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. STORMFORCE OF JACKSONVILLE, LLC, Respondent.	OSHRC Docket No. 19-0593

ON BRIEFS:

Ashley A. Briefel, Senior Attorney; Charles F. James, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor for Occupational Safety and Health; Kate S. O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, D.C.
For the Complainant

Anthony D. Tilton, Esq.; Patrick S. Bickford, Esq.; Emily C. Burke, Esq.; Cotney Construction Law, LLP, Tallahassee, FL
For the Respondent

DECISION

Before: ATTWOOD, Chairman; SULLIVAN and LAIHOW, Commissioners.

BY THE COMMISSION:

Following the inspection of a residential roofing project in West Jacksonville, Florida, the Occupational Safety and Health Administration issued StormForce of Jacksonville, LLC, a citation alleging a serious violation of 29 C.F.R. § 1926.501(b)(13), which requires employees "engaged in residential construction activities 6 feet (1.8 m) or more above lower levels" to be protected by specified fall protection measures. Administrative Law Judge Heather A. Joys affirmed the citation and assessed the proposed $10,210 penalty. For the reasons discussed below, we reverse the judge and vacate the citation.

BACKGROUND

An OSHA compliance officer inspected the roofing project's worksite, a single-family home, on the second and final day of the job. The crew at the worksite was employed by Florida Roofing Experts, Inc. (FRE), which in turn was a subcontractor of StormForce, the roofing project's general contractor. Since 2015, StormForce has exclusively used FRE (or FRE's predecessor, Great White Construction) for all roofing jobs—approximately 600 to 700 per year.

At the time of OSHA's inspection, a five-member FRE crew was working on the house's roof and no StormForce employee was present on site, though StormForce's site foreman—the only StormForce employee to visit the worksite—had inspected the project that morning and the day before. After observing the crew's work, the compliance officer concluded that the crew was not using any form of fall protection. OSHA subsequently issued StormForce a citation for that failure as a "controlling employer" under the Secretary's multi-employer citation policy.

DISCUSSION

On review, StormForce challenges three aspects of the judge's decision. First, StormForce claims the judge erred in finding that the cited provision is not preempted by a more specifically applicable provision. Second, the company argues the judge erred in finding that StormForce was properly cited as a controlling employer at the roofing worksite. Finally, the company maintains that even if it was a controlling employer, the judge erred in finding it violated the cited provision.

I. Preemption

StormForce argues that another provision of the fall protection standard, 29 C.F.R. § 1926.501(b)(10), is more specifically applicable than the one cited by the Secretary here. *See* 29 C.F.R. § 1926.20(d)(1) ("If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process."); *see also Vicon Corp.*, 10 BNA OSHC 1153, 1156 (No. 78-2923, 1981) (claim that general standard is preempted by more specific standard is affirmative defense), *aff'd*, 691 F.2d 503 (8th Cir. 1982) (unpublished table decision). The judge rejected StormForce's preemption defense, concluding that the two standards are "equally applicable" and, consequently, the Secretary has prosecutorial discretion to choose which one to enforce. We agree that the defense should be rejected, but for different reasons than the judge.

The citation alleges that, in violation of § 1926.501(b)(13), StormForce "failed to assure that five subcontracted employees conducting re-roofing work on a 3:12 pitch roof were protected from . . . 13-[foot], 6[-]inch fall hazards by the use of . . . personal fall arrest systems, or an alternative fall protection measure." The cited provision expressly applies to "[r]esidential construction," whereas § 1926.501(b)(10), the provision StormForce claims is more specifically applicable here, applies to "[r]oofing work on [l]ow-slope roofs."[1] There is no dispute that FRE was engaged in residential construction activities that included "[r]oofing work" on a "[l]ow-slope roof," as those phrases are defined in the fall protection standard. 29 C.F.R. § 1926.500(b) (definitions of "[l]ow-slope roof" and "[r]oofing work").

Paragraph (b)(13) provides, in part, that employees working "6 feet (1.8 m) or more above lower levels" must "be protected by guardrail systems, safety net system, or personal fall arrest system *unless another provision in paragraph (b) of this section provides for an alternative fall*

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[1] These provisions state as follows:

> (10) Roofing work on Low-slope roofs. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning line system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system. Or, on roofs 50-feet (15.25 m) or less in width (see appendix A to subpart M of this part), the use of a safety monitoring system alone [i.e. without the warning line system] is permitted.
>
> . . . .
>
> (13) Residential construction. Each 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 unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.
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> NOTE: There is a presumption that it is feasible and will not create a greater hazard to implement at least one of the above-listed fall protection systems. Accordingly, the employer has the burden of establishing that it is appropriate to implement a fall protection plan which complies with §1926.502(k) for a particular workplace situation, in lieu of implementing any of those systems.

29 C.F.R. § 1926.501(b)(10), (13).

protection measure." 29 C.F.R. § 1926.501(b)(13) (emphasis added). Based on this language, the additional fall protection measures available for use on a low-slope roof under paragraph (b)(10) can also be used under paragraph (b)(13) when residential construction includes roofing work performed on a such a roof.[2] *Id.*; Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,693 (Aug. 9, 1994) (final rule) (noting as to paragraph (b)(13) that "if another provision in paragraph (b) allows an alternative fall protection measure, such as covers over holes, those alternatives measures are also acceptable and do not need to be documented in a fall protection plan in order to be used"). In contrast, paragraph (b)(10), the provision StormForce claims is more specifically applicable, does not incorporate additional methods of compliance set forth in other provisions, such as paragraph (b)(13).[3] 29 C.F.R. § 1926.501(b)(13) ("Exception:

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[2] StormForce notes that non-mandatory Appendix A to subpart M references paragraph (b)(10), but not paragraph (b)(13), when discussing the safety monitor option for roofs 50 feet or less in width (such as the roof at issue). According to StormForce, this shows that paragraph (b)(10) is more specifically applicable because the appendix "provides specific guidance for how employers, engaged solely in roofing work on low-slope[] roofs, can comply with [paragraph (b)(10's] fall protection requirements." As discussed above, however, the plain language of paragraph (b)(13) specifically allows for the use of "an alternative fall protection measure" set forth in another provision in paragraph (b) when applicable—such as the use of a safety monitoring system on a low-slope roof with a width 50 feet or less. Although Appendix A is titled "Non-Mandatory Guidelines for Complying With § 1926.501(b)(10)," there is nothing in the appendix that undermines paragraph (b)(13)'s plain language.

StormForce also argues that the preamble to the fall protection standard explains that the "alternative fall protection measure language" in paragraph (b)(13) was "included to address situations where 'infeasibility or greater hazard situations arise' in residential construction." This part of the preamble, however, specifically discusses the exception in paragraph (b)(13) and not the preceding sentence that references "an alternative fall protection measure." Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,692-93 (Aug. 9, 1994) (final rule). Indeed, after addressing the exception, the preamble states in the next paragraph: "[I]f another provision in paragraph (b) allows an alternative fall protection measure, such as covers over holes, those alternatives measures are also acceptable *and do not need to be documented in a fall protection plan in order to be used*." *Id.* at 40,693 (emphasis added).

[3] We note that although the opening clause of paragraph (b)(10)—"Except as otherwise provided in paragraph (b) of this section"—could be considered ambiguous with regard to whether it incorporates the requirements of other provisions, the preamble makes clear that the purpose of this clause is to limit paragraph (b)(10)'s applicability:

> As with paragraph (b)(9), discussed above, the provisions of paragraph (b) which cover hoisting areas, holes, ramps and runways, and dangerous equipment apply

When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of §1926.502.").

Accordingly, only paragraph (b)(13) allows for the full complement of fall protection measures that could apply to the specific type of roofing work at issue here (work that is part of *residential* construction) as well as the type of roof on which the work was being performed (a low-slope roof). We therefore reject StormForce's preemption defense. *Compare Pa. Steel Foundry & Mach. Co.*, 12 BNA OSHC 2017, 2029 (No. 78-0638, 1986) (finding guarding standard that "fully addresses the matter of guarding a wheel of a swing frame grinder" is more specifically applicable than general guarding standard cited by Secretary), *aff'd*, 831 F.2d 1211 (3d Cir. 1987).

II. Controlling Employer

The Secretary cited StormForce as a "controlling employer" under its multi-employer citation policy.[4] OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy ¶ X.E (Dec. 10, 1999); *see Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1781 (No. 03-1622, 2009) (stating "[t]he Secretary's multi-employer citation policy is to the same effect" as Commission precedent).

> notwithstanding the provisions of paragraph (b)(10). The rationale for these exceptions is the same as that provided in the discussion of paragraph (b)(9), above.

Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. at 40,689; *see Am. Sterilizer Co.*, 15 BNA OSHC 1476, 1478 (No. 86-1179, 1992) (standard's preamble can be " 'best and most authoritative statement of the Secretary's legislative intent' " (citation omitted)). The preamble's "discussion of paragraph (b)(9)" referenced in the above passage is as follows:

> It is important to note that controlled access zones are not permitted to be used as protection for employees performing overhand bricklaying and related work who are exposed to fall hazards associated with hoist areas; holes; ramps, runways, and other walkways, and dangerous equipment. In these situations, fall protection must be provided by compliance with the paragraphs addressing the specific hazard, (i.e., paragraphs (b)(3), (4), (6), and (8)), as appropriate.

