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. SUMMIT CONTRACTING GROUP, INC., Respondent.	OSHRC Docket No. 18-1451

ON BRIEFS:

Joseph M. Berndt, Attorney; Heather R. Phillips, 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

Bryan D. Judah, General Counsel; Summit Contracting Group, Inc., Jacksonville, FL
For the Respondent

DECISION

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

Following the inspection of a multi-family housing project in Ponte Vedra, Florida, the Occupational Safety and Health Administration issued Summit Contracting Group, Inc., 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 John B. Gatto affirmed the citation and assessed the proposed $11,640 penalty. For the reasons discussed below, we reverse the judge and vacate the citation.

BACKGROUND

Summit was the general contractor for the Ponte Vedra project, which spanned fourteen acres and included the construction of fourteen multi-family residential buildings. Summit contracted the project's framing work to Gunner Houston, Ltd. Gunner Houston, in turn, hired

three framing subcontractors to perform this work: Martin Serrano Remodeling, LLC; Elite Construction & Associates, LLC; and Superior Framing LMT, LLC. These three subcontractors did not have a direct contractual relationship with Summit.

An OSHA compliance officer inspected the worksite on April 17, 2018. When the compliance officer arrived on site, each of the three framing subcontractors was performing roofing work on a different building. Over a 10- to 15-minute period, the compliance officer observed the owner and four employees of Martin Serrano Remodeling, three employees of Elite Construction, and one employee of Superior Framing working without fall protection while exposed to falls ranging from 12 feet to 34 feet. None of Summit's or Gunner Houston's employees were exposed to a fall hazard. Following the inspection, OSHA issued Summit the one-item citation under the Secretary's multi-employer citation policy, alleging that Summit was a "controlling employer" liable for the framing subcontractors' failure to use fall protection. OSHA Instruction CPL 02-00-124, Multi-Employer Citation Policy ¶ X.E (Dec. 10, 1999) (defining controlling employer as one "who has general supervisory authority over the worksite, including the power to correct safety and health violations itself or require others to correct them").

DISCUSSION

On review, Summit challenges two aspects of the judge's decision. First, the company argues that the Secretary's multi-employer citation policy, as well as Commission precedent assessing multi-employer liability, is invalid in the Eleventh Circuit, where this case arises.[1] Second, the company maintains that even if valid, the judge erred in finding that Summit, as a controlling employer, had constructive knowledge of the violative conditions. For the following reasons, we reject Summit's argument that multi-employer worksite liability is invalid in the Eleventh Circuit but agree with the company that it lacked constructive knowledge.

Multi-Employer Worksite Liability

"The grounding of the multi-employer citation policy in [section 5(a)(2) of the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(2)] has long been recognized by both the courts and the Commission." *Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1203 (No. 05-0839, 2010), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished). "Under Commission precedent,

[1] The worksite at issue and Summit's principal place of business are both in Florida, which is in the Eleventh Circuit.

an employer may be held responsible for the violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *StormForce of Jacksonville, LLC*, No. 19-0593, 2021 WL 2582530, at *3 (OSHRC Mar. 8, 2021) (internal quotation marks and brackets omitted).

On review, Summit argues that the Secretary's multi-employer citation policy is invalid under Eleventh Circuit precedent and, therefore, the judge erred in applying Commission precedent imposing multi-employer liability.[2] Summit is correct that in deciding a case, the Commission applies the precedent of the particular circuit to which that decision may be appealed. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). Here, however, the Commission determined in *McDevitt Street Bovis., Inc.*, that "the Eleventh Circuit has neither decided nor directly addressed the issue of multi-employer liability." *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1110 (No. 97-1918, 2000).

Indeed, in *McDevitt* the Commission addressed whether Eleventh Circuit precedent precludes the Commission from applying its own multi-employer precedent on controlling employer liability and roundly rejected the notion. 19 BNA OSHC at 1110-12. In that case, a general contractor with no exposed employees was cited for a subcontractor's OSHA violation.[3] *Id.* at 1108-09. McDevitt, like Summit here, argued that the citation must be vacated because the multi-employer worksite doctrine was invalid in the Eleventh Circuit. *Id.* at 1110. In making this argument, McDevitt relied on the same cases now relied upon by Summit: *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 (5th Cir. 1975) (per curiam); *Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318 (5th Cir. 1979); and *Barrera v. E. I. Du Pont de Nemours & Co.*, 653 F.2d 915 (5th

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[2] The Commission will generally apply its own precedent when an issue has not been decided or directly addressed by the relevant circuit court. *See, e.g., Angel Bros. Enters., Ltd.,* No. 16-0940, 2020 WL 4514841, at *3 (OSHRC July 28, 2020), *aff'd*, 18 F.4th 827 (5th Cir. 2021).

[3] In an attempt to distinguish *McDevitt* from the circumstances of the instant case, Summit incorrectly asserts that the Commission in *McDevitt* found "liability for an employer who exposed his own employees to hazardous violative conditions . . . ." In fact, the Commission stated in the decision's first paragraph, after describing the violative conditions, that "[i]t is undisputed that McDevitt did not create these conditions and none of its own employees were exposed to them." *McDevitt*, 19 BNA OSHC at 1108.

Cir. 1981).[4] *McDevitt*, 19 BNA OSHC at 1110. The Commission considered McDevitt's argument and explained why none of these cases are controlling. *Id.* at 1110-12.

In the first case, *Southeast Contractors*, the Fifth Circuit stated in a one-paragraph per curiam opinion that it agreed with the dissent of former Chairman Robert D. Moran in the underlying Commission decision—"especially with that portion pertaining to the general rule that a contractor is not responsible for the acts of his subcontractors or their employees." 512 F.2d at 675. The Commission found in *McDevitt* that although "originally a Commission proceeding, [*Southeast Contractors*] was summarily decided and issued before the Commission even adopted the multi-employer doctrine[.]" *McDevitt*, 19 BNA OSHC at 1112. As for *Horn* and *Barrera*, the Commission found neither controlling because, as tort cases, their "precedential value in the context of a case before the Commission is questionable." *Id.* In addition, the Commission observed that neither the Fifth Circuit nor the Eleventh Circuit had, at that point, "reviewed any Commission decisions on multi-employer liability since the Commission adopted the doctrine." *Id.*; *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1725-26 n.12 (No. 95-1449, 1999).

In the more than twenty years since *McDevitt* was decided, the Eleventh Circuit has not clarified its position on the multi-employer worksite doctrine.[5] In 2018, however, the Fifth Circuit

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[4] All three cases were decided in the Fifth Circuit, before the circuit split to form the Eleventh Circuit, and therefore are considered Eleventh Circuit precedent. *Bonner v. City of Prichard, Ala.*, 661 F.2d (11th Cir. 1981) ("We hold that the decisions of the United States Court of Appeals for the Fifth Circuit . . , as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit."). Summit also relies on another Fifth Circuit case, *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706 (5th Cir. 1981), but as noted in *McDevitt*, this decision was issued *after* the Fifth Circuit split and, therefore, is not Eleventh Circuit precedent. *McDevitt*, 19 BNA OSHC at 1110 n.8.

[5] On review, the Secretary claims three Eleventh Circuit decisions show that the circuit has, in fact, spoken to the issue of multi-employer liability by affirming citations issued under the Secretary's citation policy: *Pace Construction Corp. v. Sec'y of Labor*, 840 F.2d 24 (11th Cir. 1988) (unpublished table decision); *Calloway v. PPG Industries, Inc.*, 155 F. App'x 450, 455 (11th Cir. 2005) (unpublished); and *Southern Pan Services Co.*, 685 F. App'x 692, 695 (11th Cir. 2017) (unpublished). All of these decisions, however, are unpublished and, therefore, are not binding precedent in the Eleventh Circuit. 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."). Moreover, *Southern Pan* concerns an exposing employer rather than a controlling employer. 685 F. App'x at 695. *Calloway*—like *Horn* and *Barrera*—is a tort case. 155 F. App'x at 455. And *Pace Construction* is an unpublished table decision that affirms an administrative law judge's order without

in *Hensel Phelps Construction Co.*, 909 F.3d 723 (5th Cir. 2018), became the eighth circuit court of appeals to "adopt[] the principles associated with multi-employer liability."[6] *McDevitt*, 19 BNA OSHC at 1111 & n.11. In rejecting Hensel Phelps' challenge to the Secretary's multi-employer citation policy, the Fifth Circuit examined its past precedent on this issue. *Hensel* Phelps, 909 F.3d at 737-42. The court explained that *Southeast Contractors* "turned, not on any interpretation of [section 5(a)(2) of the OSH Act], but on an interpretation of [the cited construction standard]." *Id.* at 740. According to the court, its holding in that decision was "limited to its facts [as they related to] the meaning of the [cited] regulation. Nothing more." *Id.* at 741. The Fifth Circuit therefore held that when it agreed with the reasoning of former Chairman Moran's dissent, it had "merely approved of the 'general rule that a contractor is not responsible for the acts of his subcontractors or their employees,' " but "did not tether that approval to any interpretation of [section 5(a)(2)]." *Id.*

In *Hensel Phelps*, the Fifth Circuit also readily dispensed with *Horn* and *Barrera*. As to *Horn*, the court found that the decision "does not carry the day" and explained it would be inappropriate to "apply a broad general statement of law regarding the scope and application of the [OSH] Act contained in a [tort case] to the entirely different question of whether the Secretary has the authority under the [OSH] Act to cite a controlling employer for violating an occupational safety and health standard." *Id.* at 741-42. The court declared *Barrera* "wholly irrelevant" to the issue at hand, concluding that "[t]he decision has no force here." *Id.* at 742. Although *Hensel Phelps* is not Eleventh Circuit precedent, the Fifth Circuit's reading of its own decisions is highly persuasive, particularly to the extent that the court's analysis stands directly at odds with Summit's claim that these decisions "unambiguously" preclude assessing multi-employer worksite liability here.

