the other lot. . . Lot 8." (Tr. 47.) Alberto told Greenfield he had worked for Fama for 10 years (Tr. 112).

Fama's Management Employees

Francisco Martinez

Francisco Martinez founded Fama in 1995. He owns and manages the company (Tr. 256). He testified Fama secures roofing contracts, primarily for new construction, and subcontracts the labor. "We are the company in between homeowners, builders, or companies,

with the suppliers and laborers." (Tr. 257.) Fama works primarily with four building companies. A builder will supply blueprints for houses in a development to Fama and request a proposal. After calculating the costs, based on square footage of the roofs and provision of the shingles and labor, Fama responds with a total price for the houses (Tr. 265). "If they agree, we do the job." (Tr. 266.) Fama pays the work crews a set amount based on the price Fama charges for a particular house (Tr. 267).

Fama works regularly with a known group of work crews. They "are all the time the same ones. They are the same. . . . There's not -- no new ones." (Tr. 267.) Fama finds work crews for particular projects based on informal communications with the crews, with each side checking in with the other regarding projects. "Subcontractors, they call us to find out if we have work to do, or we're planning a project and we call them and say, 'Hey, you know what; can you help me out. Next month I'm going to have five houses.' If they agree, yes, we keep that in mind with them. Okay. If they say, 'Oh, I'm sorry; I'm working in Alabama this coming month,' okay, well, we call somebody else." (Tr. 266.)

Some projects require the services of brick flashing crews. Francisco Martinez generally contacts Daniel Martinez first for those projects. In "the case of Daniel Martinez, he's my brother, so he has his own crews working with them, so I prefer to work with him. He's part of the family." (Tr. 258-59.) Francisco Martinez also prefers to contact certain roofing crews first. "The first call all the time goes to the most flexible people we can find. . . . Flexible means if they can do more faster and on timing what [we're] expecting. Okay? And usually these guys, like Carlos, Carlos [Galicia] and Antonio [Cardenas], they are good. All the time they are making good timing. One of the crews will represent the face of Fama. If they do well, you know, like a subcontractor, that means we're doing well." (Tr. 269.)

Francisco Martinez testified Fama will contact the roofing crew of its choice and explain the scope of the job. "So we send the pictures. We send a picture of that project, and we say, 'I have this one in two weeks; if you need it, just call me. If not, I can call somebody else.'" (Tr. 270.) The work crew decides how many crew members it needs to complete a job (Tr. 269-70). Francisco Martinez only visits the worksite before the roofing work begins and after it is completed. He does not visit the worksite while the roofing work is in progress (Tr. 270).

Cynthia Osorio

Cynthia Osorio is the daughter of Francisco Martinez and the niece of Danial Martinez. She helps manage Fama.[9] Her duties include scheduling, ordering material, reviewing invoices, and issuing checks. She has worked for the company for 15 years. She stated Fama employs three to four employees at any given time, all of whom work in Fama's office (Tr. 204). Fama routinely engages four main roofing crews to perform roofing jobs. The work crews together comprise 12 to 15 people (Tr. 206-08).

Osorio stated Fama orders and pays for the shingles, felts, vents, staples, nails, and flashing for the roofing jobs, and arranges for the materials to be delivered to the worksite. On occasion Fama pays for a dump truck to be brought to the site for trash. Crews generally work Monday through Friday, turning in invoices Thursday afternoon. Fama pays the crews on Friday afternoon (Tr. 211-12). Work crews sometimes buy tools or supplies on Fama's credit. Fama then deducts the amount from the crew's paycheck. Fama has provided cash advances to individual roofers (Tr. 213). Fama does not provide paid vacation time, health insurance, or retirement plan coverage to members of the roofing crews (Tr. 285). Fama once paid a medical bill for Antonio Cardenas when he was injured at the beginning of a roofing job and paid him $350.00 that week, even though he did not work due to his injury (Tr. 286).

Osorio testified Fama "doesn't really have, like a time frame" for work crews to complete a house but, because Fama generally contracts for new construction, a work crew can usually complete a house in one day. The workers do not "have to go and take off shingles and clean the roof and clean up the trash. It's all new construction, so it's laying felt and then the shingles. So it's less work, way less work." (Tr. 215-16.) Fama prefers to have a work crew arrive at the worksite soon after the materials are delivered, to prevent theft of the materials (Tr. 216-17).

At one time, Fama implemented a rule for work crews wanting to hire another employee: "[Y]ou can't just bring somebody you pick up from the Home Depot or from the street, you know. They had to be somebody that knew roofing and had done roofing in the past." (Tr. 222.) The rule, however, "didn't work. [The roofing crews] didn't run it through us. . . [N]obody really went by it. . . [A work crew] didn't get in trouble if they had somebody else working there." (Tr. 223-24.)

Fama provides mandatory safety training every four or five months, with topics chosen by Francisco Martinez and Osorio, for the work crews it engages (Tr. 227-28, 230). If a work

[9] Fama's website identifies Cynthia Osorio as Fama's president (Ex. C-4).

crew declined to attend safety training, Osorio stated, "[T]hat would be a problem with me like if we had to look for crews, they wouldn't be at the top of my list." (Tr. 229.) Fama provides work crews it engages with a safety program and requires them to use it. If Fama learns a member of a work crew was working without fall protection, "We tell them to come to the office , the day they come pick up a paycheck. Tell them to watch another [safety] video." (Tr. 225). Fama has a progressive disciplinary system in place, by which an employee can be fined, and the fine amount deducted from his paycheck. Osorio stated Fama has never actually fined anyone for a safety violation (Tr. 225-26).

Prior to Georgia's implementation of a Hands-Free Law, prohibiting the use of handheld cell phones while driving, Fama instituted a rule prohibiting members of work crews from using their cell phones while driving to a Fama-contracted worksite.[10] Fama also instituted a rule prohibiting members of the work crews from using cell phones while on the roofs of houses (Tr. 232).

> Osorio: It's dangerous, you know. So I have told them, no, you cannot use it on our job sites, you know. And I've never seen them, so I don't even – I haven't even had to go further up and tell them like, well, you're going to get fined. Like, it's something that I just tell them that I don't want them to do. . . . If I kept seeing somebody on the roof using their [cell phone], I probably -- they wouldn't leave me no choice but to do something more, you know.
> Q.: Like fining them?
> Osorio: I've never fined them, but probably that would be the case, if that would -- if that's – it would lead up to it.
> Q.: Or let them go?
> Osorio: Uh-huh, probably. It's hard to let somebody go right now, because of the labor shortage. There's not a lot of people that want to do roofs. . . . I mean, I definitely talk to them.

(Tr. 234-35.)

Fama has the authority to stop work on a house for which it secured the roofing contract. Although Fama does not routinely check on worksites while work is in progress, there have been occasions when one of Fama's management employees has observed a safety infraction and addressed it with the work crew. Osorio observed a member of a roofing crew working without his safety harness. She ordered him off the roof and told him to go home and return the next day with his safety harness (Tr. 235-36). Osorio was aware of another time when Francisco Martinez

[10] The Court takes judicial notice that Georgia's Hands-Free Law (HB673) took effect July 1, 2018. It prohibits drivers from: "Holding or supporting, with any part of the body, a wireless telecommunications device or stand-alone electronic device."

was on his way to meet with a builder at a worksite and noticed a roofing crew member on the roof without his safety harness. Martinez instructed him to go get his safety harness. As Martinez passed the worksite on his way back after the meeting, he saw the crew member back on the roof, working without a safety harness. Martinez ordered him he to leave. Fama has not worked with that roofing crew again (Tr. 290-91).

In June of 2016, Fama and the Secretary entered into an agreement in settlement of a citation issued to Fama for safety violations committed by a roofing crew. As part of the agreement, Fama was required to hire a third-party contractor to conduct monthly safety audits. Fama hired HBNEXT to perform the safety audits (Tr. 237-38).