59 Fed. Reg. at 40,688-89. Thus, rather than incorporating additional methods of compliance set forth in other paragraphs, paragraph (b)(10)'s opening clause *limits* that provision's applicability.

[4] According to the Secretary's policy, a "controlling employer" is "[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"; "[c]ontrol can be established by contract or, in the absence of explicit contractual provisions, by the exercise of control in practice." OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy ¶ X.E (Dec. 10, 1999).

Under Commission precedent, "[a]n employer may be held responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.' " *Summit*, 22 BNA OSHC at 1780 (citing *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000)); *see Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1200-01, 1203 (No. 05-0839, 2010) (noting that "[t]he Commission's test of employer liability, which grew out of the reasoning in these early cases, held an employer 'responsible for the violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite' "; overruling *Summit Contractors, Inc.*, 21 BNA OSHC 2020 (No. 03-1622, 2007), *vacated*, 558 F.3d 815 (8th Cir. 2009), and "restor[ing] the Commission's well-settled precedent on multi-employer liability"), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished).

Here, the judge concluded that the record evidence establishes StormForce's "overall supervisory role on the worksite, including its control over scheduling, logistics, and quality of work," and that StormForce "exercised sufficient supervisory control . . . such that it could have directed FRE to correct safety violations."[5] Based on our review of this evidence, as discussed in detail below, we agree with the judge and conclude that the Secretary has proven StormForce was a controlling employer at the cited worksite.

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[5] Relying on *Gil Haugan*, 7 BNA OSHC 2004, 2006 (No. 76-1512, 1979) (consolidated), the judge concluded that StormForce's role as the "general contractor" on the cited project created a rebuttable presumption that StormForce was a controlling employer. In the more than 40 years since the *Haugan* decision was issued, the Commission has never again recognized the existence of such a presumption. *But see R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 818 (6th Cir. 1998) (citing *Haugan* for proposition that "[t]here is a presumption that a general contractor has sufficient control over its subcontractors to require them to comply with safety standards"). Moreover, the rebuttable presumption identified in *Haugan* is directly at odds with the Commission's treatment of burdens when assessing an entity's status as an employer in other contexts. *Compare All Star Realty Co.*, 24 BNA OSHC 1356, 1358 (No. 12-1597, 2014) ("[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site." (quoting *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005) (consolidated))); *Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 1358 n.4 (No. 02-1164, 2011) (consolidated) (overruling *Trinity Indus. Inc.*, 9 BNA OSHC 1515 (No. 77-3909, 1981), to hold that Secretary bears burden of showing that "the cited entity is part of a single-employer relationship"), *aff'd*, 692 F.3d 65 (2d Cir. 2012). We thus overrule *Haugan* to the extent that its formulation of a "rebuttable presumption" is inconsistent with established precedent.

Master Subcontractor Agreement

StormForce claims that its contract with FRE, titled "Master Subcontractor Agreement" and in place at the time of OSHA's inspection, sets out "the framework for [its] limited supervisory authority at projects." That contract specifies that StormForce "does not retain supervisory control of such joint use areas for purposes of liability for unsafe conditions" and that "StormForce shall not be able to ensure [FRE's] adherence to safety standards and the [Occupational and Safety Health] Act because StormForce cannot reasonably be expected to prevent, detect or abate violative conditions by reason of its limited role on the project." And, in the event StormForce does observe unsafe conduct by an FRE employee, the contract states that "StormForce's sole remedy shall be to contact [FRE's] management personnel and identify the breach of contract."

These contractual clauses, however, are undermined by the contract's incorporation of a document—titled "Subcontractor Expectations"—that sets forth an extensive list of work conduct and practices StormForce requires FRE and its employees to follow on roofing projects. This detailed list, along with other evidence concerning StormForce's inspection responsibilities, demonstrates that StormForce's supervisory authority was far from limited. For example, the contract's list requires FRE to call StormForce's site foreman once FRE's employees arrive on site or if they are going to be late, if there is a problem with the existing roof, if the homeowner becomes angry or upset, if its employees cause or discover damage to the home, if weather or darkness prevents completion of the job, and when the job is complete but before its employees leave the job site. Per the contract, FRE must also inform StormForce if there is a material shortage, and FRE can acquire additional materials only after obtaining written approval from StormForce's site foreman.

In addition, the contract prohibits FRE from (1) starting a new job until the pending one is complete; (2) communicating with the homeowner at any point during the job (only StormForce is allowed to do this), including rescheduling the work for any reason (e.g., weather); and (3) placing "any signage of their company or any other company on [the] jobsite," or even mentioning any company name other than StormForce while working.[6] Finally, FRE employees are required

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[6] On the worksite at issue here, not only was FRE's name absent from the worksite, but StormForce placed a magnet with its company name on a dumpster owned by FRE.

to wear certain clothing at the worksite and refrain from using any profanity while there.[7] Given these comprehensive requirements, we find that StormForce's actual supervisory authority under its contract with FRE is much more extensive than StormForce claims.

Work and Safety Practices

StormForce's work and safety practices, particularly those required of the company's site foremen, further demonstrate the extensive degree of control that StormForce maintains at its worksites.[8] Before a job begins, FRE notifies StormForce's area installation manager (AIM) who FRE's crew leader for that job will be, and the AIM assigns one of StormForce's site foremen to the worksite. On the first morning of the job, StormForce's site foreman arrives on site by 7 a.m. to introduce himself to the homeowner, takes preconstruction photos of various locations on and near the house, checks the accuracy of delivered materials, and then leads a crew "huddle." During this huddle, StormForce's site foreman identifies FRE's crew leader and exchanges phone numbers, reviews the scope of work to be performed, reviews dress and language codes, emphasizes that homeowner contact be made through StormForce, and verifies that FRE has taken steps to adequately protect the homeowner's property (such as air conditioning units and landscaping) in accordance with the contract.

Once work commences, StormForce's site foreman has extensive inspection responsibilities. After the FRE crew completes the removal of the roof's shingles, the site foreman inspects the roof's deck and takes photos to document the deck's existing condition. He then "carefully" observes the next step of the roofing process, during which a felt layer is installed. Following this process, he observes the "roofing installation up on the roof" during "at least three intervals."[9] Finally, he closes out the job by performing a final walkthrough with the homeowner,

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[7] StormForce's area installation manager testified that one of the company's site foremen has contacted his FRE counterpart about a crew member wearing a t-shirt that referenced a different contractor, and after talking to FRE's site foreman, the crew member turned his shirt inside out.

[8] These work and safety practices are set forth in materials that are used to train StormForce's site foremen, including the one who was assigned to the worksite that OSHA inspected.

[9] The AIM disputed whether this last requirement actually mandates three separate inspections by StormForce's site foreman. The AIM explained that "at least three intervals" simply means that the foreman is there "before, during, and after" roofing installation—though this explanation is suspect since the inspection requirement explicitly concerns "roofing installation up on the roof."

completing the roofing and additional materials checklists, and taking photos to ensure that there are no deficiencies that need to be corrected.

As to safety practices, StormForce maintains that FRE, not StormForce, is responsible for providing the crew with fall protection equipment and correcting and/or disciplining crew members for any safety violations. The record shows, however, that StormForce monitors safety issues during its regular worksite inspections. Indeed, StormForce provides its site foreman with a written safety checklist that must "be completed on every job." This checklist requires the site foreman to ensure that "all roofing materials [from] the supplier" are "placed so as not to obstruct safe access to the roof"; "[t]hat [FRE] provides a secure means for getting on and off the roof"; "[t]hat Good Housekeeping on the job is maintained to stop material from falling off the roof or tripping up workers"; and "[t]hat full consideration of weather conditions is taken in times of high wind, precipitation and icing."

Procedures accompanying the safety checklist also state that StormForce's site foreman "should recognize when [an FRE] employee is engaged in work which is dangerous and could result in death or serious injury" and that if the "Site Foreman witnesses [an FRE] employee working in violation of OSHA rules, [he or she] will contact [FRE's] home office and notify the company director of this conduct." The AIM testified that when StormForce notifies FRE of a safety violation, FRE's site foreman is expected to "come on-site or get on the phone with the crew" and "fix" the identified issue. And as to fall protection equipment in particular, the AIM testified that if StormForce's site foreman notices that FRE either lacks the necessary equipment or sees that it is not being used, he or she will call FRE's site foreman to "find out what's going on." According to the AIM, it has "always been the case" that reporting a violation in this manner results in FRE taking care of the issue, and that StormForce's site foremen have never reported a problem with this procedure. *See Summit*, 22 BNA OSHC at 1781 (finding evidence of control where respondent's employee "would only 'suggest or recommend' that [subcontractor] correct its fall protection violations," and subcontractor would always comply). Although the AIM confirmed that StormForce has never trained or disciplined any FRE employee, he conceded that "if something is going wrong on a job," StormForce has the authority to make FRE leave the worksite.