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explanation. 840 F.2d 24. Thus, the Eleventh Circuit has neither expressly accepted nor rejected the multi-employer worksite doctrine as it pertains to controlling employer liability.

[6] In addition to the Fifth Circuit in *Hensel Phelps*, seven other circuit courts have adopted these principles. *Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 820 (8th Cir. 2009); *Universal Constr. Co. v. OSHRC*, 182 F.3d 726, 731 (10th Cir. 1999); *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 983 (7th Cir. 1999); *R.P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 817-19 (6th Cir. 1998); *Beatty Equip. Leasing, Inc. v. Sec'y of Labor*, 577 F.2d 534, 536-37 (9th Cir. 1978); *New England Tel. & Tel. Co. v. Sec'y of Labor*, 589 F.2d 81, 81-82 (1st Cir. 1978); *Brennan v. OSHRC,* 513 F.2d 1032, 1038 (2d Cir. 1975).

We thus reaffirm the Commission's holding in *McDevitt* that Eleventh Circuit precedent is unsettled on the issue of multi-employer liability.[7] Accordingly, we apply Commission precedent to the circumstances of this case.

Reasonable Care

Summit does not dispute that it was a controlling employer at the Ponte Vedra worksite. "If a controlling employer has actual knowledge of a subcontractor's violation, the controlling employer has a duty to take reasonable measures to obtain abatement of that violation." *StormForce*, 2021 WL 2582530, at *6. In the absence of actual knowledge, the pertinent inquiry is whether the controlling employer "met its obligation . . . to 'exercise reasonable care,' i.e., to take 'reasonable measures' to 'prevent or detect' the violative conditions." *Id.* at *8. This inquiry requires an assessment of "the nature, location, and duration" of the violative conditions, as well as "objective factors" relating to the controlling employer's role at the worksite and its relationship with other onsite employers. *Suncor Energy (U.S.A.) Inc.*, No. 13-0900, 2019 WL 654129, at **5-9 (OSHRC Feb. 1, 2019); *StormForce*, 2021 WL 2582530, at **8-10. It is clear 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." *StormForce*, 2021 WL 2582530, at *6 (internal

[7] Summit raises two additional arguments with respect to multi-employer liability. First, Summit claims that the Secretary's citation policy is inconsistent with 29 C.F.R. § 1910.12(a). This argument has been explicitly addressed and rejected in a prior Commission case. *Summit*, 23 BNA OSHC at 1199-1203 (concluding "that the plain meaning of § 1910.12(a) does not invalidate the Secretary's multi-employer citation policy as it applies to a controlling employer on a construction site," and agreeing with Eighth Circuit's analysis of issue in *Summit*, 558 F.3d 815). We find no reason to revisit this issue.

Second, Summit raises concerns about the propriety of deferring to the Secretary's interpretation of section 5(a)(2) of the OSH Act, 29 U.S.C. § 654(a)(2), under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Commission, however, has never relied on the Secretary's interpretation of section 5(a)(2) to find that this statutory provision allows for the multi-employer worksite doctrine. Rather, the Commission's precedent on this issue is based on the provision's plain meaning, which the Commission has reaffirmed multiple times in decisions issued after *Chevron*. *See, e.g., Summit*, 23 BNA OSHC at 1203 (recognizing that "[t]he grounding of the multi-employer citation policy in [section] 5(a)(2) of the [OSH] Act has long been recognized by both the courts and the Commission"); *McDevitt*, 19 BNA OSHC at 1109 ("Under Commission precedent, an employer who either creates or controls the cited hazard has a duty under [section] 5(a)(2) of the Act, 29 U.S.C. § [654](a)(2), to protect not only its own employees, but those of other employers 'engaged in the common undertaking.' " (citing *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199 (No. 3694, 1976) (consolidated))). We therefore reject this argument.

quotation marks omitted). In other words, in assessing the extent of a controlling employer's duty to detect violative conditions not involving its own employees, the Commission takes into account that the controlling employer has a "secondary safety role" at the worksite. *Suncor*, 2019 WL 654129, at **6-7.

Here, there is no dispute that the only Summit employees present at the time of OSHA's inspection—the superintendent and assistant site superintendent—lacked actual knowledge of the framing subcontractors' failure to use fall protection. The judge concluded that Summit nonetheless had constructive knowledge, finding that with the exercise of reasonable diligence, its superintendents "could have uncovered" these violative conditions because they were in "plain view." In reaching this conclusion, the judge found Summit's worksite inspections were inadequate, especially in light of the company's awareness that fall protection violations had previously occurred on the Ponte Vedra project.

On review, Summit argues that the judge's conclusion is contrary to the Commission's holding in *David Weekley Homes*, in which the Commission reversed a judge's finding that a controlling employer had constructive knowledge of "substantive violations" committed by onsite subcontractors that " 'surely were in view' of [the controlling employer's] representatives since they were seen by [the] compliance officer."[8] 19 BNA OSHC 1116, 1119-20 (No. 96-0898, 2000). Specifically, the Commission concluded that the Secretary failed to establish that the controlling employer could have discovered the violative conditions with the exercise of reasonable diligence. *Id.* The Secretary responds that *David Weekley* is factually distinguishable because, in contrast to that case, the record here shows that Summit failed to exercise reasonable care to detect the framers' lack of fall protection.

We find that the record in this case falls short of establishing that Summit failed to exercise reasonable diligence. First, although the compliance officer was able to observe the violative

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[8] Summit further argues that the judge should not have relied on *Kokosing Construction Co.*, 17 BNA OSHC 1869 (No. 92-2596, 1996), to support his finding of constructive knowledge because that case involved an employer that failed to observe *its own* employees' violations. We agree that the judge erred in relying "on exposing employer precedent as the benchmark for how reasonable diligence or care is assessed for a controlling employer whose own employees are not exposed." *Suncor*, 2019 WL 654129, at *6. As explained in *Suncor*, relying on such precedent is "contrary to *Summit* and the Secretary's own [Multi-Employer Citation Policy]" because "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.' " *Id.* (cited authority omitted).

conditions from ground level,[9] the record establishes that these conditions existed for only 10 to 15 minutes. Thus, Summit would likely have had to continuously monitor the framers' work to discover the violative conditions during that limited timeframe, an obligation that we have never extended to even an *exposing* employer. *See, e.g., N.Y. State Elec. & Gas Corp.*, 19 BNA OSHC 1227, 1231 (No. 91-2897, 2000) (finding safety monitoring adequate where foreman inspected worksite twice daily and conducted occasional unannounced audits, and noting Second Circuit's "admonition that we cannot impose a requirement for continuous, full-time monitoring"); *Kerns Bros.*, 18 BNA OSHC at 2069-70 (finding safety monitoring adequate where co-owner or safety director inspected 75 to 95 percent of worksites daily). Moreover, it is not clear from the record that at the time of the compliance officer's inspection, either Summit supervisor was in a position to observe the violative conditions—the superintendent was at a meeting in the office trailer, and although the assistant site superintendent was walking around the worksite when the compliance office first arrived, he gave no specific testimony about what he could see from his vantage point that day while performing his various responsibilities at the worksite.

Second, regardless of the violative conditions' short duration, the record lacks sufficient evidence to establish that Summit's monitoring of the framers was inadequate. Remarkably, Summit's assistant framing superintendent—the Summit official specifically charged with supervising framing activities at the worksite—was not called to testify at the hearing. And although the record establishes that he was at offsite training during the compliance officer's inspection, the record shows that he typically conducted daily walkaround inspections. Put simply, without further evidence, we cannot evaluate the adequacy of the assistant framing superintendent's monitoring efforts on the day of the inspection.

Each of the other two superintendents also conducted daily inspections.[10] The superintendent in charge of the worksite testified that he walked around to check the progress of

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[9] Summit's contention on review that the compliance officer could observe the violative conditions only with the assistance of a zoom lens on his camera is not supported by the record. The compliance officer never testified that his observations were possible only with the aid of a zoom lens, and Summit's counsel did not ask the compliance officer to further clarify his otherwise straightforward testimony that he saw workers with no fall protection exposed to fall hazards.