As Osorio explained it, her communications with the roofing crews regarding rules and safety issues were not in furtherance of an employment relationship but were a result of longstanding friendships with the crew members. "I give them advice. I talk to them. I mean, I've known them for a long time, you know. I don't keep everything so like business instructor. I mean, I really do care about them, and as far as they're on a roof, and I want them to be careful. So I do tell them like you know, guys, you got to be more careful." (Tr. 242.)[11]

Roofing Crew Workers

The three roofing crew employee witnesses testified with the assistance of a federally-certified court interpreter (Tr. 117).

Daniel Martinez

Daniel Martinez, brother of Fama owner Francisco Martinez, testified he is retired but he "occasionally works for them and other private individuals." (Tr. 151.) When asked, "Them, being Fama?," he responded, "Yes." (Tr. 151). Before his retirement Daniel Martinez did brick flashing work for Fama for 15 to 20 years (Tr. 151). Before he started specializing in flashing work, Martinez "had worked for [Fama] as a roofer on a temporary basis." (Tr. 152.)

When asked who directs the activity at a worksite for which Martinez is doing the flashing, he responded, "Aside from the owner who tells me, 'You're going to do this,' and then I decide how we're going to do it, so I tell my assistant." (Tr. 161) He has supervisory authority over the assistant (Tr. 154-55). Daniel Martinez determines what time to arrive at the worksite, how long to work, and which helper he will be working with. Fama generally does not know

[11] Osorio is the only witness, aside from Greenfield, who evinced any concern for compliance with OSHA's construction standards and who expressed a genuine concern for the safety and health of the crew members. She appeared to care more about the well-being of the crew members than they did about themselves.

which helper Daniel Martinez hires to assist with a given job, but Martinez recalled one occasion when Fama supplied him with an assistant (Tr. 151, 162). On December 9, 2016, Alberto was Martinez's assistant (Tr. 155).

Daniel Martinez initially stated, "It's Fama who I work for." (Tr. 153.) He never formed a company and does not advertise his services. When he needs work, he texts Fama's telephone number to see if there is a project available (Tr. 153-54). He has attended safety training provided by Fama and received a safety program provided by the company. Fama does not send anyone to the worksite to check on the flashing work performed by Martinez and his crew. On some occasions, Daniel Martinez worked out-of-state jobs for Fama. Fama paid for his crew's hotel accommodations, gasoline expenses, and half the cost of their meals (Tr. 158-59, 165).

Martinez testified he is paid a set amount by the linear foot. He takes the measurements for each job. Every week, he submits an invoice to Fama "for how much work we did, and they pay me, and I in turn pay the person who helped me." (Ex. R-17; Tr. 156.) He stated he does not submit invoices to other companies he does work for "because it's the type of job that's from person to person," meaning "it's a set price, agreed in advance." (Tr. 165.) In 2016, Fama paid Daniel Martinez $51,345.83 for his services (Ex. R-6; Tr. 166). He testified he made "[p]ossibly around $30,000" from other sources, but he gave one-third of that amount to his helper (Tr. 168). His accountant subtracts the cost of expenses, equipment, and the money Martinez pays his assistant from the total paid to him by Fama (Tr. 167-68).

Antonio Cardenas

Cardenas testified he has worked for Fama for approximately 15 years, but he does not consider himself an employee of Fama (Tr.118-19). When he does jobs for Fama, Cardenas is always partnered with Carlos Galicia, who has worked for Fama for approximately 14 years. Cardenas does not own his own business or work as an independent contractor. When Fama needs work done, it contacts Cardenas and tells him there is a house project available (Tr. 119-20). Cardenas sometimes does "temporary work" for someone named Raymundo, but otherwise works only for Fama (Tr. 137-38). He stated Galicia does not have contacts aside from Fama to find work (Tr. 138).

In earlier years, Fama issued separate paychecks each week to Cardenas and Galicia. Around 2013, Fama changed to issuing only one paycheck to each work crew (Tr. 130). For 2014, Fama issued Cardenas a 1099 form for $58,502.00. He split it evenly with Galicia (Ex. R-

7; Tr. 143). In 2016, Cardenas earned approximately $45,000.00 from Fama, after taking his share of the money issued to Galicia (Tr. 127). Other contractors do not issue him a 1099. "[T]hey don't issue them because I work very little for them." (Tr. 144.)

Fama pays Cardenas a non-negotiable fixed price for each roofing job (Tr. 121). Fama has raised the price per linear foot at least twice since Cardenas began working with the company (Tr. 122). Galicia prepares the invoices they turn in to Fama for the work week (Ex. R-15; Tr. 142). Cardenas has at times turned down a roofing job with Fama because he and Carlos consider the house too large or the roof too steep (Tr. 124). He estimated he turns down Fama jobs "maybe five times" a year (Tr. 125). Cardenas stated he worked approximately 8 months in 2016, preferring not to work "when it gets very cold." (Tr. 126.) He also stated, however, that he and Galicia usually complete five houses in a week, and the complete an average of 50 houses a year (Tr. 125-26). That estimate would result in approximately 10 weeks of work, not 8 months. The discrepancy is unexplained.

Cardenas confirmed Fama paid his medical bill when he was hurt at the start of a roofing job for Fama and stated Fama provided him with an additional $350.00 the week he was unable to work (Tr. 128). Fama provided Cardenas with safety glasses and a fire extinguisher and safety kit for his truck (Tr. 129, 146). He has attended mandatory safety training and received a written safety program from Fama (Tr. 131, 147). Cardenas testified no one from Fama or HBNEXT had ever inspected a Fama worksite on which he was working (Tr. 133). Cardenas and Galicia do not hold morning safety meetings at worksites (Tr. 133).

Cardenas testified that neither he nor Galicia supervise each other. They decide together what the arrival and departure times to and from the worksite should be (Tr. 138). They purchase needed equipment together, sometimes using Fama's credit, which they pay back in installments (Tr. 140).

Cardenas gave contradictory and misleading testimony regarding the two workers who were on the roof with him and Galicia the day of the OSHA inspections. He initially stated he and Galicia never worked with another crew on the same house (Tr. 133). When asked if anyone besides Galicia worked was working with him on the Lot 8 house on December 9, 2016, Cardenas replied, "No. I don't remember." (Tr. 134.) When shown the photographs of a worker wearing a blue hoodie on the roof (Ex. C-2, pp. 3, 4, 6, 7), Cardenas stated, "I know him, but he only worked there for a day," and said he was not part of a Fama crew, but was "[a] friend who

only worked there for a day . . . I called him on that day to come help me, and he came to help, and when we finished the house and we were paid, that's when I paid him." (Tr. 135). He had a similar story for the other person on the roof (Ex. C-2, p. 6), stating, "That's a friend that I ride with this other person. They didn't have anything—any job elsewhere that day, so they came to help me." (Tr. 136.) Cardenas said the two men "came to help me a couple of more times" and they had attended safety training provided by Fama (Tr. 136). The obfuscation and disinformation regarding the two men working on the Lot 8 house roof with Cardenas and Galicia continued with Galicia.

Carlos Galicia

Carlos Galicia testified he has worked for Fama for 12 years, and his boss is Cynthia Osorio. He considers himself to be an employee of Fama. He and Antonio Cardenas work together on a crew, as they were doing the day of the inspections at issue. Galicia also considers Cardenas also to be an employee of Fama. Galicia does not own his own business, work as an independent contractor, or have employees. Francisco Martinez contacts him and Cardenas each week to tell them the location of the roofing jobs. Francisco Martinez sets the amount to be paid to Galicia and Cardenas in advance for each roofing job. Martinez raised the price per linear foot at least twice during the time Galicia worked for Fama (Tr. 170-72). Galicia differentiated the work he does with Fama from contract work. "Well, I was asked if we were doing a contract, but [Fama] just tells us if there is a job. A contract is like if I were to negotiate with you, but we only do the work that [Fama] tells us to do." (Tr. 183.)

Galicia stated he does not work for other roofing contractors (Tr. 174). On cross-examination, when reminded of his deposition testimony, he admitted he had worked with other roofing employers, stating, "Yes, but it's not a large job. It's small work." (Tr. 185.) He sometimes earned money doing yard work or painting, "but only for two or three hours. It's for a short time. It's not like jobs for a full day. . . . These are jobs for other people, but not for companies or anything. These are just for people that ask to have the grass cut." (Tr. 181-82.) Fama required Galicia to attend safety training and follow the safety program it provided (Tr. 175).