In sum, we find that StormForce's contract with FRE, as well as its actual inspection and monitoring practices at this worksite, establish that the company had supervisory authority and control over conditions at the worksite. *See Summit*, 23 BNA OSHC at 1206 (finding evidence of control where respondent's superintendent "observed the progress of the project and worksite conditions by walking the worksite twice each day" and, during weekly meetings, he "point[ed] out obvious hazards to the subcontractors"); *McDevitt*, 19 BNA OSHC at 1109-10 (finding evidence of control where general contractor had "overall authority at the worksite," including authority to demand compliance with safety requirements, stop subcontractor's work, and remove subcontractor from site). We therefore conclude that the Secretary has established that StormForce was a controlling employer.

III. Alleged Violation

"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) (noting that general contractor at multi-employer worksite "was 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. *See Summit*, 22 BNA OSHC at 1782 (concluding controlling employer "failed to take the reasonable steps and measures necessary to obtain abatement," where it stipulated to subcontractor's noncompliance with fall protection standard and its knowledge of cited conditions, and it failed to notify subcontractor of violative conditions—a procedure that had resulted in abatement in the past); *Century Communities of Ga., LLC*, 771 F. App'x 14, 15-16 (D.C. Cir. 2019) (unpublished) ("Finding that Century had actual knowledge of the violative condition, the ALJ correctly concluded that Century's general safety policies and procedures could not defeat liability under Commission precedent: Century had actual knowledge of the specific hazard and the authority to abate it but *did nothing* to correct it." (emphasis added)). It is well-established that "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*, No. 13-0900, 2019 WL 654129, at *4 (citing *Summit*, 22 BNA OSHC at 1781, which quotes OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy ¶ X.E.2).

Here, the judge found noncompliance based on her finding that FRE failed to use any form of fall protection, and then concluded—based solely on photos taken by StormForce's site foreman during his worksite inspections—that StormForce had actual knowledge of that failure.[10] *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537 (No. 86-0360, 1992) (consolidated) ("The actual or constructive knowledge of a foreman or other supervisory employee can be imputed to the employer."). In reaching these conclusions, however, the judge did not discuss StormForce's lesser duty as a controlling employer or specify what StormForce should have done differently to fulfill its compliance obligations. *See Suncor*, No. 13-0900, 2019 WL 654129, at *4. For the reasons discussed below, we find the record evidence does not establish that StormForce had actual knowledge of the violative conditions, nor does the record establish that StormForce failed to meet its obligation as a controlling employer to "prevent or detect" these conditions. *See id.*

Actual Knowledge

There is no dispute that during the two-day roofing project, FRE's crew was not using a guardrail system, a safety net, personal fall arrest systems, or a warning line system while working on the roof, and there is no claim that StormForce's site foreman believed otherwise. The remaining fall protection measure available to FRE's crew was a safety monitoring system, which is a permissible form of fall protection when, as in this case, roofing work is performed on a low-slope roof with a width of 50 feet or less. 29 C.F.R. § 1926.500(b) (definitions of "[l]ow-slope roof" and "[r]oofing work"); 29 C.F.R. § 1926.501(b)(10) & (13) (fall protection requirements). The record supports the judge's finding that, at the time of OSHA's inspection, FRE's five-member crew could not have been using a safety monitoring system that complied with the fall protection standard, because the compliance officer's testimony, as well as his photos and video of the worksite, establish that all five crew members onsite that day were engaged in roofing work, which precludes a finding that any of them were serving as a safety monitor. 29 C.F.R. § 1926.502(h)(1)(v) ("The safety monitor shall not have other responsibilities which could take

[10] Although OSHA took a statement from StormForce's site foreman about a month after the compliance officer's inspection, this statement is not part of the record and neither party called him as a witness. In addition, OSHA took no statements from anyone associated with FRE—including the crew that was working on the roof during OSHA's inspection, and the company's site foreman and owner—and neither party called any of these individuals as a witness.

the monitor's attention from the monitoring function."). But it is undisputed that StormForce's site foreman was not present at the time of OSHA's inspection. As such, he could not have had actual knowledge of the conditions observed by the compliance officer at that time.

The judge concluded that StormForce's site foreman nonetheless had actual knowledge of the violative conditions based exclusively on photos he had taken during his inspections of the roofing project, both on the morning of OSHA's inspection and the preceding day. Having reviewed these same photos, we find that none of them establish that a safety monitoring system was *not* being used by FRE during the site foreman's inspections. Indeed, all but one of the photos show fewer than five crew members on the roof, making it possible that there was a worker serving as a safety monitor who is simply not shown in the photos.[11] As for the only photo taken by StormForce's site foreman depicting five crew members, a close review shows that the crew member closest to the camera is simply standing on the roof with his arms near his head—he is not working on the roof, unlike his fellow crew members depicted in the photo, and therefore may have been serving as a safety monitor.[12] There is no credible evidence in the record, such as testimony from an FRE employee or the site foreman himself, that establishes or eliminates this

[11] According to the judge, one of the site foreman's photos depicting fewer than five crew members "shows a crew member working at the roof's edge with no monitor on the same working level." We cannot discern the judge's basis for this conclusion since the roof's entire working level is not depicted and there were other FRE crew members at the site not included in the photo.

[12] There is no evidence in the record suggesting that "other responsibilities" may have taken this crew member's "attention [away] from the monitoring function." 29 C.F.R. § 1926.502(h)(1)(v). In addition, contrary to the judge's finding, the four other crew members shown in the photo are "within visual sighting distance" of this employee—who appears to be "close enough to communicate orally" with them—and we disagree with the judge that being on slightly different slopes means that they are on different "walking/working surface[s]." 29 C.F.R. § 1926.502(h)(1)(iii), (iv); *see* 29 C.F.R. § 1926.500(b) (defining "[w]alking/working surface" as "any surface, whether horizontal or vertical on which an employee walks or works, including, but not limited to, floors, roofs, ramps, bridges, runways, formwork and concrete reinforcing steel but not including ladders, vehicles, or trailers, on which employees must be located in order to perform their job duties"); *compare Pete Miller, Inc.*, 19 BNA OSHC 1257, 1258 (No. 99-0947, 2000) (finding that use of safety monitor did not comply with requirements of § 1926.502(h), because "monitor was on the upper roof six feet above [worker]"). Finally, as to the remaining requirements in § 1926.502(h)—which pertain to the competency of the safety monitor as well as his duty to "warn the employee when it appears that the employee is unaware of a fall hazard or is acting in an unsafe manner"—this photo does not show whether, based on his observations, the site foreman would have been able to recognize any obvious deficiency.

possibility.[13] 29 C.F.R. § 1926.502(h)(1)(i), (ii). Finally, the record does not preclude the possibility that another crew member, not shown in the photo, was acting as a safety monitor—although the compliance officer observed a five-member crew when he conducted his inspection on September 28, the only photo depicting five crew members shows the worksite as the site foreman observed it on September 27, the day *before* OSHA's inspection.[14]

Given the lack of evidence in the record concerning what StormForce's site foreman actually observed during his inspections of the worksite, we find the Secretary has failed to establish that StormForce had actual knowledge of the violative conditions.

Reasonable Care

In the absence of actual knowledge of the violative conditions, we turn to whether StormForce met its obligation as a controlling employer to "exercise reasonable care," i.e., to take "reasonable measures" to "prevent or detect" the violative conditions. *Suncor*, No. 13-0900, 2019 WL 654129, at *4 (internal quotation marks omitted). The Secretary does not dispute that StormForce's monitoring and inspection procedures satisfied the company's "secondary 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. Indeed, although the judge found that StormForce's AIM was aware FRE had a history of OSHA violations, the Secretary has not challenged the appropriateness of StormForce's procedures in light of that history. *See* OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy ¶ X.E.3.d ("More frequent inspections are normally needed if the controlling employer knows that the other

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[13] The compliance officer testified that he was aware based on "third-party knowledge" from his OSHA office that FRE's owner had provided sworn testimony in "other cases" that FRE does not use safety monitors on its roofing projects. Although no objection was made to this testimony, we find it is entitled to no weight. The Secretary neither called FRE's owner as a witness to explain his purported testimony in "other cases" nor attempted to admit any such testimony as evidence in the instant proceeding. Even if the owner's prior testimony were otherwise admissible, the compliance officer's vague description concerning the source of this information—"third-party knowledge" that was "from [his] office"—makes it impossible to assess the credibility of that source. FED. R. EVID. 802 (Rule Against Hearsay), 805 ("Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.").

[14] The day on which the site foreman's photos were taken—September 27 or September 28, the day of OSHA's inspection—can be determined based on the crew's clothing. Although the record shows that there were five crew members on site during the compliance officer's inspection, there is no evidence concerning the size of FRE's work crew on September 27.

employer has a history of non-compliance.”). And the Secretary does not question the frequency of the StormForce site foreman’s inspections at this worksite or argue that, under the company’s procedures, the site foreman should have been at the worksite at the time of OSHA’s inspection.