[10] Relying on testimony from Summit's superintendent, the judge found that on the day of the OSHA inspection, "no one from Summit went around in the morning or afternoon to see if [the framers] were tied off and further that there was no specific schedule for those walks." This

all work at the site and, at times, directed subcontractors to correct safety violations. The assistant site superintendent also conducted such inspections, though his inspections were primarily focused on the ground activities for which he was responsible.[11] In addition to these daily walkarounds, Summit hired a safety consultant to, among other things, conduct monthly inspections and document safety violations at the worksite.

To supplement these inspection efforts, Summit's superintendent testified that the company relied on Gunner Houston and the three framing subcontractors to ensure the safety of their own employees. Nothing in the record shows that this reliance was unreasonable.[12] *Suncor*, 2019 WL 654129, at **7, 9-10 (considering safety history and experience of contractors to determine extent of controlling employer's secondary safety role). Summit's superintendent testified that Gunner Houston had been the framing contractor on every job he worked on during his eight years with Summit, suggesting that Summit was aware of Gunner Houston's safety record, at least at Summit's worksites. The record, however, is silent on Gunner Houston's history of safety compliance. And while Summit's superintendent acknowledged that the company would not have been aware of the framing subcontractors' safety history, the record is also silent on whether Gunner Houston vetted its framing subcontractors for safety compliance and, if so,

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mischaracterizes the superintendent's testimony, who explained that on a typical day, Summit's superintendents "don't monitor everyone getting up on the roof," but they do "walk the site" after "tak[ing] care of [their] business in the morning." While he acknowledged that Summit had no "designated schedule" for making certain the workers were tied off "first thing in the morning" and "after lunch," he did not say—and was not asked—whether he or one of the two assistant superintendents had conducted a walkaround inspection at some point during the morning of the day of OSHA's inspection, before the compliance officer arrived.

[11] The assistant site superintendent handled delivery logistics and directed the work of landscapers, irrigation, utilities, and road and sidewalk construction. The judge emphasized the fact that this assistant superintendent "focused on groundwork" during his daily walks. Given the division of duties between the two assistant superintendents, however, the record does not show that the assistant site superintendent failed to exercise reasonable care by focusing on the work activities for which he was responsible.

[12] "[L]ess frequent inspections by a controlling employer may be appropriate if its contractor has a demonstrated history of compliance and sound safety practices." *Suncor*, 2019 WL 654129, at *9. More frequent inspections may be necessary, however, "if the controlling employer knows that the other employer has a history of non-compliance" or, "especially at the beginning of the project, if the controlling employer had never before worked with this other employer and does not know its compliance history." Instruction CPL 02-00-124, Multi-Employer Citation Policy ¶ X.E.3.d.; *Suncor*, 2019 WL 654129, at *9 (citing to Multi-Employer Citation Policy and quoting ¶ X.E.3.d in parenthetical).

whether Summit was aware that Gunner Houston performed this function. What the record does show is that the three framing subcontractors had a contractual relationship with Gunner Houston, not Summit, and that Gunner Houston had its own safety consultant, utilized its own fall protection plan, held safety meetings with its subcontractors' employees, provided fall protection training to those employees, and had its own superintendents conduct safety inspections at the worksite. In short, there is insufficient evidence to conclude that Summit's reliance on Gunner Houston and the framing subcontractors was unreasonable. *Cf. R.P. Carbone Constr. Co.*, 166 F.3d 815, 820 (6th Cir. 1998) (general contractor's reliance on its subcontractor's safety efforts was unjustified because general contractor failed to inform itself as to what safety measures subcontractor had implemented and violation was in plain view for two weeks).

Finally, as to Summit's monitoring of the framers, we reject the Secretary's claim that Summit should have inspected them more frequently because the company was aware that the framers had previously failed to use fall protection at the Ponte Vedra worksite. The record does show that Summit's safety consultant reported to the company that framers had been spotted without fall protection during two monthly inspections preceding the compliance officer's visit, the superintendent was aware of previous fall protection violations at the site, and the assistant site superintendent was aware that someone visiting the site had recently commented on fall protection violations. There is, however, no evidence in the record regarding what specific measures Gunner Houston and the framing subcontractors took to ensure that the exposed employees were consistently tied off. Thus, there is little basis upon which we could conclude that Summit's response to these instances of noncompliance—including its consultations with the subcontractors whenever such instances were observed—was unreasonable. Given Summit's secondary safety role at the worksite, we find the limited evidence in the record does not support a finding that Summit's inspection practices were inadequate. *See StormForce*, 2021 WL 2582530, at *6; *Suncor*, 2019 WL 654129, at **6-7.

For all these reasons, we conclude the Secretary has not established that Summit failed to exercise the reasonable care required of a controlling employer in a secondary safety role and, therefore, has not met his burden of proving knowledge.[13] *Compare StormForce*, 2021 WL

[13] The judge found that Summit lacked an adequate safety program and this failure "independently" establishes Summit's constructive knowledge of the violative conditions. With

2582530, at **8-10 (controlling employer's knowledge not established where it is undisputed that company's foreman followed inspection procedures and procedures were adequate, no evidence shows foreman observed subcontractor's fall protection violation, and "more than a 'short[]' period of time passed between" foreman's and compliance officer's inspections), *and David Weekley*, 19 BNA OSHC at 1119-20 (controlling employer's knowledge not established where subcontractor violations "were of brief or indeterminate duration" and Secretary failed to show that controlling employer could have discovered their existence with exercise of reasonable diligence), *with McDevitt*, 19 BNA OSHC at 1110 (controlling employer's knowledge established where subcontractor's noncompliant scaffold was in plain view and had been erected for "significant period of time"), *and Centex-Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994) (controlling employer's knowledge established where inadequate guardrails and uncovered floor openings created by subcontractors were in plain view, had existed for "significant period of time," and controlling employer "could have ascertained their existence through the exercise of reasonable diligence").

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respect to exposing employers, a theory of constructive knowledge based on an employer's inadequate safety program is well-established in Commission precedent, including in cases arising in the Eleventh Circuit. *See, e.g., MasTec N. Am., Inc.*, No. 15-1574, 2021 WL 2311875, at *2 (OSHRC Mar. 2, 2021) ("[I]n the Eleventh Circuit, the Secretary may establish employer knowledge ' . . . through the employer's . . . failure to implement an adequate safety program.' " (citing *Quinlan v. Sec'y*, 812 F.3d 832, 837 (11th Cir. 2016))); *Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1950-51 (No. 07-1899, 2010) (finding constructive knowledge based on employer's failure to adequately monitor compliance with safety program). But neither the Commission nor the Eleventh Circuit has ever relied on that theory to determine whether a *controlling* employer had constructive knowledge of violative conditions to which only another employer's employees were exposed on a multi-employer worksite. Moreover, doing so here would be concerning given that Summit lacked a direct contractual relationship with the three framing subcontractors whose employees were exposed to the fall hazards. *Cf. David Weekley*, 19 BNA OSHC at 1117-18 (vacating safety program violation alleged under 29 C.F.R. § 1926.20(b)(1), where cited controlling employer lacked contractual relationship with three framing contractors who employed exposed workers, and record did not show controlling employer's "conduct was insufficient, particularly in light of the combination of its limited onsite presence and actual exercise of safety responsibilities"). While such evidence may be relevant to determining whether a controlling employer has exercised reasonable care in relation to its secondary safety role on a multi-employer worksite, we find it inappropriate to analyze the adequacy of Summit's own safety program as an independent basis for proving constructive knowledge. *Suncor*, 2019 WL 654129, at *6.

Accordingly, we reverse the judge and vacate the citation.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: May 10, 2022

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. SUMMIT CONTRACTING GROUP, INC., Respondent.	OSHRC Docket No. 18-1451

DECISION AND ORDER

Attorneys and Law Firms

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Bryan Judah, General Counsel, Summit Contracting Group, Inc., Jacksonville, FL, For Respondent.

JUDGE: John B. Gatto, First Judge

I. INTRODUCTION

The United States Department of Labor, through its Occupational Safety and Health Administration ("OSHA"), investigated a construction site in Ponte Vedra, Florida, involving Respondent, Summit Contracting Group, Inc. ("Summit"), and subsequently issued a citation to Summit on September 12, 2018, under the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651-678.[14] The citation asserted Summit committed a serious[15] violation of the

[14] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. See Order No. 4–2010 (75 FR 55355), as superseded in relevant part by 1–2012 (77 FR 3912). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein.

[15] The Act contemplates various grades of violations of the statute and its attendant regulations—"willful"; "repeated"; "serious"; and those determined "not to be of a serious nature" (referred to by the Commission as "other-than-serious"). 29 U.S.C. § 666. A serious violation is defined in the Act; the other grades are not. *See* 29 U.S.C. § 666(k).

requirements of 29 C.F.R. § 1926.501(b)(13), one of OSHA's fall protection standards, and proposed a penalty of $11,640. Summit timely contested the citation, and thereafter, the Secretary filed a formal complaint in the Commission seeking an order affirming the citation.[16] A bench trial was held in February 2020, in Jacksonville, Florida.