Galicia testified he and Cardenas had no employees and evenly split money they earned from Fama. He initially stated that in 2016, he earned approximately $30,000.00 from all his sources of income (Tr. 173). He later amended his estimate to $45,000.00, which accords with

Cardenas's testimony for that year (Tr. 196). Galicia testified that between him and Cardenas, "There is no supervisor, because we both know to do the job. So I cannot be his supervisor and he cannot be my supervisor. We both know what the job is." (Tr. 185.) Cardenas determines what time to arrive at a worksite and when to leave because Galicia rides with him the truck they own together. Galicia stated he and Cardenas purchase their own equipment, including ladders and nail and staple guns (Tr. 185-86).

As with Cardenas, Galicia's testimony regarding the two other men on the roof with them the day of the inspections changed during questioning. Initially he stated he did not know their names and said of the man in the blue hoodie, "I don't work with him, and neither does he work with me." (Tr. 177). He also posited the man was not actually working on the Lot 8 house that day. "It's likely that he was working in the subdivision, but not the same house." (Tr. 178.) The photographs comprising Exhibit C-2 show this is clearly not the case. He then stated that, at times, friends of Cardenas work with them and they all split the money earned from the job (Tr. 189).

The relationship between Cardenas and Galicia and the two men came into focus with the introduction into the record of Exhibit R-4, the 1099 form for 2016 issued by Fama to Galicia. It is for $220,667.00. Galicia testified, "Part of this went to other people." (Tr. 190) He clarified that, after expenses, he and Cardenas split the money four ways with two other people (Tr. 196). Finally he conceded the two other workers with whom they split the money were the two men working with them on the Lot 8 house on December 9, 2016. Galicia estimated the two men had been working for Fama for "probably" 10 years (Tr. 197). Galicia's testimony thus evolved from not recognizing the two workers (even denying one of them was working on the same house) to conceding they may be friends of Cardenas who helped out that day, to acknowledging the two men performed an equal amount of work for Fama as Cardenas and Galicia did in 2016, and the four of them split the money earned from Fama evenly amongst themselves.[12]

Credibility Determinations

Any discrepancy between the testimony of Greenfield and the testimony of the management and employee witnesses is resolved in favor of Greenfield. His demeanor was

[12] Fama's Counsel includes a jocular footnote in Resp't's Br., stating, "Note that the amount of non-employee compensation paid to Carlos Galicia in 2016 was $220,667. Any suggestion that this should have been W-2 regular employee compensation on Fama's payroll strains credibility. If true, the undersigned Employer's counsel would be inclined to turn in his word processor for a nail gun." (Resp't's Br., p. 18.) Galicia's testimony makes clear, however, that he received only $45,000.00 of the total amount stated in the 1099 form for 2016.

confident and straightforward. He showed no hesitation or evasiveness during his testimony. His statements regarding his observations at the Lot 63 and Lot 8 worksites are backed up by the numerous photos he took of the worksites, including the measurements of the fall distance and the portable ladders. The Court credits his statement that Alberto and Cardenas informed him they were employees of Fama and Cardenas told him he was the supervisor.[13]

Each of the remaining witnesses stumbled somewhat in their testimony when confronted with contradictory statements in their deposition testimony. Some confusion may be attributed to language difficulties of the three employees testifying with the assistance of the interpreter. But other inconsistencies were the result of deliberate deceptions. It is clear Cardenas and Galicia deliberately misled the Court when they at first disavowed knowledge of the two men working with them on December 9, 2016, and later minimized their work relationship with them. Their willingness to deceive the Court under oath weakens the credibility of their testimony as a whole.

The Darden Test

As the Commission notes,

> the Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site. . . . In determining whether the Secretary has satisfied that burden, the Commission relies upon the test set forth in *Nationwide Mutual Insurance Company v. Darden,* 503 U.S. 316 (1992) ("*Darden*").

Allstate Painting & Contracting Co., 21 BNA OSHC 1033, 1035 (Nos. 97-1631 & 97-1727, 2005) (consolidated)). To determine whether the party in question was an employer under common law, the *Darden* Court looked primarily to "the hiring party's right to control the manner and means by which the product [was] accomplished." *Darden,* 503 U.S. at 323. Factors pertinent to that issue include:

> the skill required for the job, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is

[13] Alberto's statement to Greenfield that he is an employee of Fama is corroborated by his signed witness statement (Ex. C-3). Cardenas did not deny he told Greenfield during the inspection that Fama was his employer or that he was the supervisor of the four-man crew. Fama did not challenge Greenfield's testimony that Cardenas had represented Fama at settlement conferences at OSHA's office or that he recognized Cardenas and other crew members from previous inspections resulting the Secretary issuing citations to Fama.

> in business, the provision of employee benefits and the tax treatment of the hired party.

Id. at 323-24 (citing *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989)).

The Commission has addressed the relative weight of the *Darden* factors:

> [T]he [Supreme] Court has emphasized that all of these factors must be considered, and no one factor is decisive. [*Darden*] at 324. Yet, as reflected in the Supreme Court's most recent analysis of the common law meaning of "employee" in the context of a federal labor statute, the control exercised over a worker remains a "principal guidepost." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 123 S.Ct. 1673, 1679 (2003) (issue of whether physician-shareholders of an employer could be counted as "employees" for purposes of small employer exemption of the Americans With Disabilities Act, 42 U.C.S. §12101 et seq.). Further, *Clackamas* teaches that the relational context in which the issue arises has a bearing on how the multiple factors derived from the common law are to be applied and weighed.

Froedtert Memorial Lutheran Hospital, Inc., 20 BNA OSHC 1500, 1508 (No. 97-1839, 2004).

The Eleventh Circuit has also noted it has not explicitly affirmed the application of the *Darden* test to cases involving OSHA violations but has applied the test when the parties have not disputed its application:

> Three other circuits have affirmed the application of the *Darden* test to OSHA violations. *See Slingluff v. Occupational Safety & Health Review Comm'n,* 425 F.3d 861, 867–69 (10th Cir.2005); *IBP, Inc. v. Herman,* 144 F.3d 861, 865 (D.C.Cir.1998); *Loomis Cabinet Co. v. Occupational Safety and Health Review Comm'n,* 20 F.3d 938, 941–42 (9th Cir.1994). One circuit has ruled that *Darden's* reasoning is not directly applicable to the Act. *See Sec'y of Labor v. Trinity Indus., Inc.,* 504 F.3d 397, 402 (3d Cir.2007) ("[*Darden*] was decided under ERISA and has no impact on the question of whether the scope of the OSH Act is broad enough to cover workers who are not employees under the common law definition."). The parties here assume in their briefs that the *Darden* test applies. Therefore, we apply the *Darden* test here without deciding explicitly whether the Commission's interpretation of 29 U.S.C. § 652(6) is permissible.

Quinlan v. Sec'y, U.S. Dep't of Labor, 812 F.3d 832, 837 (11th Cir. 2016). Here, both the Secretary and Fama assume the *Darden* test applies.

Analysis of Employment Relationship Under Darden Test

The issue is whether the two work crews present on Lot 63 and Lot 8 the day of the inspections were subcontractors or employees of Fama. The evidence relating to some of the factors set out in *Darden* does not weigh in favor of either option—for example, the skill

required for the job (Cardenas and Galicia both testified they had no specialized training or schooling to become roofers (Tr. 131, 175)) and the location of the work (determined by the contracts between the builder and Fama) are just as likely to be true for a subcontractor as for employees of Fama. The factor of the "extent of the hired party's discretion over when and how long to work" is also neutral. The work crew determines what time of day to arrive at the worksite and how long to work there (Tr. 151, 185-86). However, Fama expects the crew to complete the roofing job within a day or two of delivery of the roofing materials. This scheduling is as likely to apply to subcontractors as to employees.

