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 ON REMAND[1]

Attorneys and Law firms

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

I. INTRODUCTION

The Commission remanded this case "to evaluate whether there are any issues of material fact regarding Fama's liability as a controlling employer under the correct legal framework" and "based only on the facts and record evidence in this case." *Fama Construction, LLC*, No. 19-1467, 2023 WL 2837610, **3-4 (OSHRC Mar. 29, 2023). If the court "on remand determines that the violations should be affirmed after analyzing the record in this case under the correct legal framework," the court "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." *Id.* at *5. For the reasons indicated *infra*, the court concludes the Secretary has shown there are no genuine issues of material fact in dispute regarding Fama's liability as a controlling employer and has met his burden of establishing that there are truly no disputed issues of material fact regarding the defense. Therefore, the Secretary's motion for summary judgment is **GRANTED**.

[1] The court incorporates by reference its Memorandum Opinion and Order in *Fama Construction, LLC*, No. 19-1467 (OSHRC 2023) (ALJ), except for any parts that conflict with the Commission's Remand Order or this Memorandum Opinion and Order on Remand.

II. DISCUSSION

A. Liability as a Controlling Employer

The Commission affirmed this court's ruling 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." *Fama*, 2023 WL 2837610, at *3. Thus, on remand the first issue to be decided is "whether there are any issues of material fact regarding Fama's liability" as a controlling employer. *Id.* "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 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).

"If 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." *Stormforce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *6 (OSHRC Mar. 8, 2021). The Secretary argues the undisputed facts "establish that Fama had actual knowledge of its failure to inspect the worksite[.]" (Sec'y's Renewed Mot. Summ. J. 15.) The court concludes that even if undisputed, this fact is not a material one since it does not establish there is no genuine dispute that Fama had actual knowledge of *its subcontractors violations*.

"In the absence of actual knowledge," the court looks to whether Fama "met its obligation as a controlling employer to 'exercise reasonable care,' i.e., to take 'reasonable measures' to 'prevent or detect' the violative conditions." *Stormforce*, 2021 WL 2582530, at *8 (quoting *Suncor*, 2019 WL 654129, at *6). However, "a controlling employer's 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 *6 (citation omitted). Therefore, the court must assess the extent of Fama's "duty given its secondary safety role as a controlling employer in light of objective factors—the nature of the work, the scale of the project, and the safety history and experience of the contractors involved." *Id.* at *7.

Here, the nature of the work was roofing work, which exposed Fama's subcontractors to fall hazards. The scale of the project was significant since Fama held the exclusive roofing contract with the builder of the new residential townhomes at the worksite. As to the safety history and experience of the subcontractors involved, since 2013, OSHA inspected Fama at least 7 separate times, including the March 20, 2019 inspection at issue, and in each inspection, OSHA issued a fall protection violation, some of which involved violations by Cardenas and Galicia, the subcontractors involved in this case. Therefore, even though Fama's subcontractors were experienced, they had a history of safety violations. Thus, more frequent inspections were required since Fama knew its subcontractors had a history of non-compliance. *Stormforce*, 2021 WL 2582530, at *8.

Rather than provide more frequent inspections, there is no genuine dispute that by March of 2019, Fama had changed its policy, ended its training program, and halted safety inspections of its worksites. (Sec'y's SUMF ¶ 26; Greenfield Decl. ¶16; Ex. C). Fama admits it does not conduct safety inspections of its worksites.[2] (Sec'y's SUMF ¶ 72; Osorio Dep. 76:13-77:2; Martinez Dep. 29:18-25).[3] Given the nature of the work involved, the scale of the project, and history of safety violations by Fama's subcontractors, the court concludes there is no genuine dispute that Fama did not satisfy its secondary role as a controlling employer since there is no dispute that it halted its safety inspections. Fama did not just fail to exercise "reasonable care," it exercised "no care," when it stopped inspecting its worksites, even though it knew its roofing subcontractors had been previously cited for similar violations. Therefore, the court concludes the Secretary has shown that Fama is liable as a controlling employer since there is no genuine issue of material fact in dispute that Fama failed to meet its obligation to exercise reasonable care. Thus, the violations are affirmed.