The parties stipulated that Summit was an employer engaged in a business affecting interstate commerce within the meaning of section (5) of the Act, 29 U.S.C. § 652(5), and that the Commission has jurisdiction over this proceeding under section 10(c) of the Act, 29 U.S.C. § 659(c). (Compl. ¶¶ 1, 2; Answer ¶¶ 1, 2; *see also* Ex. J-1 ¶ (a)).[17] Pursuant to Commission Rule 90, after hearing and carefully considering all the evidence and arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.[18] For the reasons indicated *infra*, the Court concludes the Secretary has proven all the necessary elements of the alleged violation of 29 C.F.R. § 1926.501(b)(13), Summit has failed to carry its burden as to any preserved affirmative defenses, and therefore, the citation is **AFFIRMED** as a serious violation and Summit is **ASSESSED** a civil penalty of $11,640.

II. BACKGROUND

A. The Worksite

The issuance of the citation arose from activities observed by OSHA Compliance Officer Jose Carrion-Ruiz on the construction site of The Reserve at Nocatee (the "worksite"), a multi-family, residential complex located in Ponte Vedra, Florida. (Tr. 31-32, 91-92; Ex. J-1 ¶ (d); *see also* Ex. R-1, Ex. R-15). The project consisted of seven multi-family apartment buildings, a clubhouse, garages, pool facilities and a pond on an approximately 14-acre plot of land. (Tr. 32-33, 90-92; *see also* Ex. C-9, p. 15, Ex. R-1, Ex. R-2, Ex. R-3, Ex. R-15). Summit was the "non-performing" general contractor at the worksite and did not engage in actual construction activities,

[16] The citation was attached as an exhibit to the complaint and was also adopted by reference in the complaint. (Compl. Ex. A). Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[17] At trial, the stipulations of joint Exhibit J-1 were read into the record, and the parties agreed to additional stipulations not originally included in the exhibit. (Tr. 8-12). The parties filed an updated version of the exhibit that included all stipulations of the parties. (Tr. 12). Any references to Exhibit J-1 are to the updated version of the joint exhibit.

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

but rather, oversaw the worksite and coordinated construction with the various subcontractors onsite. (Tr. 106-07, 196-97; *see also* Ex. J-1 ¶ (g), Ex. C-8). Summit contracted with Gunner-Houston, Ltd. ("Gunner-Houston") to provide framing services at the worksite. (Tr. 52-53; *see also* Ex. J-1 ¶ (g), Ex. C-18). In turn, Gunner-Houston subcontracted with three framing subcontractors: Elite Construction & Associates, LLC ("Elite"), Martin Sarrano Remodeling, LLC ("Sarrano"),[19] and Superior Framing, LMT, LLC ("Superior"). (Tr. 52-53, 288; *see also* Ex. J-1 ¶¶ (e), (k)).

Summit had at least three superintendents at the worksite: John Riddle was Summit's General Superintendent, Steven Redden was Summit's Site Superintendent, and Alex Wrightman was Summit's Framing Superintendent.[20] (Tr. 169-72, 207). Riddle's duties as the General Superintendent included overseeing the entire worksite and managing the Assistant Superintendents, including Redden and Wrightman. (Tr. 107-08, 207; *see also* Ex. C-7). As the Site Superintendent, Redden's duties largely focused on "groundwork" and coordinating the "logistics" and deliveries for the worksite. (Tr. 153, 170-71, 198-99; *see also* Ex. C-6). Summit was, to an extent,[21] responsible for safety issues at the worksite, and its superintendents had the authority to correct the employees of the subcontractors at the worksite when a safety violation was observed. (Tr. 112-14, 178-80, 193; *see also* Ex. C-6, Ex. C-7). Riddle and Redden both walked the worksite at least once daily and corrected safety violations if they found any. (Tr. 87-88, 112-13, 190-91; *see also* Ex. C-6, Ex. C-7).

B. Worksite Safety Measures

Summit required the employees of all subcontractors on the worksite to view a fifteen-minute training video before beginning work. (Tr. 93-94, 98-99; *see also* Ex. J-1 ¶ (h)). This video was in English and Spanish and covered a variety of safety topics, one of which was fall protection. (Tr. 94; *see also* Ex. J-1 ¶ (h)). Riddle would follow up the safety video with a few minutes of

[19] The Court uses the parties stipulated spelling of "Sarrano" rather than the spelling "Serrano" as reflected in the trial transcript. (*E.g.*, Tr. 36).

[20] Redden also referred to as the "Finishing Superintendent." (Tr. 207).

[21] The extent of Summit's responsibility lies at the heart of a material dispute between the parties, namely Summit's responsibility as a "controlling employer" under the Multi-Employer Worksite Doctrine. (Sec'y's Br. 9-15; Resp't's Br. 10-17). *See generally Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1780-81 (No. 03-1622, 2009) (explaining the Multi-Employer Worksite Doctrine for controlling employers). The Court addresses this issue more fully in its analysis of Summit's liability for the violations. *See* Part III(A)(3), *infra*.

discussion on worksite safety. (Tr. 93). This was the only training on fall protection Summit conducted before beginning work. (Tr. 105).

Summit had a contract with Morrow & Associates, LLC, for "Safety Consultant Services" at the worksite. (Tr. 211; Ex. C-5). In furtherance of this contract, Hal Morrow, the owner of Morrow & Associates, visited the worksite once a month to conduct an inspection of the worksite and document any safety violations he found. (Tr. 212-13, 226-27, 250-51; *see also* Ex. R-6). Morrow took photos of the worksite and included them with his findings and recommendations in written reports. (Tr. 246-47, 250; *see also* Ex. R-6). He shared these reports and his findings with Summit's superintendents. (Tr. 268).

Morrow inspected the worksite on February 28, 2018 and March 28, 2018. (Tr. 226-27; *see also* Ex. R-6). On February 28, Morrow observed at least one fall protection violation where a framer was working on the "top plate"[22] without employing any method of fall protection.[23] (Ex. J-1 ¶ (i)). Following this observation, Morrow brought the framer down and told him he could not work on the top plate without using a ladder. (Tr. 248-49). On March 28, Morrow again inspected the worksite and observed two framers working on the top plate without using a ladder. (Tr. 253; Ex. R-6). Following this observation, Morrow brought the workers down and told them, per Summit's policy, they could not work on the top plate without using a ladder. (Tr. 256-57).

Morrow also developed a fall protection plan for the worksite, which was not specific to the worksite but applied to residential construction sites like the worksite.[24] (Tr. 230-32; *see also* Ex. C-12). Summit's superintendents were "informed" of the plan, and it represented the

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[22] Based on the photos in Morrow's report, the "top plate" appears to be the top board of a wall frame. (Ex. R-6). The approximate distance from the top plate of a first-floor wall to the ground is 10 feet. (Tr. 261-62).

[23] The parties stipulated that on February 28, 2018, "Morrow observed at least one fall protection violation involving a subcontractor employee and ordered corrective action and issued verbal warnings." (Ex. J-1 ¶ (i)). And in the February 28 inspection report, Morrow included the phrase: "***MOST*** trades were ***following OSHA Standards (FALL PROTECTION)*** during Morrow & Associates audit/inspection." (Ex. C-10, p. 2) (emphases in original). At trial, when asked about the stipulation and this phrase included in the inspection report, Morrow testified it did not necessarily mean that he observed a fall protection violation; rather, he might have seen someone about to commit a violation, which he would have corrected. (Tr. 216-18). However, on cross-examination, Morrow reviewed the photos attached to the report in Summit's Exhibit 6 and admitted there was at least one fall protection violation depicted. (Tr. 246-49; *see also* Ex. R-6).

[24] According to Morrow, a fall protection plan for "garden-style homes do[es] not have to be site-specific if all the hazards are addressed." (Tr. 231). *But see* 29 C.F.R. § 1926.502(k)(1) (requiring a fall protection plan for residential construction work to be "developed specifically for the site").

"minimum" fall protection requirements Summit's superintendents were looking for when conducting inspections. (Tr. 233-34; *see also* Ex. C-12, p. 3). No employees of subcontractors were trained on the plan. (Tr. 233). Instead, subcontractors were expected to have their own fall protection plans specific to their trades. (Tr. 233-34, 271-72; *see also* Ex. R-15). Morrow also conducted some fall protection training at the worksite, mainly for Gunner-Houston and its subcontractors. (Tr. 237). Finally, Morrow provided Summit with weekly safety meeting topics, which *may* have included fall protection. (Tr. 141-42, 277; *see also* Ex. C-16).