Three factors weigh in favor of finding a contractor-subcontractor relationship between Fama and the roofing crews

The hired party's role in hiring and paying assistants: Francisco Martinez testified each roofing crew determines how many crew members it needs to complete a job (Tr. 269-70). Daniel Martinez stated he decides who his helper will be on a given project (Tr. 151). At one time Fama tried to implement a rule prohibiting roofing crews from hiring workers without getting approval first from Fama, but "it didn't work." (Tr. 223-24.) The record establishes the roofing crews had discretion to hire their own assistants.

The provision of employee benefits: Fama provided no benefits relating to vacation time, health insurance, or retirement programs (Tr. 285).

The tax treatment of the hired party: Fama issued 1099 tax forms, not W-2 forms, to Daniel Martinez, Cardenas, and Galicia (Exs. R-5, R-6, R-7). This is evidence they worked as independent contractors and not employees.

The remaining factors weigh in favor of finding an employer-employee relationship between Fama and the roofing crews

The source of the instrumentalities and tools: Fama pays for and provides the materials needed to complete a roofing job, including shingles, felt, staples, nails, and flashing. Fama has provided a dump truck when needed on some worksites (Tr. 211-12). Fama has provided roofing crews with fire extinguishers, safety kits, hard hats, and safety glasses (Tr. 128-29, 146, 275-76). Providing workers with safety equipment is an act more likely done by an employer than a contractor.

The roofing crews generally buy their own tools and equipment, sometimes on Fama's credit. Fama then deducts the amount owed for the tools from the crews' paychecks (Tr. 148-49, 213). Cardenas explained the circumstances in which Fama would pay for equipment:

> Q.: Does Fama provide any of those pieces of equipment for you?
> Cardenas: Yes, sometimes.
> Q.: Such as?
> Cardenas: When something expensive that we are unable to buy ourselves and it breaks down, that's when.
> Q.: In that situation, do you have to repay Fama for the piece of equipment?
> Cardenas: Yes.

(Tr. 140.)

Extending credit to purchase needed equipment is more indicative of an employer-employee relationship than a contractor-subcontractor relationship. The work crews would not be able to purchase needed equipment without Fama's credit, which is not characteristic of an independent contractor prepared to subcontract for work in which it specializes.

The duration of the relationship between the parties: This factor weighs heavily in favor of finding an employer-employee relationship. Daniel Martinez and Alberto, working on Lot 63, had been doing roofing and flashing work for Fama for 15 to 20 years and 10 years, respectively (Ex. C-3; Tr. 151). For the crew working on Lot 8, Cardenas had done roofing work for Fama for 15 years and Galicia for 12 years (Tr. 118-19, 170). Galicia stated the two men working with him and Cardenas the day of the inspections had been working for Fama for "probably" 10 years (Tr. 197).

Whether the hiring party has the right to assign additional projects to the hired party: Generally, Fama assigns several houses a week to a roofing crew and pays the crew one check on Friday. The crew completes the work as scheduled (Exs. R-15, R-16, R-17; Tr. 128). Francisco Martinez acknowledged, however, that he had directed a roofing crew to stop working on a project and go to another location if an emergency arose (Tr. 260-262). Though rarely exercised, Martinez's ability to relocate a roofing crew indicates Fama has the right to assign additional projects to the crews. In applying the *Darden* test, the Eleventh Circuit has emphasized, "[I]t is the *right* to control, not the actual exercise of control, that is significant." *N.L.R.B. v. Associated Diamond Cabs, Inc*., 702 F.2d 912, 920 (11th Cir. 1983) (emphasis in original).

The method of payment: It is undisputed Fama sets a non-negotiable fixed price for each roofing job. Fama issues paychecks each Friday afternoon and a member of each roofing crew

must come to Fama's office to pick up the crew's paycheck (Tr. 122, 128, 212). This method of payment is indicative of an employer-employee relationship.

Whether the work is part of the regular business of the hiring party and whether the hiring party is in business: Fama is a roofing contractor and its business depends on roofing crews completing its contracts. Fama consistently uses the same workers to perform roofing work. Regarding the two work crews at issue in this case, Francisco Martinez testified he contacts Daniel Martinez first to perform flashing work because "I prefer to work with him. He's part of the family," (Tr. 258-859), and that his "first call goes to the most flexible people we can find. . . And usually these guys, like Carlos [Galicia] and Antonio [Cardenas], they are good." (Tr. 269.)

Additional Factors

The "principal guidepost" of the employer-employee relationship is the "control exercised over a worker." *Clackamas,* 123 S.Ct. at 1679. The Commission has held the "relational context in which the [control] issue arises has a bearing on how the multiple factors derived from the common law are to be applied and weighed." *Froedtert Memorial Lutheran Hospital, Inc.*, 20 BNA OSHC at 1508.

In addition to the enumerated factors of the *Darden* test, Fama exercised other forms of control over the roofing crews. Fama provided mandatory safety training and a written safety program to the roofing crews. If a crew had declined to attend, Fama would no longer hire it (Tr. 229). Fama implemented work rules prohibiting the use of cell phones by crew members driving to a Fama worksite and when working on roofs. Fama backed up the rules with the threat of fines for noncompliance (Tr. 232-35). Fama had the right to discipline and fire members of the roofing crews. Fama had the authority to stop work on a house for which it had secured a roofing contract. If Fama learned of a safety infraction on one of its houses, it would instruct the offending employee to watch a safety video at its office before he could pick up his paycheck (Tr. 225) Cynthia Osorio sent a worker home when she was at a Fama-contracted house and saw he was not wearing a safety harness (Tr. 235-36). Francisco Martinez fired a worker who got back on a roof without his safety harness after Martinez had ordered him to go get it (Tr. 290-91).

Francisco Martinez testified he founded Fama in 1995. Fama has a website, which Francisco Martinez testified was created "15 years ago maybe" and has never been updated

unless Osorio had done so without his knowledge (Tr. 271). She apparently had, because it states, "Fama Construction has been serving homeowners for the past 23 years." (Ex. C-4). At the time of the trial, Fama had existed for 23 years. The website goes on to state, "We are a family owned and operating roofing contractor, *employing over 50 people*, who all share in the pride of providing top quality materials, *professional installations*, and dependable warranties to both residential and commercial roofing customers." (Ex. C-4) (emphasis added.)

In a similar case where the central issue was whether the roofing contractor was an employer of the roofing crew or if the crew's supervisor was a subcontractor, the Court of Appeals for the First Circuit found the contractor's representations to the public could be considered as a factor in determining the nature of the relationship. *A.C. Castle Construction Co. v. Acosta,* 882 F.3d 34, 41 (1st Cir. 2018) ("A.C. Castle's representations were, in substance, representations he controlled [the roofing crew's supervisor] as an employee, not as an independent contractor. . . . [W]ith those representations, added to the other facts in the record elucidating their distinctive relationship, there is enough to provide substantial evidence for the ALJ's conclusion."). Here, Osorio testified she and her father worked in Fama's office, along with two other employees, leaving 46 employees (according to the website) unaccounted for unless they are members of the work crews. The inclusion of "professional installations" in Fama's list of services advances the appearance the roofing crews are employed by Fama. The Court finds Fama represented that the work crews were its employees, and not subcontractors.

Overall, the Court's analysis of the *Darden* factors, in light of the relational context of Fama and the cited work crews, indicates the relationship between Fama and the two work crews at the Devonshire Park worksites on December 9, 2016, was more akin to a traditional employer-employee relationship than that of a contractor-subcontractor. Fama and the two work crews had recurring relationships for over a decade, during which Fama exercised control not usually found in a contractor-subcontractor relationship. Specifically, Fama provided the crews with mandatory safety training, a written safety program, and safety equipment, which does not comport with the typical actions of a contractor. Fama did not permit work crews to negotiate the price of a particular job but set a fixed price. Fama implemented rules governing the use of cell phones and set a disciplinary policy for safety infractions. These actions are more typical of an employer-employee relationship than a contractor-subcontractor.