With respect to StormForce’s exercise of reasonable care, the Secretary simply asserts that the site foreman should have observed the FRE crew’s failure to use fall protection—including the purported lack of a safety monitor—and then, pursuant to StormForce’s procedures, sought abatement of these conditions by reporting them to FRE’s site foreman. According to the Secretary, “[t]he hazardous conditions were open and obvious and would have been easily discovered by StormForce, had StormForce exercised reasonable care to discover hazards.” In support, the Secretary claims that (1) StormForce’s site foreman was required under the company’s procedures to visit the worksite multiple times and photograph the work in progress; and (2) the judge found that some of the work depicted in the site foreman’s photos occurred “shortly before” the compliance officer arrived and involved the same employees observed by the compliance officer, showing that the site foreman “was in the position and had ample opportunity to notice the lack of fall protection if he acted with due diligence . . . .”

As to the Secretary’s first point, the record shows that this is exactly what StormForce’s site foreman did here. There is no dispute that prior to OSHA’s inspection, the site foreman both visited and photographed the worksite as required by StormForce’s procedures. And as we have already found, none of the foreman’s photos depict “open and obvious” fall protection violations. The Secretary’s second claim is equally baseless—contrary to the Secretary’s characterization of the judge’s finding, the judge simply acknowledged the AIM’s testimony that the site foreman photographed the worksite “likely the morning” of September 28, the same day the compliance officer conducted his inspection of the worksite. Given that the compliance officer did not commence his inspection and observe the fall protection hazards until around 12:30 p.m. and the site foreman’s photos show the roofing project at an earlier stage, we find that more than a “short[]” period of time passed between the site foreman’s and the compliance officer’s inspections.[15]

[15] The compliance officer testified that he arrived on site at 12:21 p.m. and the timestamps for his photos of the worksite, which he confirmed are accurate, show that they were taken around 12:30 p.m. In addition, a comparison of the two sets of photos from September 28 shows that the compliance officer took his photos near the end of the roofing job, after the new shingles had been installed, whereas the site foreman took his photos before installation was complete. In fact, the

In any event, it is not clear whether FRE's use of a safety monitoring system was only deficient at the time of OSHA's inspection or whether FRE was not using a safety monitoring system at all that day. Absent clarity on this point, the amount of time that elapsed between the foreman's and the compliance officer's inspections is largely irrelevant. *See Suncor*, No. 13-0900, 2019 WL 654129, at *5 (finding no constructive knowledge because, among other things, violative condition existed where controlling employer's employees did not work, meaning that condition "was not in plain view of [controlling employer's] own personnel"); *David Weekley Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898, 2000) ("in concluding that the violations 'surely were in view' of Weekley's representatives since they were seen by compliance officer Nelson, the judge failed to consider the nature, location, and duration of these conditions," particularly since "Weekley can only be held responsible for those violations 'which it could reasonably be expected to prevent or detect' ").

Finally, the Secretary points out that StormForce's procedures require the site foreman to call his FRE counterpart if a traditional form of fall protection, such as personal fall arrest systems, is not observed in use during a worksite inspection. The record, however, does not preclude the possibility that such a conversation took place in this instance. In fact, the compliance officer testified that he recalled the site foreman talking about how he had met with FRE's site foreman for this project "as many as two times," and StormForce's AIM testified it was his understanding that the two companies' site foremen had communicated with one another on the day of OSHA's inspection, but he did not know the content of any of their communications.

In light of this record evidence, we find the Secretary has not established that StormForce, as a controlling employer, failed to take reasonable measures to "detect or prevent and abate" the violative conditions at issue. *Suncor*, No. 13-0900, 2019 WL 654129, at *4.

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shadows depicted in each set of photos suggest that the site foreman's photos were taken well before the compliance officer's photos.

Accordingly, we reverse the judge and vacate the citation.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
James J. Sullivan, Jr.
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: March 8, 2021

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., 9th Floor
Washington, DC 20036-3457

Secretary of Labor, Complainant, v. StormForce of Jacksonville, LLC, Respondent.	OSHRC Docket No. **19-0593**

Appearances:

Dane L. Steffenson, Esq., U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia, for Complainant

Andrew M. Fredrickson, Esq. and Anthony D. Tilton, Esq., Cotney Construction Law, LLP, for Respondent

JUDGE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

After receiving an anonymous complaint about hazardous working conditions, the Jacksonville Area Office of the Occupational Safety and Health Administration initiated an inspection of a roofing job at a house in West Jacksonville, Florida. Compliance Safety and Health Officer Nolan Houser conducted the inspection. At the worksite, he found five roofers on a 13 ½ foot high, low-sloped, residential roof, none of whom appeared to be using any form of fall protection. The crew consisted of employees of Florida Roofing Experts, Inc. (FRE). From information he obtained on the site, CSHO Houser discovered StormForce of Jacksonville, LLC, (StormForce) was the general contractor for the job. Based upon these findings, the Secretary issued StormForce a single item citation alleging a serious violation of 29 C.F.R. § 1926.501(b)(13) for failure to provide fall protection. The Secretary issued the citation to StormForce under the multi-employer worksite doctrine. The Secretary proposes a penalty of $10,210.00 for the citation.

There is little doubt the roofing crew observed by CSHO Houser was not protected from a fall hazard. The question is: Was StormForce properly cited for the exposure of FRE's roofing crew? To answer that question, the court must interpret and apply the Commission's multi-employer worksite doctrine to the unique facts of this case.

The undersigned held a hearing in this matter on December 9 and 10, 2019, in Jacksonville, Florida. The parties filed post-hearing briefs on March 13, 2020.[1]

For the reasons discussed below, the citation is affirmed and a penalty of $10,210.00 is assessed.

JURSIDICTION

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651. The parties also stipulated at the hearing that at all times relevant to this action, StormForce was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 12). Based on the parties' stipulations and the facts presented, StormForce is an employer covered under the Act and the Commission has jurisdiction over this proceeding.

BACKGROUND

Stipulated Facts

The parties stipulated to the following facts:

> Respondent retained Florida Roofing Experts, Inc., as a subcontractor at a work site located at 3502 Lenczyk Drive, West Jacksonville, Florida 32277.
>
> Respondent's employees were not exposed to any alleged hazard at the inspection site.
>
> The citation at issue is not based on any alleged exposure of Respondent's foreman, which is the only employee it had at the inspection site.
>
> OSHA's compliance safety and health officer entered the inspection site on September 28, 2018.
>
> Respondent's employees were not present at the inspection site on September 28, 2018, during OSHA's inspection.
>
> And OSHA issued one serious citation to the Respondent for an alleged violation of 29 CFR 1926.501(b)(13) as a result of this inspection.

(Tr. 11-12)

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[1] To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

During the course of the hearing, the parties further stipulated the pitch of roof at the worksite was less than 4 in 12 and met the definition of a low-slope roof found at 29 C.F.R. § 1926.500(b) (Tr. 321-22). The parties agreed the width of the roof was less than 50 feet (Tr. 321). The Secretary also stipulated he did not contend StormForce was the correcting employer as that term is used in his multi-employer worksite policy (Tr. 355).

StormForce's Operations

StormForce is a family-owned roofing contractor doing business in Jacksonville, Florida, since 2012 (Tr. 45). It is owned by Rebecca Manderson and her husband (Tr. 219). Thomas Ashley is the company president (Tr. 221-21). For the past seven years, the Manderson's son, Jacob, has been the company's Area Installation Manager (AIM) and holds the company's roofing license for the State of Florida (Tr. 41, 44). StormForce contracts directly with homeowners to perform roofing work on their homes. At the time of the inspection, StormForce had 31 employees (Tr. 46).

None of StormForce's employees perform roofing work. Rather, it subcontracts for all its labor. Since 2017, StormForce exclusively used Florida Roofing Experts (FRE) for its labor needs. Prior to that, StormForce used Great White Construction. Travis Slaughter is the owner of FRE and its predecessor, Great White Construction. In the last three years, AIM Manderson estimated it had completed 600 to 700 roofing jobs using labor supplied by company's owned by Travis Slaughter.

For each of its roofing jobs, StormForce was responsible for scheduling with the homeowner, ordering and coordinating delivery of the materials, overseeing logistics, inspecting the work performed, and obtaining and distributing payment (Tr. 41, 81, 175). AIM Manderson is responsible for oversight of these aspects of the job. StormForce employs roofing inspectors and site foremen who report directly to AIM Manderson (Tr. 42). It assigns a single site foreman for each of its roofing jobs. AIM Manderson trains StormForce's site foremen (Tr. 186).

The Site Foreman

The site foreman's duties are spelled out in StormForce's Job Summary[2] and training materials (Exhs. C-2 and R-27). According to the Job Summary, the "Site Foreman is

[2] AIM Manderson testified StormForce had a newer version of the Job Summary for the site foreman position (Tr. 116). He had testified similarly in his deposition (Tr. 113-14). AIM Manderson's testimony appeared heavily coached. Certain responses were repeated nearly verbatim. Although his position with the company involved significant responsibility, he claimed ignorance of basic operations. He repeatedly refused to confirm the authenticity

responsible for managing the subcontractor's crew while replacement roofs are being installed." (Exh. C-2) He serves as the point of contact with the homeowner, verifies the job is being done according to "technical specifications," manages material needs, and obtains homeowner sign off and payment (Exh. C-2).