Summit had a progressive discipline policy at the worksite. (Tr. 130-32, 243-244; *see also* Ex. C-13). Under the policy, the first level of discipline was a "verbal warning," and the policy indicated "[s]everal verbal warnings may be issued depending on the gravity of the violation." (Ex. C-13). The policy provided for two successive written warnings, which "stipulated that further infractions will result in termination." (Ex. C-13). Finally, the policy required a final written notice resulting in termination. (Ex. C-13). As the Court discusses more fully below in addressing Summit's knowledge of the violations, there is little evidence in the record that this policy was meaningfully enforced at the worksite. *See* Part III(A)(4)(b)(iii), *infra.*

C. The Inspection and Citation

The inspection giving rise to the citation occurred on April 17, 2018. (Ex. J-1 ¶ (d)). "A few days before" this date, Redden spoke with an individual, who he believed to be another OSHA Compliance Officer,[25] at the entrance of the worksite clubhouse. (Ex. C-6). This individual told Redden some workers on the roof of Building 3 were not tied off. (*Id.*). Redden called Riddle who in turn contacted Gunner-Houston's framing superintendent about the issue. (*Id.*). Redden and Riddle walked the site but did not confirm any fall protection violations. (Tr. 175).

Sometime before April 17, OSHA's Jacksonville office also received an email containing photographs of the worksite.[26] (Tr. 23-31; *see also* Ex. C-1, pp. 13-15). The photographs depicted two employees working on roofs without using any form of fall protection. (Ex. C-1, pp. 13-15).

[25] Redden testified he believed the individual was an OSHA officer (Tr. 172-75; *see also* Ex. C-6), but the Secretary's counsel represented it was not an OSHA officer. (Tr. 183). Regardless of the identity of this individual, the salient fact to the Court is that Redden's attention had been drawn to potential fall protection violations a few days before the inspection leading to the issuance of the citation.

[26] Carrion-Ruiz did not know the exact date the photographs were taken, only that they were taken some time before April 17. The parties agreed to the admission of the photographs into evidence for the purpose of establishing Summit's knowledge, without agreeing to the exact date they were taken. (Tr. 29-31).

Thereafter, on April 17, Carrion-Ruiz visited the worksite to conduct the inspection. (Ex. J-1 ¶ (d)). Carrion-Ruiz arrived at the worksite around 2:00 p.m. and entered the site in his vehicle, first stopping across from the pond, which was about 200 or 300 feet away from a building being framed. (Tr. 32-35, 76, 78; *see also* Ex. R-2 at notation "2"). From this vantage point, Carrion-Ruiz could see a framer working on a roof without using fall protection. (Tr. 34-35). Carrion-Ruiz then drove further into the worksite, making several stops to observe workers and take photographs, before parking his vehicle. (Tr. 32-34; *see also* Ex. C-1, Ex. R-2 at notations "3" to "5").

Over the course of his inspection, Carrion-Ruiz observed active construction on three buildings. (Tr. 49). He also observed employees from subcontractors Elite, Superior, and Sarrano, on the buildings working at heights of 12 to 34 feet without using any form of fall protection. (Ex. J-1 ¶¶ (e), (f)). Specifically, Carrion-Ruiz observed four employees of Sarrano, as well as Martin Sarrano himself, working on one roof without fall protection (Tr. 36-40, 49; *see also* Ex. C-1, pp. 4-10, 12); three employees of Elite working on a different roof without fall protection (Tr. 41-45, 49; *see also* Ex. C-1, pp. 11, 13-17); and one employee of Superior working on a third roof without fall protection (Tr. 44-46, 49; C-1, pp. 18-22), totaling at least nine individuals working at heights above six feet without using any form of fall protection. (Tr. 49; *see also* Ex. J-1 ¶¶ (e), (f)). Carrion-Ruiz observed at least one fall protection violation on every building undergoing construction on the date of his inspection. (Tr. 49). The parties have also stipulated that although none of Summit employees were exposed to fall hazards, employees from Elite, Sarrano, and Superior were exposed to fall hazards of 12 to 34 feet. (Ex. J-1 ¶¶ (e), (f)).

After Carrion-Ruiz had been taking pictures for about 10 or 15 minutes, he encountered Redden walking through the worksite around the area where Carrion-Ruiz had seen Sarrano's framers working on a roof. (Tr. 47-49; *see also* Ex. C-1, pp. 23-24, Ex. R-2). Redden pointed Carrion-Ruiz in the direction of the worksite's trailer and continued walking. (Tr. 50). Carrion-Ruiz encountered Riddle and Gunner-Houston's operations manager, Ricky Nelson, about halfway to the trailer. (Tr. 50, 270). All three proceeded to the trailer to conduct an opening conference. (Tr. 50). Carrion-Ruiz was not permitted to interview any employees on April 17 but arranged to conduct them at a nearby gas station the next day. (Tr. 52). Following his inspection, opening conference, and interviews, Carrion-Ruiz determined that Summit was the "controlling employer" under OSHA's Multi-Employer Citation Policy. (Tr. 54-55). Thereafter, OSHA issued Summit the

citation, which alleged seven instances of a violation of 29 C.F.R. § 1926.501(b)(13). (Compl. Ex. A, pp. 6-7).

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). Thus, "[t]he Act's purpose is straightforward: 'to assure so far as possible safe and healthful working conditions' for 'every working man and woman in the Nation.' " *Sec'y, U.S. Dep't of Labor v. Action Elec. Co.*, 868 F.3d 1324, 1333 (11th Cir. 2017) (*quoting Georgia Pac. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004 (11th Cir. 1994) (*quoting* 29 U.S.C. § 651(b)). To achieve this purpose, the Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty to comply with all applicable occupational safety and health standards promulgated under the Act. *Id.* § 654(a)(2). Pursuant to that authority, the standard at issue in this case was promulgated.[27]

A. Alleged Violation of 29 C.F.R. § 1926. 501(b)(13)

The citation asserts Summit violated the cited standard because "[e]ach employee(s) engaged in residential construction activities 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 1926.501(b)[.]" (Compl. Ex. A, p. 6). The cited standard provides in relevant part: "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." 29 C.F.R. § 1926. 501(b)(13).

[27] As indicated *supra*, the Secretary delegated his authority under the Act to the Assistant Secretary of Labor for Occupational Safety and Health. The Assistant Secretary has promulgated the occupational safety and health standards at issue.

Under the law of the Eleventh Circuit where this case arose,[28] "the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer 'knowingly disregarded' the Act's requirements." *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 836 (11th Cir. 2016) (quoting *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1307 (11th Cir. 2013)). "If the Secretary establishes a prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Id. (*citing *id.* at 1308).

The parties have stipulated Carrion-Ruiz observed workers engaging in residential construction activities at six or more feet above a lower level.[29] Therefore, the cited standard applied.[30] The parties have also stipulated, and the record supports, employees of three subcontractors, Gunner-Houston, Elite, Sarrano, and Superior, were observed engaging in construction on a residential building without employing any method of fall protection. Therefore,

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[28] The employer or the Secretary may appeal a Commission order to the federal court of appeals for the circuit in which the violation allegedly occurred or where the employer has its principal office, and the employer also may appeal to the District of Columbia Circuit. *See* 29 U.S.C. §§ 660(a) and (b). Here, the violation occurred in Florida, in the Eleventh Circuit, where Summit's principal office is also located, and Summit has indicated its intent to appeal there. (*See* 29 U.S.C. § 660(b); Resp't's Br. 9). The Commission has held that "[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court applies the precedent of the Eleventh Circuit in deciding the case where it is highly probable that the case will be appealed.

[29] The cited standard defines a "lower level" in relevant part as " those areas or surfaces to which an employee can fall. Such areas or surfaces include, but are not limited to, ground levels, floors, platforms …" 29 C.F.R. § 1926.500(b). Here, the parties stipulated workers were exposed to fall hazards of "12 to 34 feet." (Ex. J-1 ¶ (e)). These distances represented either a fall from a floor to the floor below it, which approximated 12 feet, or a fall from a roof edge to the ground below, which approximated 34 feet. (Tr. 155-57).

[30] Summit made a "threshold" challenge to its liability as a controlling employer under the Multi-Employer Worksite Doctrine. (Resp't's Br. 5). The Secretary addresses this argument in the context of the first element of his burden, i.e., whether the standard applies. (Sec'y's Br. 8-15). However, under Commission precedent, "the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014); *see also Secretary, U.S. Dep't of Labor v. Action Elec. Co.*, 868 F.3d 1324, 1335-36 (11th Cir. 2017) (analyzing the application of a standard to the actual activities of the employees). Thus, the Court does not, as the parties did, address Summit's liability under the Multi-Employer Worksite Doctrine in the context of whether the cited standard applies.

the standard was violated. Thus, the Court's remaining focus will be on the last two factors, whether an employee was exposed to the hazard that was created and whether Summit "knowingly disregarded" the Act's requirements.