Fama argues its signed contracts with the work crews are evidence the crews worked as subcontractors. These boilerplate forms were not, however, for specific roofing projects and, with one exception, were not dated (Exs. R-8, R-9, R-10, R-11). More persuasive are the statements made by members of the work crews to Greenfield during the inspections at issue and in previous inspections. Greenfield asked Alberto if he was a subcontractor or an employee. As evidenced in his signed witness statement, Alberto responded, "I am an employee. So are the men on that other house." (Ex. C-3.) On several previous inspections, Greenfield had encountered Cardenas, who always identified himself as an employee of Fama (Tr. 45-46). At trial, Galicia testified he and Cardenas worked for Fama (170-72). In contradiction to what he had previously told Greenfield, at trial Cardenas stated he does not consider himself to be an employee of Fama, yet he does not own his own business or work as an independent contractor (Tr. 119-20). Cardenas also represented Fama during settlement conferences for previous citations issued to Fama at OSHA's office (Tr. 45).

Based on the foregoing analysis, the Court finds Fama was the employer of the two work crews working on Lots 63 and 8 on December 9, 2016, at the Devonshire Park subdivision. Therefore, the Secretary correctly cited Fama for the alleged violations.

IV. FAMA AS CONTROLLING EMPLOYER

The Court also finds, under the Secretary's alternative theory, that Fama is a controlling employer with regard to the cited worksites under the multi-employer worksite doctrine. As the Commission has noted, "an employer owes a duty under § 5(a)(2) of the Act not only to its own employees but to other employees at the worksite when the employer creates and/or controls the cited condition." *Summit Contractors, Inc*., 23 BNA OSHC 1196, 1205 (No. 05-0839, 2010). "[A]n employer's duty to exercise reasonable care where its own employees are not exposed to the hazard 'is less than what is required of an employer with respect to protecting its own employees,' such that a general contractor need not inspect the worksite as frequently as an employer whose own employees are exposed to the hazard." *Evergreen Constr. Co*., 26 BNA OSHC 1615, 1618 (No. 12-2385, 2017).

As established *supra*, Fama had the power to correct safety violations and exercised considerable control over the work crews. The Court concludes that even if the work crews at issue were subcontractors, Fama was a controlling employer. *See Suncor Energy (U.S.A.) Inc.*, 2019 WL 654129, at *3 (No. 13-0900, 2019) (*quoting* OSHA Instruction CPL 02-00-124, Multi-

Employer Citation Policy § X.E.1 (Dec. 10, 1999) (MEP) (defining controlling employer as "[a]n employer who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them")); see also, *Summit Contractors Inc.*, 22 BNA OSHC 1777, 1780-81 (No. 03-1622, 2009) (agreeing with and quoting the MEP's definition of a controlling employer); *McDevitt Street Bovis Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) (finding general contractor to be controlling employer where supervisor had "authority to demand a subcontractor's compliance with safety requirements, to stop a subcontractor's work if safety violations were observed, and to remove a subcontractor from the worksite").

"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").

"Determining whether a controlling employer has met its duty to exercise reasonable care involves analyzing several factors: those that relate to the alleged violative condition itself and those that relate to the employer's duty to monitor or inspect." *Suncor*, 2019 WL 654129, at *5. "Whether a controlling employer should have known of the conditions giving rise to the violations of another employer depends in part on the 'nature, location, and duration of th[e] conditions.'" *Id.* (*quoting David Weekley Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898, 2000).

Greenfield testified Fama was on notice that to meet the standard of reasonable care, more frequent inspections of the usual work crews hired to complete its roofing jobs were required. "This particular employer has been in the [OSHA] office several times, and entered into different informal settlement agreements, stating they're aware of what these violations are, what the hazards are, what the -- what is required of them, and come into agreements that we'll

train these employees, or we'll fix this, or we're ensure that they're doing what they're supposed to. And so they have a heightened knowledge of what these hazards are and the continuing problem, but [they] haven't been doing anything . . . in any of the prior agreements." (Tr. 82.) Fama was also a party to a settlement agreement for a previous citation issued by the Secretary where it agreed "they would hire a third-party safety consultant that would train these people for these ladder and fall protection, these other violations, and also that they would do periodic inspections, and up to the point of the day of this inspection, they had not done that. . . ." (Tr. 68.)

Although "the extent of measures a controlling employer must implement to satisfy the duty of reasonable care 'is less than what is required of an employer with respect to protecting its own employees[,]'" *Suncor*, 2019 WL 654129, at *7 (*quoting* MEP § X.E.2), there is no evidence Fama conducted any inspections. Rather, Fama admitted it "does not perform random inspections of its worksites" and "rarely goes to a work site while its subcontractors are working on a roof." (Resp't's Br. at 25) (*citing* Tr. 133, 176, 270). Given the extensive history of OSHA violations by Fama work crews installing roofs, reasonable care required Fama to increase its inspections. Therefore, Fama did not meet its duty to exercise reasonable care.

V. THE CITATIONS

The Court of Appeals for the Eleventh Circuit, where this case arose,[14] has held "[t]o establish a prima facie case under the Occupational Safety and Health Act, 29 U.S.C. §§ 651 et seq., the Secretary must show '(1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements.'" *Samsson Constr., Incorp. v. Sec'y, U.S. Dep't of Labor*, 723 F. App'x 695, 697 (11th Cir. 2018) (*quoting ComTran Group, Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013). For the reasons indicated *infra*, the Court

[14] Under the Act, 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). "[I]n general, '[w]here 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.'" *Dana Container, Inc.*, 25 BNA OSHC 1776, 1792 n.10 (No. 09- 1184, 2015), *aff'd*, 847 F.3d 495 (7th Cir. 2017) (citation omitted). The alleged violations occurred in Georgia, which is also where Fama's principal office is located (Tr. 168). Therefore, the Court applies the precedent of the Eleventh Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

concludes the Secretary has also established a prima facie case for the knowledge element for each cited violation.

A. LOT 63
(Docket No. 17-1173)

Citation Number 1

Item 1: Alleged Serious Violation of 29 C.F.R. § 1926.1053(b)(1)

In Item 1 of citation 1, the Secretary alleges Fama violated 29 C.F.R. § 1926.1053(b)(1), the ladders standard, since "[t]wo employees performing roofing work were exposed to a fall hazard of approximately 11.1-feet when they used an aluminum extension ladder that was not extended three feet above the roof landing." The cited standard mandates in relevant part "[w]hen 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[.]" 29 C.F.R. § 1926.1053(b)(1).

1. The Cited Standard Applied

The cited standard is found in *Subpart X—Stairways and Ladders* of the construction standards, which "applies to all stairways and ladders used in construction, alteration, repair (including painting and decorating), and demolition workplaces covered under 29 C.F.R. § part 1926[.]" 29 C.F.R. § 1926.1050(a). Fama was under contract to install roofs on houses, a construction activity. The Secretary has established the cited standard applied to the cited conditions.

2. The Cited Standard Was Violated

Greenfield observed a blue portable extension ladder extended "[a]pproximately a foot, maybe a foot and a half" above the porch roof where Alberto was working. He based the estimate on the standard one-foot distance between ladder rungs (Ex. C-1, pp. 1-3, 8; Tr. 51). The portable ladder "could have been extended another 3 or 4 feet" according to Greenfield. Martinez and Alberto had been using it for approximately 20 minutes (Tr. 66). Page 7 of Exhibit C-1 provides the best angle showing the blue ladder extends well short of three feet above the porch roof. The Secretary has established the cited standard was violated.

3. Fama's Employees Were Exposed to the Violative Condition

Both Alberto and Martinez used the ladder to access the porch roof (Tr. 57-58). The Secretary has established employee exposure.

4. Employer Knowledge

"The Secretary may prove that an employer had knowledge of a violation in one of two ways—(1) by imputing the actual or constructive knowledge of a supervisor or (2) by demonstrating constructive knowledge based on the employer's failure to implement an adequate safety program." *Samsson*, 723 F. App'x 697 (*quoting ComTran*, 722 F.3d at 1311). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct." *ComTran*, 722 F.3d at 1307–08. "An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have." *ComTran*, 722 F.3d at 1308. A supervisor's knowledge of a subordinate employee's violative conduct may be imputed to the employer even when the supervisor himself is simultaneously involved in the same violative conduct. *Quinlan v. U.S, Dept. of Labor,* 812 F.3d 832 (11th Cir. 2016).