The site foreman's procedures for any given worksite are outlined in the training materials (Exh. R-27 pp. 14-15; Tr. 99). The site foreman is assigned his jobs for the week on Sunday evening. He is responsible for putting together the "installation package" which includes various paperwork. The site foreman is to arrive at the worksite by 7:00 a.m., when he is to introduce himself to the homeowner, let the homeowner know he is the point of contact, and place StormForce's sign in the yard. He checks the materials for accuracy. Once the crew arrives, the site foreman holds a "crew huddle." During the crew huddle, the site foreman identifies the subcontractor's crew leader and exchanges contact information; he reminds the crew he is the only point of contact for the homeowner; and he reviews the scope of work, the dress and language codes, and the HVAC and home protection protocols with the subcontractor's crew (Tr. 100-01). The site foreman has responsibility to inspect the work at several stages of the roofing process and is required to take pictures (Tr. 100-03). The site foreman is to take pictures that cover 31 items enumerated in the training materials and upload the pictures to StormForce's customer relations manager (CRM) (Exh. R-17 p. 18; Tr. 121). He conducts the final inspection with the homeowner, completes the final paperwork, and uploads the information to the CRM.

According to AIM Manderson, a site foreman would typically be assigned five to seven jobs per week or two per day (Tr. 176, 272). At the time of the inspection, StormForce was only contracting with homeowners for residential roofing work (Tr. 292). StormForce's residential roofing jobs take one to two days to complete (Tr. 273). In order to complete his job assignments, the site foreman would need to be on the worksite at least three times (Tr. 104).

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of company documents produced to the Secretary in discovery. In addition to appearing coached, AIM Manderson testified in a halting manner, seeming to consider what answer would be most beneficial, rather than providing candid responses. Based upon his demeanor and manner of testifying, the undersigned did not find AIM Manderson a credible witness. StormForce did not produce the newer version of the job description in discovery. Nor did it submit a different version at hearing. Failure to submit evidence within a party's possession and control raises an inference the evidence does not exist or would be unfavorable to it. *Capeway Roofing Systems, Inc*., 20 BNA OSHC 1331 (No. 00-1968, 2003) (citations omitted); *see also Regina Contr. Co.*, 15 BNA OSHC 1044, 1049 ((No. 87-1309, 1991).

To ensure the work of the subcontractor was done properly, according to code, and in conformance with the subcontract, the site foreman did not interact directly with the subcontractor's employees. Rather, the site foreman was to notify the subcontractor's management of any infractions (Tr. 93, 118, 290-91). StormForce had found this the most effective way to address any concerns with the work or conduct of subcontractor employees because they "listen to their own supervisors." (Tr. 118, 270-71) AIM Manderson testified this was an effective method of ensuring compliance with all the terms of the subcontract (Tr. 71-72, 110, 167, 290-91).

The training materials contain a page titled: "Site Foreman Safety and Check Lists and Procedures" delineating the site foreman's responsibilities with regard to safety (Exh. R-27 p. 13) Tr. 107-08). The Site foreman's responsibilities are

1) Overseeing job progress and ensuring that work is carried out in conformance with the Subcontract Agreement between StormForce and its Subcontractor;
2) Managing, ordering, and attending to the building material needs for the project;
3) Maintaining the job schedule and project timelines;
4) Performing estimates and cost analysis for the purposes of meeting customer expectations; and
5) Examining the installation in order to ensure that work meets or exceeds all applicable building codes.

(Exh. R-27 p. 13) It specified the site foreman was not responsible for training, monitoring, or disciplining the subcontractor's employees for safety and health compliance; for inspecting or monitoring the worksite for subcontractor employee safety and health compliance; or for providing the subcontractor's employees with safety equipment. *Id*. The document contained a caveat which stated:

> ***Please note that Site Foreman should recognize when a Subcontractor's employee is engaged in work which is dangerous and could result in death or serious injury. It is certainly not StormForce's policy to ignore this type of behavior. If a Site Foreman witnesses a Subcontractor's employee working in violation of OSHA rules, the Site Foreman will contact Subcontractor's home office and notify the company director of this conduct.***

Id. AIM Manderson testified the expectation is that the site foreman will ensure the subcontractor has fall protection equipment and that they are using it (Tr. 109). If it is not being used, the site foreman is to report it to the subcontractor's foreman. (Tr. 69-72; 110). The checklist addressed this requirement with a space to check whether the site foreman has notified the subcontractor of an observed safety infraction.

The Subcontract for Labor

For the job at issue, StormForce and FRE had a written master subcontractor agreement (Exh. R-26).[3] Under the terms of the agreement signed by Travis Slaughter, FRE supplied all "equipment, labor and services" required to complete each roofing job (Exh. R-26 p. 1). The equipment supplied by the subcontractor was the nail guns and compressor, ladders, and fall protection equipment (Tr. 177). FRE was responsible for securing all necessary permits (Exh. R-26 p. 3; Tr. 177). The agreement specifically prohibits FRE from placing any sign on the worksite that shows its name (Exh. R-26 p. 9). Attached to the master agreement is a standard fee agreement specifying the price for services "per square" and the payment terms (Exh. R-26 p. 12-13).

Jobs performed under the master subcontract are done so pursuant to a specific work or labor order. A sample work order is attached to the master agreement with spaces for, among other things, the start and end dates, location, and a description of what was to be provided (Exh. R-26 p. 14).[4] In the description section, StormForce provided the subcontractor with the size and pitch of the roof, and the number of pre-existing layers to be torn off (Tr. 276; Exh. R-29). Other items the subcontractor might provide, such as a dumpster, would also be included in this section (Exh. R-29). Prior to commencement of a job, StormForce provides FRE with a calendar invite specifying the date the job was to commence, the work order, and the notice of commencement from the homeowner (Tr. 281). FRE selects which of its crews will perform a job without input from StormForce (Tr. 183).

Also attached to the master agreement was a document titled "Subcontractor Expectations." (Exh. R-26 p. 16-20). Included in this document are guidelines for scheduling, communications, storage of materials, billing, and the procedures on the job beginning with "pulling up to the job site." (Exh. R-26 pp. 16-20). The first general guideline in the document states

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[3] Although the effective date of the contract is October 6, 2017, the date at the bottom of each page of the document is March 1, 2013, suggesting the form had been used in the past. This, along with AIM Manderson's testimony StormForce did nothing to change their procedures after receiving a citation in 2016 (Tr. 69) makes suspect StormForce's contention it changed its policy regarding direct supervision of FRE's employees sometime between 2016 and the inspection.

[4] Exhibit R-29 is the work order for the worksite.

> During the performance of your work at the Project, the actions and behavior or (sic) your employees reflect upon the reputation of "**StormForce of Jacksonville LLC (StormForce**)**.** Do not take any actions or conduct yourself in a way that would be interpreted unfavorably upon StormForce and do not mention any other company names while working.

(Exh. R-26 p. 16, emphasis in the original) Subcontractor crews are prohibited from wearing garments with other contractor's names, or obscene or vulgar pictures or phrases. The subcontractor must do the job when scheduled and a crew may not begin a new job until the current job is complete. All rescheduling of jobs is to be done by the AIM. The subcontractor must communicate with the StormForce site foreman regarding arrival and departure times. The subcontractor decides when it will begin work, as long as work begins before 9:00 a.m., and sets the lunch and departure schedule for its crew (Tr. 178). It is to communicate any issues with material shortages or other problems related to the work to StormForce's site foreman. The document contains additional provisions addressing quality of work, protection of the homeowner's property, housekeeping, and cleanup.

The master subcontract between StormForce and FRE contained provisions addressing safety at the worksite, including StormForce's obligations to FRE's employees (Exh. R-26 pp. 7-8). Under the contract, the subcontractor's employees were "required to follow the safety rules, regulations and procedures instituted by [FRE], StormForce or any other contractor on the project and shall comply with all safety requirements identified in the Occupational Safety and Health Act of 1970" (Exh. R-26 p. 7). The master subcontract specified StormForce had no responsibility for training or disciplining FRE's employees with regard to safety infractions. It contains an acknowledgement by FRE that it

> shall control and implement all required safety procedures, and that StormForce shall only perform site visits for the purposes of determining conformance with the plans and specifications for the project. As a result, StormForce shall not be able to ensure Subcontractor (while working for Subcontractor) adherence to safety standards and the OSHA Act because StormForce cannot reasonably be expected to prevent, detect or abate violative conditions by reason of its limited role on the project. Therefore, Subcontractor shall be solely responsible for controlling safety on the jobsite as it related to Subcontractor.

Id. Should StormForce observe a safety infraction, the contract states "StormForce's sole remedy shall be to contact [FRE's] management personnel and identify the breach of contract." *Id*.

The Worksite and the Inspection

In 2018, StormForce contracted with the homeowner of 3502 Lenczyk Drive, in West Jacksonville, Florida, to replace the home's roof. FRE provided a five-man crew to perform the work (Tr. 50, 230).[5] The job took two days to complete (Tr. 128). It began, September 27, 2018, and was completed by September 28, 2018. David Nosal[6] was StormForce's site foreman for the job (Tr. 49).

The worksite consisted of a single-story home with a low-slope roof (Exhs. C-13 and C-15). The height of the roof was 9 feet, 6 inches at the eave and 13 feet, 6 inches at the gable (Tr. 235). Photographs of the worksite taken by Site Foreman Nosal show the crew was required to tear off the existing roof and replace it with a new asphalt shingle roof (Exh. C-14).