1. Whether Employees Were Exposed to the Hazard

a. Multi-Employer Worksite Doctrine

The main point of contention between the parties is whether Summit should be held liable for the violations as a "controlling employer" under the Commission's "Multi-Employer Worksite Doctrine." *See, e.g.*, *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000). A "controlling employer is one who 'has general supervisory authority over the worksite, including the power to correct safety and health violations or require others to correct them.'" *Evergreen Constr. Co.*, 26 BNA OSHC 1615 (O.S.H.R.C. Apr. 26, 2017) (quoting *Summit Contractors Inc.*, 22 BNA OSHC 1777, 1781 (No. 03-1622, 2009) (quotation omitted). Under the Commission's Multi-Employer Worksite Doctrine, an employer may be liable for the violation of an OSHA standard even though none of its employees were exposed to the hazard. *See Flint Engineering & Construction Co.*, 15 BNA OSHC 2052, 2055 (No. 90-2873, 1992). As the Commission noted early in applying the doctrine, the Commission's adoption of the doctrine was an "exercise of the Commission's adjudicatory function in determining liability for safety and health violations," and the Commission makes an "independent legal determination" of an employer's liability under the doctrine. *Limbach Co.*, 6 BNA OSHC at 1245-46.[31]

Summit challenges the application of the doctrine to it under the particular facts of this case, but also makes several preliminary challenges regarding the validity of the doctrine in the first instance. (Resp't's Br. 5-10). Summit argues: (1) the Multi-Employer Worksite Doctrine is invalid under 11th Circuit law (Resp't's Br. 5-6); (2) the doctrine should be reconsidered in light of decisions from the Supreme Court about the application of *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984) ("*Chevron*"), and the Court therefore owes no deference to the Secretary's interpretation under that decision (*id.* 6-9); and (3) the doctrine is inconsistent with 29 C.F.R. § 1910.12(a) (*Id.* 10).

[31] Although OSHA has a Multi-Employer Citation Policy (OSHA Instruction CPL 02-00-124 § X.E.1 (Dec. 10, 1999)), the Commission has held it is not a substantive rule because it does not "create liability on an employer" separate from the requirements of the Act. *Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1779-80 (No. 03-1622, 2009) (citing *Limbach Co.*, 6 BNA OSHC 1244, 1245-46 (No. 14302, 1977) (finding the same for the previous policy)).

b. Whether Multi-Employer Worksite Doctrine is Invalid in Eleventh Circuit

Summit cites *Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318 (5th Cir. 1979) ("*Horn*")[32] and argues that it "unambiguously provides that [the Act] relates only to the obligations of an employer 'to his employees' and does not extend to other persons" like subcontractors. (Resp't's Br. 6). Summit goes on to argue that, while the Fifth Circuit has overturned this precedent in *Acosta v. Hensel Phelps Construction Co.*, 909 F.3d 723 (5th Cir. 2018), the Eleventh Circuit has yet to do so. (*Id.*). The Court finds no merit in Summit's argument. As noted by the Fifth Circuit in reversing its precedent on the multi-employer worksite issue, the continued validity of the holding in *Horn* and other cases from the old Fifth Circuit is questionable considering developments in administrative law since those cases were decided. *See Acosta*, 909 F.3d at 730-31 (finding that the Supreme Court's decisions in *Chevron* and *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) required the court to re-engage with the Secretary's reading of the Act "through a *Chevron* lens." (quoting *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 17 (1st Cir. 2006))). In any event, Summit's contention is untenable in light of subsequent decisions of the Eleventh Circuit and Commission precedent.

In *Southern Pan Servs. v. U.S. Dep't of Labor*, 685 F. App'x 692 (11th Cir. 2017), the Eleventh Circuit upheld the Commission's application of the Multi-Employer Worksite Doctrine and the exposing employer's liability thereunder. *Id.*, 685 F. App'x at 695; *see also Pace Constr. v. Secretary of Labor*, 840 F.2d 24 (11th Cir. 1988) (Table) (summarily affirming *Pace Constr. Corp.*, 13 BNA OSHC 1282 (No. 86-517, 1987) in which the employer was found liable under Multi-Employer Worksite Doctrine). Thus, although the Eleventh Circuit has not explicitly disavowed the holding in *Horn*, it has apparently accepted multi-employer worksite liability under the Act.

The Court notes that the Eleventh Circuit's opinion in *Southern Pan* was not designated for publication and thus is not considered binding precedent in the Circuit. *See* 11TH CIR. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."). To the extent that *Southern Pan* does not represent the law of the Eleventh Circuit, the Court nonetheless finds it persuasive. Further, Summit's argument is precluded by Commission

[32] The Eleventh Circuit was created when the Fifth Circuit split on October 1, 1981. Immediately after the split, the Eleventh Circuit stated in *Bonner v. City of Prichard, Alabama*, 661 F. 2d 1206 (11th Cir. 1981), that any opinion issued by the Fifth Circuit before the close of business on September 30, 1981 is binding precedent on the Eleventh Circuit.

precedent. In *McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108 (No. 97-1918, 2000), a case arising in the Eleventh Circuit, the respondent argued that three cases from the former Fifth Circuit precluded multi-employer worksite liability in the Eleventh Circuit. *See McDevitt Street Bovis, Inc.*, 19 BNA OSHC at 1110. The Commission found, however, that former Fifth Circuit precedent, including *Horn*, "do[es] not preclude … following Commission precedent [on multi-employer worksite liability]" for cases arising in the Eleventh Circuit.[33] *Id.* Thus, to the extent Summit's argument is not precluded by Eleventh Circuit law itself, it is precluded by Commission caselaw.

c. Whether Chevron Deference Applies

Summit also argues the Multi-Employer Worksite Doctrine is premised on deference to the Secretary's interpretation of the Act under *Chevron*.[34] (Resp't's Br. 6). Summit then points to a series of Supreme Court cases which it argues have "clarif[ied] the application and call[ed] into question the rationale behind *Chevron* deference and express[ed] the need to reconsider it." (Resp't's Br. 6). Summit goes on to argue "[b]ased on the current reservations the U.S. Supreme Court has with respect to the application of the *Chevron* doctrine, the controlling employer doctrine [i.e., Multi-Employer Worksite Doctrine] arguably presents the appropriate fact patter[n] for the Court to reconsider the application of *Chevron*." (Resp't's Br. 7). The Court is not persuaded.

To start, it is not entirely clear that *Chevron* is necessary for the application of the Multi-Employer Worksite Doctrine. Indeed, the two Commission cases originally setting forth the doctrine preceded *Chevron* by nearly a decade. In *Anning-Johnson Co.*, 4 BNA OSHC 1193 (No.

[33] The Commission noted that one of the cited cases, *Southeast Contractors, Inc. v. Dunlop*, 512 F.2d 675 (5th Cir. 1975), was a *per curiam* decision which adopted the dissenting Commissioner's reasoning before the Commission had even adopted the Multi-Employer Worksite Doctrine. *Id.* at 1110-11. As for the other two cases, *Horn* and *Barrera v. E.I. duPont de Nemours & Co.*, 653 F.2d 915, 920 (5th Cir. 1981), the Commission noted they were "tort cases whose precedential value in the context of a case before the Commission is questionable." *Id.* at 1112, citing *Frohlick Crane Service, Inc. v. Occupational Safety & Health Review Comm'n*, 521 F.2d 628, 631 (10th Cir. 1975) ("This is not a tort case. Rather, it is an administrative proceeding brought under remedial legislation designed to provide a safe place to work for every working man and woman in the Nation. The Act should not be given a narrow or technical construction…").

[34] Under *Chevron*, "[w]hen a court reviews an agency's construction of the statute which it administers ... [and] the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Gonzalez v. U.S. Atty. Gen.*, 820 F.3d 399, 404 (11th Cir. 2016), quoting *Chevron*, 467 U.S. at 842-43. "In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Gonzalez*, 820 F.3d at 404, quoting *Chevron*, 467 U.S. at 844.

3694, 1976) and *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185 (No. 12775, 1976), the Commission adopted the doctrine under its own interpretation of the Act in light of its scope and purpose, not on any deference to the Secretary's view. *See Anning-Johnson Co.*, 4 BNA OSHC at 1196-97; *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC at 1187-88. Indeed, as the Commission later noted in recounting the history of the doctrine, the Commission was initially at odds with the Secretary's position on the issue but later reversed itself, having been persuaded by the reasoning of two courts of appeals. *See Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1200 (No. 05-0839, 2010).