B. Infeasibility Defense

Under Commission precedent, to establish an infeasibility defense, Fama "must prove: (1) means of compliance prescribed by the standard are technologically or economically infeasible,

[2] In an OSHA interview Osorio admitted Fama did not perform safety audits and no longer trained work crews, based on legal advice that work crew inspections and work crew training could be viewed as evidence of an employment relationship with the workers. (Greenfield Decl. ¶16.)

[3] As indicated in its previous Memorandum Opinion and Order, since Fama's Response to the Secretary's Statement of Material Facts did not address Sec'y's SUMF ¶¶ 26 and 72, they are undisputed.

and (2) there are no feasible alternative means of protection." *Centimark Corp.*, No. 20-0762, 2023 WL 2783505, at *21 (OSHC Mar. 29, 2023).[4] Since the court on remand has concluded that the violations should be affirmed, the Commission has directed the court to "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." *Fama*, 2023 WL 2837610, at *5.

The Supreme Court has held that with respect to an issue on which the nonmoving party bears the burden of proof, such as Fama's infeasibility defense, "we do not think … that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

As the Supreme Court has also explained, the nonmoving party is not required to produce evidence "in a form that would be admissible at trial in order to avoid summary judgment." *Id.* at 324. Rather, "Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred." *Id.*

Here, Fama asserts 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. (Resp't's Mem. Resp. to Sec'y's Renewed Mot. Summ. J. 15-17; Martinez Decl. ¶6; Exs. B-D.) Although this is evidence regarding the first element of Fama's infeasibility defense, as indicated *infra*, it is rendered immaterial by Fama's complete failure of proof concerning the second element of its case.

[4] In the Eleventh Circuit, to establish infeasibility, the employer must prove "(i) that compliance with a particular standard either is impossible or will render performance of the work impossible; and (ii) that it (the employer) undertook alternative steps to protect its workers (or that no such steps were available)." *M.C. Dean, Inc. v. Sec'y of Lab.*, 505 F. App'x 929, 936, 24 O.S.H. Cas. (BNA) 1001, 2013 WL 382824 (11th Cir. 2013).

The Secretary points out that Fama offered no evidence regarding the second element of its infeasibility defense. (Sec'y's Renewed Mot. Summ. J. at 18.) After carefully reviewing the record evidence, the court agrees with the Secretary and concludes there is a complete failure of proof concerning the second element of Fama's case, i.e., that there are no feasible alternative means of protection (or couched in terms of Eleventh Circuit precedent, that Fama undertook alternative steps to protect its subcontractors or that no such steps were available).

Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (*quoting* Fed. Rule Civ. Proc. 1). "If the nonmoving party fails to make 'a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof,' the moving party is entitled to summary judgment." *Jackson v. Sara Lee Bakery Grp.*, 517 F. App'x 645, 646, (11th Cir. 2011) (quotation omitted). "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322,-23. Therefore, the Secretary has discharged his burden by "showing"—that is, pointing out to the court—that there is an absence of evidence to support Fama's case and has "met his burden of establishing that there are truly no disputed issues of material fact regarding the defense." *Fama*, 2023 WL 2837610, at *5. Accordingly,

III. ORDER

IT IS HEREBY ORDERD THAT the Secretary's motion for summary judgment is **GRANTED**, the violations are **AFFIRMED**, and the court assesses penalties of $5,834, $4,167, and $58,343 respectively for Citation 1, Item 1, Citation 1, Item 2, and Citation 2 Item 1.

SO ORDERED.

/s/
JOHN B. GATTO, Judge

Dated: April 24, 2023
Atlanta, GA