Here, Alberto admitted to Greenfield that Daniel Martinez was his supervisor (Tr. 41). Martinez corroborated this statement in his testimony (Tr. 160-61). The Court concludes Martinez was Fama's supervisor. Both Martinez and Alberto used the portable ladder to access the porch roof. At the time of the inspection, Martinez was working on the ground in the immediate vicinity of ladder, with Alberto in plain view on the porch roof. (Ex. C-1, pp. 1-2; Tr. 42). The Court concludes Martinez had both actual and constructive knowledge that the portable ladder was not in compliance with the terms of the cited standard and his knowledge is imputed to Fama.

Characterization of the Violation

The Secretary characterized the violations as "serious." A "serious" violation is established when there is "a substantial probability that death or serious physical harm could result [from a violative condition] . . . 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). "That provision does not mean that the occurrence of an accident must be a substantially probable result of the violative condition but, rather, that a serious injury is the likely result should an accident occur." *Miniature Nut & Screw Corp*., 17 BNA OSHC 1557, 1558 (No. 93-2535, 1996).

Greenfield explained the serious characterization of the violation.

> It's a serious violation because of the injuries that could occur if they fall, which would be lacerations, fractures and possibly death. . . . If [the portable ladder is] three feet above the eaves, they can use the side rails. The -- whoever is using the ladder can use the side rails as something to grab onto when they're going up or getting down. If it's not set that high, then the person would have to -- like, getting down from the roof, would have to blindly try to lean over the edge and step down. And I'm aware of people falling where they've mis-stepped.

(Tr. 84.) The Court concludes the Secretary properly characterized Item 1 as a serious violation.

Citation Number 2

Item 1: Alleged Repeated Violation of 29 C.F.R. § 1926.102(a)(1)

In Item 1 of citation 2, the Secretary alleges a repeated violation of 29 C.F.R. § 1926.102(a)(1), the eye and face protection standard, when "[t]wo employees performing roofing work were exposed to struck-by hazards from wood chips and nails while operating nail guns without wearing eye protection." The cited standard provides "[t]he employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation." 29 C.F.R. § 1926.102(a)(1).

Related to the "repeated" characterization of the alleged violation, the Secretary asserts "Fama Construction, LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard 1926.102(a)(1), which was contained in OSHA inspection number 1043716, citation number 2, item number 1, and was affirmed as a final order on April 17, 2015, with respect to a workplace located at 426 Devon Brook Ct., Lawrenceville, Georgia."

1. The Cited Standard Applied

Generally, an OSHA standard presumes a hazard and the Secretary is not required to establish one exists as part of his burden of proof. When, however, a standard specifies it applies only when a hazard is present, such as a personal protective equipment ("PPE") standard like § 1926.102(a)(1), the Secretary must meet the additional requirement.

> To establish the applicability of a PPE standard that, by its terms, applies only where a hazard is present, the Secretary's burden includes demonstrating that there is a significant risk of harm and that the employer had actual knowledge of a need for protective equipment, or that a reasonable person familiar with the

> circumstances surrounding the hazardous condition, including any facts unique to the particular industry, would recognize a hazard requiring the use of PPE.

Wal-Mart Distribution Ctr. # 6016, 25 BNA OSHC 1396, 1400-1401 (No. 08-1292, 2015), *aff'd in pertinent part, rev'd in part on other grounds*, 819 F.3d 200 (5th Cir. 2016).

Greenfield testified use of a nail gun presents a significant risk of harm to the employee using it, as well as to other employees in the vicinity. Hazards include "a nail ricocheting and striking [an employee] in the eye, a piece of wood from the roof being -- popping back up, possibly particles from the asphalt shingles popping up and striking the person in the eye. . . . I've been on a construction site before in which someone was operating a nail gun, and they -- the nail went through the decking and struck two floors, the foundation two floors below. . . .That's about 20 feet." (Tr. 87-88.)

The Commission has recognized "the eye is an especially delicate organ and … any foreign material in the eye presents the potential for injury." *Vanco Constr. Inc.,* 11 BNA OSHC 1058, 1060 (No. 79-4945, 1982) (*citing Sterns– Roger, Inc*., 7 BNA OSHC 1919, 1921 (No. 76-2326, 1979)), *aff'd*, 723 F.2d 410 (5th Cir. 1984). A reasonable person familiar with the construction industry would recognize a hazard to an employee using a nail gun requiring the use of protective eyewear. The cited standard applied to the cited condition.

2. The Cited Standard Was Violated

Greenfield observed Alberto operating a nail gun while not wearing safety glasses (Tr. 87). Instead, he was wearing ordinary plastic sunglasses. Greenfield explained why sunglasses were inadequate to comply with the cited standard. "Those glasses don't have the ANSI stamp on them, which would state that they are safety glasses, which would mean that they're shatter-proof, impact resistant. . . . [A]ll safety glasses have to have some kind of ANSI stamp or logo on there, saying that they comply." (Tr. 53.) The Secretary has established Fama violated the cited standard.

3. Fama's Employee Was Exposed to the Violative Condition

Alberto was using a nail gun to install asphalt shingles while not wearing safety glasses (Tr. 49-50). He was exposed to the hazard of being struck in the eye. The Secretary has established employee exposure to the hazard.

4. Employer Knowledge

Alberto was working in plain sight of or in the immediate vicinity of Martinez and Martinez's actual and constructive knowledge of the violative conduct is imputed to Fama. The Secretary has established employer knowledge.

Characterization of the Violation

The Secretary characterized the violation as a "repeated" one. "A violation is properly characterized as repeated under section 17(a) of the Act, 29 U.S.C. § 666(a), 'if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.' " *Angelica Textile Servs., Inc.*, 2018 WL 3655794, at *11 (No. 08-1774, 2018) (*quoting Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979)). "The Secretary establishes 'a prima facie case of [[substantial] similarity by showing that the prior and present violations are for failure to comply with the same standard. " *Id.* (*quoting id.*). The parties stipulated to the existence of three violations of the cited standard by Fama that became Final Orders of the Commission on April 19, 2015, January 21, 2015, and February 14, 2014. (*Pretrial Order,* Attachment C, ¶ 5.) The Court concludes they were substantially similar violations. "This prima facie showing of substantial similarity may be rebutted 'by evidence of the disparate conditions and hazards associated with these violations of the same standard.' " *Angelica*, 2018 WL 3655794, at *11 (*quoting Potlatch*, 7 BNA OSHC at 1063). Fama offered no evidence to rebut the Secretary's prima facie showing of substantial similarity. Therefore, the Court concludes the Secretary properly characterized the violation as a repeated one

Item 2: Alleged Repeated Violation of 29 C.F.R. § 1926.501(b)(13)

In Item 2 the Secretary alleges a repeated violation of 29 C.F.R. § 1926.501(b)(13), the fall protection standard, when "[a]n employee performing roofing work was exposed to a fall hazard of approximately 11.1-feet to 12-feet when he worked from an approximately 4/12 slope porch roof without using fall protection." The cited standard provides in relevant part that "[e]ach employee engaged in residential construction activities 6 feet (1.8 m) or more above lower levels shall be protected by guardrail systems, safety net system, or personal fall arrest system[.]" 29 C.F.R. § 1926.501(b)(13).

Related to the repeated characterization of the alleged violation, the Secretary asserts "Fama Construction, LLC was previously cited for a violation of this occupational safety and health standard or its equivalent standard 1926.501(b)(13), which was contained in OSHA inspection number 1007529, citation number1, item number 2, and was affirmed as a final order

on January 21, 2015, with respect to a workplace located at Lot 182, 308 Brittany Cove, Loganville, Georgia."

1. The Cited Standard Applied

Fama's work crews were engaged in residential construction activities in the Devonshire Park subdivision on December 9, 2016. The cited standard applied to the cited conditions.

2. The Cited Standard Was Violated

Alberto was not tied off while working on the porch roof, nor was he using any other form of fall protection (Ex. C-1, pp. 1-3, 7-8). Greenfield measured the distance between the ground and the porch roof to be 11.2 feet (Ex. C-1, pp. 4-5; Tr. 54). The Secretary has established a violation of the cited standard.