In any event, the Supreme Court has not overturned *Chevron*, despite the misgivings of some Justices pointed out by Summit. (Resp't's Br. 6-7 (citing various cases)). In *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), wherein the Court limited courts' deference to an agency's interpretation of its own regulations, the Court made clear that its decision in no way impacted *Chevron* deference. *See Kisor*, 139 S.Ct. at 2425 (Roberts, C.J., concurring) ("Issues surrounding judicial deference to agency interpretations of their own regulations are distinct from those raised in connection with judicial deference to agency interpretations of statutes enacted by Congress. … I do not regard the Court's decision today to touch upon the latter question." (citing *Chevron*)).[35] Thus, Summit's insistence as to the infirmity of *Chevron* poses no basis for this Court to revisit the Multi-Employer Worksite Doctrine as defined by the Commission.

d. Whether Multi-Employer Worksite Doctrine is Consistent with 29 C.F.R. § 1910.12(a)

Summit also argues that the Multi-Employer Worksite Doctrine is inconsistent with 29 C.F.R. § 1910.12(a). (Resp't's Br. 10). This section, in pertinent part, states: "Each employer shall protect the employment and places of employment of each of his employees engaged in construction work by complying with the appropriate standards prescribed in this paragraph." 29 C.F.R. § 1910.12(a). Summit's argument is foreclosed by the Commission's decision in *Summit Contractors, Inc.*, 23 BNA OSHC 1196 (No. 05-0839, 2010) ("*Summit III*"), *aff'd*, 442 F. App'x. 570 (D.C. Cir. 2011). In that decision, the Commission overruled its previous position that 29

[35] The Court therefore declines to go through the "exhaustion of traditional tools of statutory interpretation" as laid out in Summit's brief. (Resp't's Br. 8-9). The language relied on for Summit's request was taken from the *Kisor* decision, which dealt with deference to an agency's interpretation of its own regulations, not the statute the agency is charged with administering, which implicates *Chevron* deference. *See Gonzalez*, 820 F.3d at 404. The Chief Justice's concurring opinion in *Kisor* made clear the decision did not impact such a scenario under *Chevron*, and his vote was necessary to the court's opinion. *See Kisor*, 139 S.Ct. at 2425.

C.F.R. § 1910.12(a) shielded controlling employers from liability under the Multi-Employer Worksite Doctrine where none of its own employees were exposed. *Compare Summit Contractors, Inc.*, 21 BNA OSH 2020 (No. 03-1622, 2007) ("*Summit I*") (holding, by the differing views of two Commissioners, that liability of this type was foreclosed by 29 C.F.R. § 1910.12(a)), with *Summit III*, 23 BNA OSHC 1196 (expressly overruling *Summit I*). With no Eleventh Circuit precedent to the contrary,[36] the Court is bound by the Commission's decision. *See New Haven Foundry*, 1 BNA OSHC 1721, 1722 (No. 4514, 1974).

e. Whether Summit is Controlling Employer of Worksite

Having rejected Summit's arguments concerning the validity of the Multi-Employer Worksite Doctrine, the Court finds the Secretary has established that Summit was a "controlling employer" at the worksite. Under the Multi-Employer Worksite Doctrine, "an employer who either creates or controls the cited hazard has a duty under § 5(a)(2) of the Act … to protect not only its own employees, but those of other employers engaged in the common undertaking." *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1199 (No. 3694, 1976). A controlling 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." *McDevitt Street Bovis, Inc.*, 19 BNA OSHC at 1109 (quoting *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994)).

In the case of a general contractor of a construction worksite, like Summit, "the general contractor is responsible for violations of its subcontractors that the general contractor could reasonably be expected to prevent or to detect and abate by reasons of its supervisory capacity

[36] The Commission initially dealt with the continuing validity of *Summit I* in *Summit Contractors, Inc.*, 22 BNA OSHC 1777 (No. 03-1622, 2009) ("*Summit II*"), which was decided on remand from the Eighth Circuit. *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009). The Eighth Circuit concluded that a plain reading of 29 C.F.R. § 1910.12(a) did not preclude liability under the Multi-Employer Worksite Doctrine for a controlling employer where none of its own employees were exposed to the hazard. *Summit Contractors, Inc.*, 558 F.3d at 824-25. It was perhaps unclear in *Summit II* whether the Commission was simply following the Eighth Circuit's decision as the law of the circuit or adopting the Court's reasoning outright as the Commission's view. However, the Commission later made clear in *Summit III*, that, while *Summit II* was decided by the "law of the case," the Commission was overruling *Summit I* entirely based on a reconsideration of the Commission's position. *Summit III*, 23 BNA OSHC at 1201. The Commission has since applied *Summit III* in cases arising outside the Eighth Circuit. *See, e.g.*, *Suncor Energy (U.S.A.), Inc.*, 2019 WL 654129 (No. 13-0900, 2019) (Tenth Circuit); *Pullman Power, LLC*, 25 BNA OSHC 1474 (No. 07-1796, 2015) (Fourth Circuit). The Court therefore concludes *Summit III* is applicable to this Eleventh Circuit case.

over the entire worksite ….” *Gil Haugan*, 7 BNA OSHC 2004, 2006 (Nos. 76–1512 & 76–1513, 1979). Moreover, there is 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 and to abate violations. The burden of rebutting this presumption is on the general contractor.” *Id.*

Here, the evidence strongly supports a finding that Summit was a controlling employer of the worksite, and Summit has made no cogent argument to rebut that finding. According to the contract designating Summit as the general contractor of the worksite, Summit was “solely responsible for, and ha[d] control over, construction means, methods, techniques, sequences and procedures,” was required to “evaluate the jobsite safety thereof,” and was “fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences and procedures.” (Ex. C-8, p. 15). Likewise, in the contract between Summit and Gunner-Houston, the latter was only to “commence work as directed by Summit” and Summit could suspend Gunner-Houston’s work “at any time and without cause.” (Ex. R-10, pp. 3-4). Summit retained the authority to correct Gunner-Houston’s work. (*Id.* at 4). Additionally, Summit had the right to terminate its contract with Gunner-Houston if it “disregard[ed] the Laws, Codes, or Regulations of any public body having jurisdiction.” (*Id.*). The Commission has held that similar contractual provisions are evidence of a company’s status as a controlling employer. *See Summit II*, 22 BNA OSHC at 1781 (contractual provision giving ability to terminate subcontractor for violating safety regulations); *Sunrise Plastering Corp.*, 8 BNA OSHC 1765, 1766 (No. 78-0846, 1980) (contractual provision requiring general contractor to bring all work into compliance with safety regulations).

Alongside the contractual provisions granting Summit control over the worksite, Summit in fact exercised such control. Summit was described by its own employees as a “non-performing general contractor” whose sole role at the worksite was to coordinate work amongst the various subcontractors. (Tr. 106-07, 196-97; Exs. J-1 ¶ (g), C-8). Summit exercised its authority to control the work of the subcontractors, including Gunner-Houston and its subcontractors, who needed Summit’s approval to commence their work. (Tr. 138). Summit’s general control over the worksite was epitomized by one exchange at trial with Riddle:

> Q. Okay. So would it be fair to say that someone has general supervisory authority over the worksite?

> A. Over the site? Meaning do I take ownership in this [sic] 14 acres? Is this [sic] 14 acres mine? If that's the question, yes, Summit is the general contractor over that 14 acres.

(Tr. 107). Indeed, Riddle described himself and Redden as "two individuals managing 200 individuals" at the worksite. (Tr. 124).

Summit's general authority over the worksite included the responsibility and authority to find and correct safety violations. Both Riddle and Redden testified that they walked the site at least once daily, and if they observed any safety violations during these walks, they would either correct the worker by stopping work or else inform the worker's respective subcontractor of the violation. Summit also held weekly meetings to discuss safety issues, including ones directed at specific safety violations occurring on the worksite.[37] Finally, Summit contracted with Morrow to conduct general safety audits of the worksite and highlight safety violations, which were shared with Summit's superintendents and the various subcontractors on site. Summit's general responsibility for safety issues on the worksite lends further support that it was a controlling employer for purposes of the Multi-Employer Worksite Doctrine. *See Calpine Corp.*, 27 BNA OSHC 1014, 1021 (No. 11-1734, 2018) (conduction of safety audits to point out safety issues to subcontractors and the respondent's correction of safety violations of subcontractors was evidence of its status as a controlling employer); *Summit III*, 23 BNA OSHC at 1206 (general authority over worksite safety, including daily walks by the superintendents, as well as weekly meetings to address safety issues with its subcontractors suggested the respondent was a controlling employer); *Southern Scrap Material Co.*, Inc., 23 BNA OSHC 1596, 1616 (No. 94-3393, 2011) (the fact that the respondent's superintendents conducted daily walks of the worksite to look for safety violations was evidence of its status as a controlling employer); *Summit II*, 22 BNA OSHC at 1781 (general contractor's practice of informing subcontractors of their employees fall protection violations indicated it was a controlling employer of the worksite).