On September 28, 2018, the Jacksonville Area OSHA Office received a complaint regarding worksite conditions at 3502 Lenczyk Drive. CSHO Houser was assigned to investigate the complaint (Tr. 227). As he drove up to the home, CSHO Houser observed five individuals working on the roof without the use of fall protection (Tr. 230, 233). He took video and photographs from the public street prior to entering the site (Tr. 229-31). Upon CSHO Houser's entering the worksite and identifying himself, the crew began to pack up their gear (Tr. 235-36). CSHO Houser was able to determine the individual in charge of the worksite was named Alfredo. Alfredo spoke little English. CSHO Houser obtained minimal information from the crew in the short time they remained onsite after he arrived. He observed fall protection equipment in the crew's van (Tr. 244).

Based upon information he obtained from Alfredo's phone and the permit posted at the worksite, CSHO Houser identified FRE as the employer of the roofing crew. He unsuccessfully attempted to contact FRE (Tr. 241).[7] The dumpster on site had a magnetic sign with

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[5] FRE also provided, and separately billed for, the dumpster.

[6] Site Foreman Nosal left StormForce's employ three months after the inspection (Tr. 49). He was not called to testify by either party. As a former employee, he was equally available to either party via subpoena.

[7] Travis Slaughter, the owner of FRE and its predecessor company with whom StormForce subcontracted for labor, was well-known to the Jacksonville Area Office having been inspected and cited many times and having a reputation for a "disregard for safety." (Tr. 238-39) The undersigned takes judicial notice the Eleventh Circuit has issued orders of summary enforcement and contempt against Florida Roofing Experts, Great White Construction, and Travis Slaughter for failure to comply with final orders of the Commission. *See Secretary of Labor v. Great White Construction, Inc.*, Docket No. 17-13711-D, Order for Summary Enforcement (11th Cir. October 2, 2017); *Secretary of Labor v. Great White Construction, Inc*., Docket No. 17-15760-E, Order of Summary Enforcement (11th Cir. June 5, 2018); *Secretary of Labor v. Great White Construction, Inc., Travis Slaughter, and Florida Roofing Experts, Inc.*, Docket No. 19-13261-J, Order of Civil Contempt (11th Cir. September 26, 2019). Photographs of multiple worksites taken by StormForce site foremen and maintained by StormForce show roofing

StormForce's name and number on it and Alfredo identified the job site as belonging to StormForce (Tr. 237-38, 241). CSHO Houser called the number and was able to speak with AIM Manderson (Tr. 242). No one from StormForce was available to come to the worksite. The following Monday, CSHO Houser met with StormForce's company president, AIM Manderson, and Site Foreman Nosal (Tr. 244). During his meeting with StormForce personnel, CSHO Houser requested, and StormForce provided, the photographs maintained in the company's CRM for the worksite (Tr. 245-46). CSHO House interviewed Site Foreman Nosal who could not recall whether FRE employees were using any fall protection (Tr. 246).

Based upon his investigation, CSHO Houser recommended a citation alleging a single serious violation of § 1926.501(b)(13) be issued to StormForce. CSHO Houser based his recommendation on his conclusion StormForce was the controlling employer onsite due to its overall oversight of the job. The Secretary issued StormForce the citation March 25, 2019. StormForce timely filed its notice of contest.

DISCUSSION

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, No. 05-1907, 2009 WL 2567337 (OSHRC August 11, 2009).

Item 1, Citation 1, alleges a violation of 29 C.F.R. § 1926.501(b)(13). The standard requires

> Each 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 unless another provision in paragraph (b) of this section provides for an alternative fall protection measure. Exception: When the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems, the employer shall develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502.

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crews exposed to fall hazards (Exhs. C-11 and C-12; Tr. 140-43, 203, 251-52). The undersigned finds AIM Manderson's testimony he was unaware of FRE's history of noncompliance less than credible.

The citation alleges

> On or about September [28], 2018,[8] the employer failed to assure that five subcontracted employees conducting re-roofing work on a 3:12 pitch roof were protected from a 13-foot, 6 inch fall hazards by the use of a personal fall arrest systems, or any alternative fall protection measure.

The Secretary contends StormForce's failure to provide a safe workplace to FRE's employees exposed to fall hazards at the West Jacksonville, Florida, worksite constituted a violation of the cited standard.

Applicability of the Standard

There is no dispute the work being performed at the cited worksite was construction work as that term is defined in 29 C.F.R. § 1910.12(b) and that the construction standards apply. The cited standard more narrowly applies only to residential construction. Residential construction is not defined in the standards. The structure at the worksite was a residence. The Commission and the Secretary have historically applied residential construction standards to residences and other structures built using traditional residential construction techniques. *Capeway Roofing Systems, Inc*., No. 00-1968, 2003 WL 22020485, at *10 (OSHRC August 26, 2003), *aff'd, Capeway Roofing Systems, Inc. v. Chao*, 391 F.3d 56 (1st. Cir 2004).[9] The standards applicable to residential construction apply.

In addition to being residential construction, the work being performed was roofing work on a low-slope roof as that term is defined in 29 C.F.R. § 1926.500(b). Fall protection requirements for such work is addressed in 29 C.F.R. § 1926.501(b)(10). The residential construction standard limits acceptable forms of fall protection to guardrails, safety nets, or personal fall arrest systems "unless another provision in paragraph (b) of this section provides for an alternative fall protection measure." Under the unique circumstances of this case § 1926.501(b)(10) is one such "provision of paragraph (b)" that "provides for an alternative fall protection measure." Consequently, compliance with § 1926.501(b)(13) was not limited to the

[8] Testimony was adduced at hearing the date input by CSHO Houser was inaccurate and should have reflected the date of his inspection or September 28, 2018. StormForce did not argue the citation should be vacated, or that it suffered any prejudice, on the basis of this discrepancy. The undersigned amends the citation to allege a violation on or about September 28, 2018, to conform to the evidence.

[9] OSHA's directive on residential construction, which the Commission referenced in *Capeway Roofing Systems*, states residential construction is characterized by wood framing and using traditional wood frame construction techniques. OSHA Instruction STD 3-0.1A (June 18, 1999).

three forms of traditional fall protection enumerated in that standard, but also included any alternative fall protection permitted in § 1926.501(b)(10).

StormForce's argument the Secretary should have cited § 1926.501(b)(10) creates a false dichotomy between the two standards. Section 1926.500(b)(10) applies broadly to all roofing work on low-slope roofs, whether commercial or residential. Likewise, § 1926.501(b)(13) applies to all residential construction work, not only roofing work. The overlap of the two standards, where roofing work is being performed on a low-slope residential roof is addressed in the plain language of § 1926.501(b)(13) which allows for alternative protective measures where another provision of paragraph (b) also applies.[10] It is within the Secretary's prosecutorial discretion to choose which of two equally applicable standards to cite. The issue in dispute is whether StormForce provided any of the permissible forms of fall protection.

Violation of the Standard

The evidence is undisputed, on the day of the inspection, no guardrails or safety nets were in use at the worksite. The documentary evidence establishes the roofing crew was not using any type of personal fall arrest system (Exhs. C-13 and C-15). Under § 1926.501(b)(10), the roofing crew could have used a safety monitoring system as fall protection. The preponderance of the credible evidence establishes they did not.

The requirements of a safety monitoring system are enumerated in 29 C.F.R. § 1926.502(h).[11] Important among those requirements is that the safety monitor have no other responsibilities while performing his monitoring functions. CSHO Houser observed all five crew members performing roofing work (Tr. 258-59).[12] CSHO Houser's testimony is corroborated by the video he took of the worksite (Exh. C-15). The video depicts all five crew members engaged in some type of work, none acting solely as a safety monitor. CSHO Houser's testimony is also corroborated by the photographs he took showing working surfaces on which crew members are all performing roofing work and no other individual on that working surface

[10] There is no dispute the roof was over 6 feet above the lower level necessitating some form of fall protection under either standard.

[11] StormForce incorrectly contends a safety monitoring system contains "no tangible, visible components." A safety monitoring system requires designation of a person to serve as a safety monitor. 29 C.F.R. § 1926.502(h)(1). A person is both tangible and visible.

[12] CSHO Houser's testimony was candid, straightforward, and consistent. His demeanor was calm and confidant. Based on the consistency of his testimony and his demeanor, the undersigned finds him a credible witness and gives his testimony significant weight. StormForce's characterization of CSHO Houser's testimony regarding the use of a safety monitor as opinion testimony is wrong. CSHO Houser testified to his observations.

monitoring their work (Exh. C-13). Photographs of the worksite taken by Site Foreman Nosal and maintained by StormForce in its business records show the same (Exh. C-14; Tr. 246). StormForce presented no credible evidence regarding the worksite conditions to contradict the Secretary's evidence.

Section 1926.501(b)(13) provides an exception where "the employer can demonstrate that it is infeasible or creates a greater hazard to use these systems" it may "develop and implement a fall protection plan which meets the requirements of paragraph (k) of 1926.502." It is well settled the party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception *C.J. Hughes Construction, Inc.,* No. 93-3177, 1996 WL 514965, at *4 (OSHRC September 6, 1996). StormForce presented no evidence of infeasibility or greater hazard, nor did not present evidence either it or FRE had a fall protection plan.