3. Fama's Employee Was Exposed to the Violative Condition

The Secretary has established Alberto was exposed to a fall hazard of 11.2 feet.

4. Employer Knowledge

Alberto was working without fall protection in plain view of Martinez. Martinez's actual and constructive knowledge of the violative conduct is imputed to Fama. The Secretary has established employer knowledge.

Characterization of the Violation

The Secretary characterized the violation as a repeated one. The parties stipulated to the existence of five violations of the cited standard by Fama that became Final Orders of the Commission on February 19, 2018, two on January 21, 2015, February 14, 2014, and December 13, 2011. (*Pretrial Order,* Attachment C, ¶ 5.) The Court concludes they were substantially similar violations and Fama offered no evidence to rebut the Secretary's prima facie showing of substantial similarity. Therefore, the Court concludes the Secretary properly characterized the violation as a repeated one.

B. LOT 8
(Docket No. 17-1180)

Citation Number 1

Item 1: Alleged Willful Violation of 29 C.F.R. § 1926.102(a)(1)

In Item 1 of citation 1, the Secretary alleges a willful violation of 29 C.F.R. § 1926.102(a)(1), the eye and face protection standard, when "[e]mployees using nail guns while performing roofing work are not being protected from struck by hazards to their eyes through the

use of eye protection[.]" Related to the willful characterization of the alleged violation, the Secretary asserts Fama was previously cited for a violation of this standard on three occasions, which were affirmed as a final orders of the Commission on April 19, 2015, January 21, 2015, February 14, 2014.

1. The Cited Standard Applied

For the same reasons indicated *supra*, the cited standard applied to the cited condition.

2. The Cited Standard Was Violated

None of the four employees working on the roof of the house under construction on Lot 8 was wearing safety glasses. They were using nail guns to attach the asphalt shingles to the roof (Ex. C-2, pp. 4-5, 7-9, 13; Tr. 55-56, 60, 63-64, 96-97). Galicia conceded he was not wearing eye protection that day. "Because that day, it was very cloudy, and the glass would fog up real quickly. . . . [I]t was foggy that day, and if I were to wear those glasses, they would have clouded up quick, would not -- they would not have allowed me to see. I would have fallen. So it was better to have them off." (Tr. 194-95.) As several photographs of the brilliant blue sky in Exhibit C-2 show (pp. 1-3, 7-10, 12-13), it was neither cloudy nor foggy that day. The Secretary has established a violation of the cited standard.

3. Fama's Employee Was Exposed to the Violative Condition

All four employees working on the roof of the Lot 8 house were exposed to the hazard of flying particles striking their eyes. Employee exposure is established.

4. Employer Knowledge

Actual knowledge is established due to the presence of Cardenas at the worksite. Greenfield testified Cardenas identified himself as the supervisor of the crew at the time of the inspection. As noted earlier, this testimony is credited over the assertions of Cardenas and Galicia that there was no supervisor between the two of them. Contrary to the initial testimony of the two partners, there were two other crew members working with them on the Lot 8 house. Both Cardenas and Galicia eventually identified them as friends of Cardenas. Cardenas was, therefore, the supervisor of the other three men on the worksite. Cardenas participated in the same violative conduct engaged in by the other crew members.

Constructive knowledge is also established due to the close proximity of Cardenas to the violative conduct of the other crew members, which was in plain sight. Furthermore, under the multi-employer worksite doctrine, as the controlling employer, Fama was required to exercise

reasonable care to prevent and detect violations on the worksite. "More frequent inspections are normally needed if the controlling employer knows that the other employer has a history of non-compliance." (Ex. C-5, ¶ X.E.3.d.) Fama was well aware, due to the its extensive recent history of citations for violations of the standards at issue here, that the worksites supervised by Cardenas required inspection. Fama had not performed any inspections prior to December 9, 2016. "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program." *ComTran*, 722 F.3d at 1308. Fama's failure to inspect despite Cardenas's history of non-compliance also establishes constructive knowledge. The Secretary has established employer knowledge.

Item 2: Alleged Willful Violation of 29 C.F.R. § 1926.501(b)(13)

In Item 2 the Secretary alleges a willful violation 29 C.F.R. § 1926.501(b)(13) "when four employees installing asphalt shingles on a 10/12 slope roof failed to attach a lifeline to their harnesses and were exposed to a fall hazard of approximately 11.1 feet or greater." Related to the willful characterization of the alleged violation, the Secretary asserts Fama was previously cited for a violation of this standard on three occasions, which were affirmed as final orders of the Commission on January 21, 2015, January 21, 2015, and on December 13, 2011.

1. The Cited Standard Applied

For the same reasons indicated *supra*, the cited standard applied to the cited condition.

2. The Cited Standard Was Violated

None of the four employees on the roof of the Lot 8 house was using fall protection (Cardenas attached a lifeline briefly to his rock-climbing harness when he observed Greenfield speaking with Alberto on Lot 63) (Ex. C-2; Tr. 105-06). The Secretary has established a violation of the cited standard.

3. Fama's Employee Was Exposed to the Violative Condition

The four employees were exposed to a fall of 11.1 feet, as shown in the photographs Greenfield took of a measuring tape extended from the ground to the roof edge (Ex. C-2, pp. 10-11). Employee exposure is established.

4. Employer Knowledge

Actual knowledge is established due to the presence of Cardenas at the worksite. As noted earlier, Cardenas was the supervisor of the other three men on the worksite and he participated in the same violative conduct engaged in by the other crew members. As noted

earlier, constructive knowledge is also established due to the close proximity of Cardenas to the violative conduct of the other crew members, which was in plain sight. Furthermore, Fama's failure to inspect despite Cardenas's history of non-compliance also establishes constructive knowledge. The Secretary has established employer knowledge.

Item 3: Alleged Willful Violation of 29 C.F.R. § 1926.1053(b)(1)

In Item 3 the Secretary alleges a willful violation of 29 C.F.R. § 1926.1053(b)(1) when "[f]our employees performing roofing work were exposed to a fall hazard of approximately 11.1-feet when they used an aluminum extension ladder that was not extended three feet above the roof landing."

1. The Cited Standard Applied

For the same reasons indicated *supra*, the cited standard applied to the cited condition.

2. The Cited Standard Was Violated

The four crew members used a portable extension ladder to access the roof of the Lot 8 house. The side rails of the roof extended only 1.5 to 2 feet above the roof, instead of the required 3 feet (Ex. C-2, pp. 10-11; Tr. 63, 109). The Secretary has established a violation of the cited standard.

3. Fama's Employee Was Exposed to the Violative Condition

The four crew members were exposed to a fall hazard of 11.1 feet due to the improperly placed ladder. Employee exposure is established.

4. Employer Knowledge

Actual knowledge is established due to the presence of Cardenas at the worksite. As noted earlier, Cardenas was the supervisor of the other three men on the worksite and he participated in the same violative conduct engaged in by the other crew members. As noted earlier, constructive knowledge is also established due to the close proximity of Cardenas to the violative conduct of the other crew members, which was in plain sight. Furthermore, Fama's failure to inspect despite Cardenas's history of non-compliance also establishes constructive knowledge. The Secretary has established employer knowledge.

Characterization of the Violations

The Secretary characterized the cited violations as "willful" ones. Although the Act does not define the terms "willful" or "willfully," the Eleventh Circuit has held that "[t]he definition of 'willful' in this circuit is, in its simplest form, 'an intentional disregard of, or plain

indifference to, OSHA requirements.' " *Fluor Daniel v. Occupational Safety & Health Review Comm'n*, 295 F.3d 1232, 1239–40 (11th Cir. 2002) (internal citation and quotation omitted). In the Eleventh Circuit, in order to establish a willful violation, the Secretary must prove either "(1) [that the] employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard or (2) that, if the employer did not know of an applicable standard of provision's requirements, it exhibited such reckless disregard for employee safety or the requirements of the law generally that one can infer that . . . the employer would not have cared that the conduct or conditions violated [the standard]." *Id.,* 295 F. 3d at 1240 (internal citation and quotation omitted).

Here, the record provides abundant evidence Fama (through Cardenas) knew of the three cited standards and consciously disregarded them. Fama provided mandatory safety training and a written safety program to its work crews. Cardenas testified he attended the safety training and Fama required him to follow the written safety program. He admitted he knew OSHA required him and his crew members to wear fall protection "[b]ecause they were demanding it. . . Because there were other framing workers who reported that they had already been visited, and so from then, we started carrying it." (Tr. 131.) When asked if he knew he and his crew members were supposed to wear safety glasses when using nail guns, he stated, "Yes, we had been told. . . . Fama told us and also the workers that were working next door have already told us that OSHA was demanding that they wear that." (Tr. 132.) He also knew the OSHA standards required the siderails of portable ladders to extend 3 feet or more beyond the upper landing surface (Tr. 132).

Cardenas had represented Fama during settlement negotiations for previous citations. Cardenas had spoken with OSHA representatives several times before the inspection at issue, and they had "talked about the requirements for fall protection, eye protection, and ladder placement." (Tr. 133.) As Greenfield was talking with Alberto on Lot 63, he observed that Cardenas "went and attached a lifeline to a rock-climbing harness at the front of his waist, and this was just before I identified myself, but this is when he saw me standing right in front of the lot." (Tr. 47.) This behavior indicates an awareness on the part of Cardenas that OSHA regulations required him to use fall protection when working on the roof.

The previous citations also establish Fama, as the controlling employer, "knew of [the] applicable standard[s] . . . prohibiting the conduct or condition[s] and consciously disregarded the standard[s]," in accordance with the formulation established in *Fluor Daniel.* The parties

stipulate there was one prior citation for a violation of § 1926.1053(b)(1), three for § 1926.102(a)(1), and five for § 1926.501(b)(13). Fama knew of the applicable standards because the Secretary had cited the company for violating them numerous times, and it consciously disregarded the standards with each new worksite. Fama ignored the flagrant safety record of Cardenas and Galicia and continued to give them preference over other crews because they were the most "flexible," meaning they performed the jobs "faster and on timing what [we're] expecting." (Tr. 269) Fama prioritized speed (and profit) above safety.

The Secretary states, "Despite its poor safety record, Fama refused to undertake any effort to discover violations, even when it promised OSHA it would do so (Tr. 100:21-25). Without any effort to monitor work crew compliance, Fama's safety training and disciplinary program predictably made no correction to its work crew's lax attitude towards OSHA's safety requirements." (Secretary's brief, pp. 27-28.) The Court agrees with the Secretary's analysis. The existence of the previous citations weighs heavily in the Court's determination of Fama's state of mind regarding its duty to ensure compliance with OSHA's construction standards.

Cardenas and Fama's management manifested a heightened awareness that the work crew members were violating the cited standards when they failed to use fall protection, wear safety glasses while using a nail gun, or used an improperly placed ladder. The Court concludes the Secretary's characterization of Fama's violations of §§ 1926.1053(b)(1), 102(a)(1), and 501(b)(13) as willful was appropriate.

VI. PENALTY DETERMINATION

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00- 1052, 2005) (citation omitted). "The other factors are concerned with the employer generally and are considered as modifying factors.'" *Natkin & Co. Mech. Contractors*, 1 BNA OSHC 1204, 1205 n.3 (No. 401, 1973).

At the time of the violations, Fama employed fourteen to nineteen people, including office employees and work crews (Tr. 206-08). Therefore, a 60% reduction for size is

appropriate. As to its history of violations, the Court finds an increase of 10% is appropriate given Fama's previous violations within the last five years, and its repeated, blatant disregard of the most basic construction standards. The gravity of the violations of the three cited standards discovered during the December 9, 2016, inspections of Lot 63 and Lot 8 is high. On Lot 63, one employee was exposed to the cited hazards for approximately 20 minutes. On Lot 8, four employees were exposed to the cited hazards for approximately 40 minutes. The likelihood of injury for the violation of each standard was high. No precautions were taken against injury.

At the time of the inspections, Fama was subject to a maximum penalty of $9,054 for the serious violation, and up to $126,749 for each willful and repeated violation. (*See* 82 FR 5382.) Docket No. 17-1173 had two citations, one with an alleged serious violation and a proposed penalty of $3,984, and the second with two alleged repeat violations, the first with a proposed penalty of $15,935 and the second with a proposed penalty of $19,919. Docket No. 17-1180 had one citation with three alleged willful violations, the first with a proposed penalty of $47,801, the second and third each with a proposed penalty of $55,770. The Court does not agree with the Secretary's proposed penalties for the two repeat violations in Docket No. 17-1173 or the first willful violation in Docket No. 17-1180.

"The OSHA scheme allows the Commission to increase the proposed penalty imposed by the Secretary if, after the hearing provided by the statute, the Commission determines that such an increase is warranted." *Dan J. Sheehan Co. v. Occupational Safety & Health Review Comm'n*, 520 F.2d 1036, 1041 (5th Cir. 1975). Thus, the Commission may, where appropriate, assess a penalty higher than that proposed by the Secretary. *R.G. Friday Masonry, Inc.*, 17 BNA OSHC 1070, 1075 (Nos. 91–1873 & 91–2027, 1995) (consolidated). Although gravity normally is the most significant consideration, each factor can be accorded the weight that is reasonable in the circumstances. *Merchant's Masonry, Inc.*, 17 BNA OSHC 1005, 1006 (No. 92-424, 1994).

There is ample authority to establish that in situations of this nature, a substantial penalty is warranted under section 17(j) to accomplish the civil, remedial purpose of inducing the cited employer to satisfy its statutory obligation to provide a safe workplace. For example, in *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995), the Commission doubled the $14,000 penalty assessed by the judge in view of the employer's blatant disregard for the safety of its employees and the high gravity of the violations. See also, *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1625 (No. 88-1962) (lack of good faith as a significant factor in penalty assessment). Penalties

must be assessed in an amount sufficient to preclude their being assumed by the employer as "simply another cost of doing business." *Quality Stamping Prods. Co.*, 16 BNA OSHC 1927, 1929 (No. 91-414, 1994). See *E.L. Davis Contrac. Co.*, 16 BNA OSHC 2046, 2053 (No. 92-35, 1994) (where Commission assessed a penalty of $60,000 to cause the company to appreciate "the vital importance of complying with OSHA regulations"). Therefore, the Court concludes the appropriate penalties in light of Fama's continued disregard for OSHA's safety standards, despite repeated citations, is $3,984 for the serious violation, $55,770 for each repeat violation, and $55,770 for each willful violation. Accordingly,

VII. ORDER

IT IS HEREBY ORDERED THAT:

1. Docket No. 17-1173: Item 1 of Citation Number1, alleging a serious violation of § 1926.1053(b)(1), is **AFFIRMED**, and a penalty of $3,984 is **ASSESSED**;

2. Docket No. 17-1173: Item 1 of Citation Number 2, alleging a repeat violation of § 1926.102(a)(1), is **AFFIRMED**, and a penalty of $55,770 is **ASSESSED**;

3. Docket No. 17-1173: Item 2 of Citation Number 2, alleging a repeat violation of § 1926.501(b)(13), is **AFFIRMED**, and a penalty of $55,770 is **ASSESSED**;

4. Docket No. 17-1180: Item 1 of Citation Number 1, alleging a willful violation of § 1926.102(a)(1), is **AFFIRMED**, and a penalty of $55,770 is **ASSESSED**;

5. Docket No. 17-1180: Item 2 of Citation Number 1, alleging a willful violation of § 1926.501(b)(13), is **AFFIRMED**, and a penalty of $55,770 is **ASSESSED**; and

6. Docket No. 17-1180: Item 3 of Citation Number 1, alleging a willful violation of § 1926.1053(b)(1), is **AFFIRMED**, and a penalty of $55,770 is **ASSESSED**.

SO ORDERED.

/s/ *John B. Gatto*
First Judge John B. Gatto

June 5, 2019
Atlanta, GA