The credible evidence establishes the roofing crew was working at heights in excess of 6 feet without the benefit of any form of fall protection. The standard was violated and FRE's employees were exposed to a fall hazard.

Employer Knowledge

> [T]he Secretary can prove employer knowledge of the violation in one of two ways. First, where the Secretary shows that a supervisor had either actual or constructive knowledge of the violation, such knowledge is generally imputed to the employer. *See Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir.1979); *New York State Elec. & Gas Corp.,* 88 F.3d at 105; *see also Secretary of Labor v. Access Equip. Sys., Inc.*, 18 O.S.H. Cas. (BNA) 1718, at *9 (1999). An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.,* 5 O.S.H. Cas. (BNA) 1202, at *3 (1977) (holding that because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to respondent").

ComTran Grp., Inc. v. U.S. Dep't of Labor, 722 F.3d 1304, 1307–08 (11th Cir. 2013).

The Secretary has met his burden to establish StormForce had actual knowledge of the violative condition. Under StormForce's procedures, Site Foreman Nosal would have visited the worksite on at least two occasions prior to the inspection, including an initial meeting with the crew. He visited and took photographs both days of the two-day project. Among StormForce's business records are photographs of the progress of the roofing job at issue taken by Site Foreman Nosal (Tr. 246). Those photographs show the worksite at various stages of the job.

(Exh. C-14). In none is the roofing crew using any type of fall protection. In Exhibit C-14, page 1, all five crew members are performing work on various working levels without anyone serving as safety monitor.[13] Pages 4 – 11 of Exhibit C-14 show the stage of roofing just prior to the stage at which CSHO Houser arrived on site. Exhibit C-14 at page 5 shows a crew member working at the roof's edge with no monitor on the same working level. In none of the photographs maintained by StormForce is any crew member using fall protection.

The documentary evidence establishes StormForce's site foreman observed and photographed the worksite conditions that constituted the violation.[14] Site Foreman Nosal was the sole representative at the worksite for StormForce. He was responsible for contact with the homeowner and ensuring FRE carried out the job in accordance with its contractual obligations. His photographs depicting the violative conditions are maintained by StormForce. Site Foreman Nosal's actual knowledge of the violative conditions is imputed to StormForce.

StormForce contends the evidence is insufficient to establish actual knowledge because photographs are undated and because Site Foreman Nosal was not called to testify that he took the photographs. AIM Manderson testified the photographs in Exhibit C-14 were of the worksite StormForce produced during the inspection (Tr. 119-20). The photographs were taken from StormForce's CRM system, having been filed under the customer's account number (Tr. 123). AIM Manderson testified Site Foreman Nosal was the representative for StormForce at the worksite. CSHO Houser testified Site Foreman Nosal confirmed the photographs were taken by him (Tr. 246). He testified, based on his experience, the photographs on pages 4 – 11 of Exhibit C-14 show work done at the end of the project, likely the morning before he arrived. All of the crew members are wearing the same shirts, pants, and headgear in both these and CSHO Houser's photographs. A reasonable inference can be drawn that the photographs were all taken the same day as, and at the site of, the inspection.

[13] The individual in the foreground does not appear to be performing roofing work when the photograph was taken. He is not on the same working surface as at least two other employees engaged in roofing work, nor does he have a clear view of the entire working surface on which one employee is working. Under § 1926.501(h)(1)(iii), a safety monitor must be on the same working surface and within visual sighting distance of the person being monitored.

[14] StormForce trained Site Foreman Nosal on fall protection requirements prior to the inspection (Exh. R-6). In that training, StormForce instructed Site Foreman Nosal about the specific duties of a safety monitor, most of which he could have observed were lacking at the worksite. It further trained Site Foreman Nosal that a safety monitoring system on a low slope roof, less than 50 feet in width, required a safety monitor "in conjunction with a warning line system." (Exh. R-6 at p. 11; Tr. 145-57). If, as StormForce contends, Site Foreman Nosal might have believed FRE was using a safety monitor system, that belief would have been contrary to his training.

The Secretary established StormForce had actual knowledge of the worksite conditions constituting the violation.

Employee Exposure and the Multi-employer Worksite Doctrine

The parties stipulated no employees of StormForce were exposed to the fall hazard at the worksite. StormForce's liability for any violations at the worksite is premised on the Commission's multi-employer worksite doctrine. Under the Commission's multi-employer worksite doctrine, "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*., No. 05-0839, 2010 WL 3341872, at *8 (OSHRC August 19, 2010). The Commission has also found an employer is liable "for violations of other employers where it could be reasonably expected to prevent or detect and abate the violation due to its supervisory authority and control over the worksite." *Red Lobster Inns of America, Inc*., No. 76-4754, 1980 WL 10629, at *2 (OSHRC July 18, 1980) *citing Gil Haugan, d/b/a Haugan Construction Co.*, Nos. 76-1512 and 1513, 1979 WL 8537, at *3 (OSHRC December 20, 1979); and *Knutson Construction Co.*, No. 765, 1976 WL 6122 (OSHRC October 12, 1976). In *Red Lobster*, the Commission went on to hold this theory of liability does not require a finding the employer created the hazard or "has the manpower or expertise to itself abate the hazard." 1980 WL 10629, at *2.

Applicability in the Eleventh Circuit

As an initial matter, StormForce argues the Commission may not apply its multi-employer worksite doctrine to cases arising in the Eleventh Circuit. StormForce argues, because the Commission is bound by the law of the circuit to which a case is likely to be appealed, the Commission is bound by Eleventh Circuit precedent. The Eleventh Circuit has adopted the case law of the former Fifth Circuit that predates the September 30, 1981, split of the circuits. Holdings in those Fifth Circuit cases apply unless and until the Eleventh Circuit overrules them. Prior to issuing its decision in *Acosta v. Hensel Phelps*, 909 F.3d 723, 733 (5th Cir. 2018), overturning its prior case law, the Fifth Circuit had declined to apply the Commission's multi-employer worksite theory of liability. *See Melerine v. Avondale Shipyards, Inc*., 659 F.2d 706 (5th Cir. Unit A 1981). Because the Eleventh Circuit has not specifically overturned the prior Fifth Circuit precedent, StormForce argues, the Commission remains bound by it in cases arising out of the Eleventh Circuit.

StormForce raised this issue for the first time in its post-hearing brief. It did not raise this argument in its Answer or identify it as a legal issue in dispute in the Joint Prehearing Statement. In his opening statement, counsel for StormForce stated StormForce did not seek to overturn Commission precedent with regard to the multi-employer worksite doctrine, but to ensure its proper application to the facts of this case (Tr. 19). In failing to timely raise the defense, StormForce has waived it. Even if not waived, the argument has no merit.

A similar argument was raised and rejected by the Commission in *McDevitt Street Bovis, Inc*., No. 97-1918, 2000 WL 35559662, at *2-5 (OSHRC September 28, 2000). The undersigned is bound by the holding in *McDevitt*. Neither subsequent Eleventh Circuit unpublished, non-binding, decision cited by StormForce requires a contrary finding. In *Southern Pan Services v. U.S. Department of Labor*, 685 F. App'x 692, 695 (11th Cir. 2017), the Eleventh Circuit found the multi-employer worksite doctrine applicable. In *Calloway v. PPG Industries, Inc*., 155 F. App'x 450 (11th Cir 2005), the Eleventh Circuit addressed the applicability of the multi-employer worksite doctrine in a negligence case involving a property owner who did not function as a general contractor. Even if binding authority, the holding is inapposite. The Commission's multi-employer worksite doctrine may be the basis for citation in this case.

Applicability to StormForce

The Secretary contends as the general contractor, StormForce owed a duty to FRE's employees to ensure they were protected from fall hazards. StormForce's oversight of the job was sufficient such that it is liable under the multi-employer worksite doctrine as a controlling employer for exposure of FRE's employees. StormForce contends it did not exercise sufficient control over FRE's employees for purposes of ensuring compliance with safety standards such that it can be found liable under the multi-employer worksite doctrine.

The Commission has consistently recognized a general contractor's role on a worksite as a controlling employer by virtue of its overall supervisory capacity for the construction project. *Anning-Johnson Co*., Nos. 3694 and 4409, 1976 WL 5967, at *6 (OSHRC May 12, 1976)("we note that typically a general contractor on a multi-employer project possesses sufficient control over the entire worksite to give rise to a duty under section 5(a)(2) of the Act either to comply fully with the standard or to take the necessary steps to assure compliance"); *Grossman Steel & Aluminum Corp*., No. 12775, 1976 WL 5968, at *4 (OSHRC May 12, 1076)("The general contractor is well situated to obtain abatement of hazards, either through its own resources or through its supervisory role with respect to other contractors…Thus, we will hold the general contractor responsible for violations it could reasonably have been expected to prevent or abate by reason of its supervisory capacity."); *Red Lobster Inns,* 1980 WL 10629, at *2; and *Centex-Rooney Construction Co.,* No. 92-0851, 1994 WL 682931 (OSHRC December 2, 1994). In so holding, the Commission has created a

> presumption that, by virtue of its supervisory capacity over the entire worksite, the general contractor on the site has sufficient control over its subcontractors to require them to comply with occupational safety and health standards to abate violations. The burden of rebutting this presumption is on the general contractor.

Gil Haugan, 1979 WL 8537, at *3.

The Commission has not undertaken to define the term "general contractor." Black's Law Dictionary defines a general contractor as

> One who contracts for the construction of an entire building or project, rather than a portion of the work. The general contractor hires subcontractors (e.g. plumbing, electrical, etc.), coordinates all work, and is responsible for payment to subcontractors.

StormForce's role on its roofing jobs is consistent with that definition.

StormForce contracts directly with property owners for completion of roofing projects. It coordinates all scheduling, including rescheduling of work due to weather. StormForce orders aerial views and drawings of the roof (Tr. 279-80). It determines the size and pitch of the roof, as well as the number of layers of old roof to be removed. It determines the amount of materials necessary for the job then orders those materials from a supplier. It coordinates delivery of those materials. It has a subcontract with FRE for supply of labor. It orders a dumpster from FRE the cost of which is separately billed to StormForce (Tr. 278-79). FRE supplies a crew to the worksite on the day designated by StormForce. StormForce requires FRE to commence the job on the day specified and the supplied crew to complete the job before moving on to another one.

StormForce's site foreman arrives at the job prior to FRE's crew. He meets first with the homeowner and, upon their arrival, with FRE's crew. He checks the materials for accuracy of the delivery and takes photographs of the property before work commences. He ensures FRE's crew is familiar with general rules of behavior and protection of the homeowner's property via a group huddle. Under the master subcontract between StormForce and FRE, FRE must give StormForce access to the worksite (Exh. R-26 p. 8). During the course of work, StormForce's site foreman inspects the worksite at various stages of the job and documents the progress. Site Foreman Nosal told CSHO Houser he met with an FRE representative for the job (Tr. 253-54). He took photographs on both days during which the job at issue was underway (Exh. C-14).[15] FRE is obligated under the master subcontract to perform all clean up to the satisfaction of StormForce's site foreman (Exh. R-26 p. 6). At the completion of the work, StormForce's site foreman conducts the final walkthrough with the homeowner and obtains payment.

At all times, StormForce holds itself out as the company performing the job. It places its own sign at the worksite. It prohibits any other signs or attire depicting any other contractor on the site. FRE reports problems with, or shortages of, materials to StormForce who deals directly with the supplier. FRE reports issues that affect its ability to complete the job, such as problems with the house, to StormForce. FRE reports any problems with the homeowner to StormForce. StormForce is the sole contact with the homeowner. StormForce held itself out as, and acted in the capacity of, the general contractor for the worksite.

The master subcontract requires FRE employees to follow all safety and health related laws, rules, and regulations (Exh. R-16 p. 7). StormForce had no contractual obligation to train, monitor, or discipline FRE's employees with regard to safety. In the absence of contractual obligations, the Commission requires the controlling employer have the ability to require others to correct safety violations or otherwise control matters that might affect safety. AIM Manderson testified the method by which StormForce ensures all aspects of its contract with FRE are met, including proper installation of the roof, is to report issues to FRE management (Tr. 290-91). StormForce can require FRE to leave a worksite if StormForce discovers a problem (Tr. 89). This has not been necessary, as AIM Manderson testified StormForce's method of addressing quality of work issues and safety issues was effective (Tr. 61, 70-72, 110, 167, 290-91). "From my history, that's always been the case, is we report it and they take care of it." (Tr. 72) StormForce expects its site foremen to report a lack of fall protection equipment or FRE's failure to use fall protection to FRE (Tr. 109-10, 133; Exh. R-27 p. 13). StormForce expects FRE to come into compliance upon such notification. The record as a whole establishes

[15] Exhibit C-14 contains photographs of the worksite produced from StormForce's business records. The photographs show different stages of the project, including tear off of the original roof. In those photographs, the crew is wearing different clothing than in those that show work at later stages. A reasonable inference can be drawn that the photographs were taken on different days.

StormForce exercised sufficient supervisory control over the worksite such that it could have directed FRE to correct safety violations.

The D.C. Circuit's decision in *IBP, Inc. v. Herman*, 144 F. 3d 861 (D.C. Cir. 1998), relied upon by StormForce, does not necessitate a different result. *IBP* involved a contract to perform equipment cleaning between a factory owner and an independent contractor which required the D.C. Circuit to expand the multi-employer worksite doctrine to the general industry setting. Applicability of the multi-employer worksite doctrine in the construction context, as in the instant case, is well-settled. *Century Communities, Inc. d/b/a Century Communities of Georgia, LLC v. Secretary of Labor,* 771 F. Appx. 14 (D.C. Cir. 2019). In holding the factory owner was not a controlling employer, the D.C. Circuit relied on the inability of the factory owner's supervisors to obtain compliance. To the contrary here, according to AIM Manderson, addressing quality of work or safety concerns with FRE management resulted in immediate correction or compliance on the part of FRE. The holding in *IBP* is inapposite.

StormForce contends the Secretary must establish its control over the worksite was "consistent and pervasive." See Respondent's Post-Hearing Brief at pp. 17, 19, and 23. This is a criteria formulated by StormForce, as it appears nowhere in Commission precedent. Nor must the Secretary establish, as StormForce contends, direct control over the subcontractor's employees. While evidence of direct supervisory control may be sufficient, it is not necessary and StormForce points to no Commission precedent so holding. To the contrary, the Commission has found liability of a general contractor with no supervisory authority over employees. *See Red Lobster Inns*, 1980 WL 10629, at *2. In *Red Lobster Inns*, the Commission held

> Although he did not supervise other employees, [the jobsite superintendent] held a highly responsible position and was invested by Respondent with substantial authority. It was [the jobsite superintendent]'s responsibility as Respondent's representative on the worksite to see that the construction work was completed successfully. Indeed, it was only through [the jobsite superintendent] that Respondent had knowledge of the status of a major corporate project. Respondent cannot divest itself of such knowledge simply by not assigning [the jobsite superintendent] supervisory status over other employees.

Based on its overall supervisory role on the worksite, including its control over scheduling, logistics, and quality of work, StormForce is liable for exposure of FRE's employees to the fall hazard present at the worksite. Where a controlling employer has actual knowledge of the hazardous condition and its "precautions were inadequate to ensure compliance…[t]he subcontractor employees' access to the violative conditions…[give] rise to [the controlling employer's] liability." *Century Communities,* 771 F.Appx. at 15. The citation issued to StormForce is affirmed.

Characterization

The Secretary has characterized the violation as serious. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. As the Third Circuit has explained:

> It is well-settled that, pursuant to § 666(k), when the violation of a regulation makes the occurrence of an accident with a substantial probability of death or serious physical harm *possible*, the employer has committed a serious violation of the regulation. The "substantial probability" portion of the statute refers not to the probability that an accident will occur but to the probability that, an accident having occurred, death or serious injury could result, even in those cases in which an accident has not occurred or, in fact, is not likely to occur.

Secretary of Labor v. Trinity Industries, 504 F.3d 397, 401 (3d Cir. 2007) (internal quotation marks and citations omitted); *See also, Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Mosser Construction*, No. 08-0631, 2010 WL 711322 (OSHRC February 23, 2010); *Dec-Tam Corp.*, No. 88-0523, 1993 WL 27401 (OSHRC January 19, 1993). The likelihood of an accident goes to the gravity of the violation, which is a factor in determining an appropriate penalty. *J.A. Jones Constr. Co.*, 87-2059, 1993 WL 61950, at *14 (OSHRC February 19, 1993).

There can little dispute a fall from a 9-foot roof could result in serious injury, including death. StormForce's own training materials recognize the serious nature of fall hazards (Exh. C-6). The violation is properly characterized as serious.

Penalty Determination

The Secretary proposes a penalty of $10,210.00. The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, No. 88-1962, 1994 WL 53780 (OSHRC February 18, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, No. 93-0239, 1995 WL 139505, at *3 (OSHRC March 29, 1995)("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. *Capform Inc.*, No. 99-0322, 2001 WL 300582 (OSHRC March 26, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* No. 00-1052, 2005 WL 696568, at *3 (OSHRC February 25, 2005).

Five crew members were exposed to a 9-foot fall hazard for the entire two-day project. Photographs show crew members working on the edge of the roof with no fall protection, increasing the likelihood of a fall. Despite having harnesses in FRE's van, none of the crew used any type of fall protection. The gravity of the violation is high.

StormForce is entitled to a small reduction for size, history, and good faith. StormForce is a small employer and employs no construction laborers. It has received only one citation in the past as the general contractor at a construction worksite in 2016. The record contains little evidence of StormForce's good faith efforts toward employee safety. The record contains no evidence of StormForce's safety manual applicable to its own employees. It has taken no steps to obtain its subcontractor's safety rules (Tr. 217). The Secretary's proposed penalty of $10,210.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1, Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.501(b)(13) and a penalty of $10,210.00 is assessed.

SO ORDERED.

/s/____________________________
Heather A. Joys
Administrative Law Judge, OSHRC

Dated: April 30, 2020
Washington, DC