The record also reflects that Summit had significant control over the specific fall hazard violations at issue here and had the authority to abate them. *See, e.g.*, *Summit III*, 23 BNA OSHC at 1206 (examining the respondent's control over a specific electric hazard on site to determine

[37] For example, the evidence demonstrated that, following Carrion-Ruiz's inspection and observation of the fall protection violations, Summit held a meeting on the subject of fall protection. (Tr. 145-46; Ex. R-7).

whether it could have easily abated the hazard). Summit directed its superintendents in accordance with its fall protection plan to look for fall protection violations on site. Summit's superintendents had the authority to correct fall protection violations of any subcontractor. Indeed, both Riddle and Redden testified they had observed and corrected fall protection violations prior to Carrion-Ruiz's inspection and Riddle specifically remembered issuing verbal warnings to employees at the worksite regarding fall protection violations

Summit has not rebutted the presumption of its control over the worksite for purposes of holding it liable under the Multi-Employer Worksite Doctrine. Summit argues that "in prior decisions where the Commission has found 'supervisory employer' liability on behalf of a general contractor, notwithstanding the Commission's reference to liability on the basis of its supervisory role, the general contractor was the employer responsible for creating or controlling the particular hazard, and would thus be responsible for the violation on that basis." (Resp't's Br. 11). The Court disagrees. Liability as a "creating employer" under the Multi-Employer Worksite Doctrine is a separate source of liability from an employer's liability as a "controlling employer." *See Summit III*, 23 BNA OSHC at 1205 (acknowledging that these are separate sources of lability under the Multi-Employer Worksite Doctrine). As to liability as a controlling employer, although control over the particular hazard is sometimes a factor in the analysis,[38] it is by virtue of the general contractor's supervisory role that the Commission imposes a duty on the contractor to detect and abate *all* hazards on the worksite except those "it could not reasonably be expected to detect or prevent." *Knutson Constr. Co.,* 4 BNA OSHC 1759, 1761 (No. 765, 1976), *aff'd,* 566 F.2d 596 (8th Cir.1977). In *Blount Int'l Ltd.*, 15 BNA OSHC 1897 (No. 89-1394, 1992), the Commission made it clear that a general contractor's duty to detect and abate violations by its subcontractors does "not depend on whether the employer actually created the hazard or has the manpower or expertise to abate the hazard itself." *Blount Int'l Ltd.*, 15 BNA OSHC at 1899.

Finally, Summit argues it "has no direct contractual relationship with the employers whose employees were exposed to fall protection hazard" and argues that it "lack[s] … any contractual enforcement mechanism" over the violating employees. (Resp't's Br. 14). *See also* Ex. J-1, ¶ (k). However, Summit retained a "contractual enforcement mechanism" over its direct subcontractor,

[38] *See, e.g.*, *Summit III*, 23 BNA OSHC at 1197 (examining the respondent's control over a particular electrical hazard in evaluating whether it was a controlling employer for purposes of abating that hazard).

Gunner-Houston, if it failed to follow safety rules. And, as evidenced by the testimony of both Riddle and Redden, Summit's superintendents had *de facto* authority to correct the employees of all the subcontractors on site, regardless of whether the employee worked for a direct subcontractor. In *Summit III*, the Commission upheld a citation issued under a similar set of facts. There, as here, the general contractor had subcontracted to a framing subcontractor who in turn had subcontracted with another company to perform the "actual framing labor." *Summit III*, 23 BNA OSHC at 1197. Where an employee of the third subcontractor was exposed to an electrical hazard, the Commission upheld the citation issued to the general contractor in part because of its control over the worksite and the particular hazard. *Id.* at 1205-06. Thus, a direct contractual relationship between a general contractor and the subcontractor whose employees are exposed to the hazard is not the *sine qua non* of liability under the Multi-Employer Worksite Doctrine.

Based on the foregoing factors, the Court concludes that Summit was the controlling employer of the worksite because it "could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite." *McDevitt Street Bovis, Inc.*, 19 BNA OSHC at 1109, quoting *Centex-Rooney Construction Co.*, 16 BNA OSHC 2127, 2130 (No. 92-0851, 1994). Summit had a duty under the Multi-Employer Worksite Doctrine to protect not only its own employees, but those of other employers engaged in the common undertaking. As indicated *supra*, the parties stipulated that although no employees of Summit were exposed to fall hazards, employees from Elite, Sarrano, and Superior were exposed to fall hazards of 12 to 34 feet.

2. Whether Summit Had Constructive Knowledge of the Violations

"The knowledge element of the prima facie case can be shown in one of two ways." *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014) (*citing ComTran* at 1307). "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." *Id. (citing ComTran* at 1307–08). "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Id.* at 803-04 (*citing ComTran* at 1308). However, in the Eleventh Circuit, a "supervisor's 'rogue conduct' generally cannot be imputed to the employer in that situation. Rather, 'employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual

knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].'" *ComTran* at 1316 (citation omitted). Nonetheless, when a supervisor has engaged in that misconduct while simultaneously supervising a subordinate who is also engaged in such misconduct, "the general rule should apply in this case—i.e., that the knowledge of a supervisor of a subordinate employee's violation should be imputed to the employer." *Quinlan*, 812 F.3d at 841. In this case, the Secretary only argues Summit had constructive knowledge of the violation. (Sec'y Br. 19, 27-44).[39]

To start, the Court finds Riddle and Redden were both supervisors for purposes of imputing knowledge to Summit. The Eleventh Circuit has held that "an employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer." *M.C. Dean, Inc. v. Secretary of Labor*, 505 F. App'x 929, 934 (11th Cir. 2013) (quoting *Access Equip. Sys.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999)). As to Riddle, the Court has no hesitation finding, and there appears to be little dispute, that he qualified as a supervisor by virtue of being "delegated authority over other employees …." *Id.* Indeed, he was in charge of the entire worksite (Tr. 107-08; Ex. C-7, Ex. R-18) with the authority to: direct the activities of Summit's assistant superintendents (Tr. 153, 207; Ex. C-7); coordinate and approve the start of work for the subcontractors on site (Tr. 112-13, 136-38); and correct and discipline employees who committed safety violations, including fall protection violations. (Tr. 112-14; Ex. C-7).

However, as to Redden, Summit appears to argue he did not qualify as a supervisor because he had "been assigned responsibility solely over … sitework and hardscape activities, consisting

[39] A large portion of the Secretary's argument for constructive knowledge is made in the context of arguing against Summit's unavoidable employee misconduct defense. (Sec'y's Br. 27-44). As the Eleventh Circuit noted in *ComTran*, "the Secretary's alternative method to show employer knowledge and the unforeseeable employee misconduct affirmative defense involve an identical issue: whether the employer had an adequate safety policy." *ComTran*, 722 F.3d at 1308 n.3 (quoting *New York State Elec. & Gas Corp. v. Sec'y's of Labor*, 88 F.3d 98, 106 (2d. Cir. 1996)). Because the Secretary bears the burden of establishing the inadequacy of an employer's safety measures in the first instance (*see ComTran*, 722 F.3d at 1309), and further because the Court finds Summit has waived its affirmative defense of unavoidable employee misconduct (*see* Part III(C), *infra*), the Court considers the Secretary's arguments in the context of constructive knowledge. *Cf. Burford's Tree, Inc.*, 22 BNA OSHC 1948, 1951-52 (No. 07-1899, 2010) (noting that the factors for constructive knowledge and the factors for unavoidable employee misconduct are the "same factors" and considering them accordingly), *aff'd*, 413 F. App'x 222 (11th Cir. 2011) (unpublished).

of sidewalks, paving, and building pads" and had "no supervisory responsibilities with respect to any vertical construction activities." (Resp't's Br. 3).[40] The Court finds no merit in Summit's assertion. It is true, as Summit suggests, Riddle gave Redden no responsibilities regarding framing work of the type that was being performed during Carrion-Ruiz's inspection. (Tr. 153). Redden likewise emphasized his duties focused on "groundwork" and that the site had its own Framing Superintendent, Wrightman, whose purview was supervising framing activities. (Tr. 153, 169-71, 198-99, 207). Whatever Redden's nominal duties were, the record indicates that his supervisory authority of the site was far broader than Summit suggests. Although Riddle may have been designated as the General Superintendent of the jobsite, Redden was put in charge of the entire jobsite when Riddle was not on site. (Tr. 190-91). Despite Redden's apparent focus being on "groundwork," he testified several times that he had general supervisory authority to direct the employees of subcontractors to correct any safety violations, including fall protection violations. (Tr. 178-80, 189-90, 193; Ex. C-3, Ex. C-6). Indeed, he had corrected fall protection violations in the past. (Tr. 193; Ex. C-6). Redden also had the authority to report an employee to their direct supervisor observing a safety violation. (Tr. 191-93; Ex. C-3). Riddle also held an expansive view of Redden's authority over the worksite.[41] (Tr. 113-14, 118-19). Thus, although Riddle may not have explicitly assigned Redden duties relates to "vertical construction," the Court finds he also was a supervisor for purposes of imputing knowledge to Summit. *Cf. M.C. Dean, Inc.*, 505 F. App'x at 935 (noting that designation as a supervisor, ability to discipline or recommend discipline, and duty of "monitor[ing] safety at the worksite" as evidence an employee is a supervisor); *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1080 (No. 99-0018, 2003) (supervisory status found for employee who, inter alia, could "supervise the work activities of his crew … and [] ensure that the work was done in a safe manner"); *Propellex Corp.*, 18 BNA OSHC 1677, 1680 (No. 96-0265, 1999) (ability to report behavior to a worker's supervisor indicative of supervisory status).

a. Lack of Reasonable Diligence

The Secretary can establish an employer's constructive knowledge where he demonstrates that the employer could have uncovered the violating conduct with the exercise of reasonable

[40] Summit made this assertion in its proposed findings of fact without proffering any legal analysis in its brief. (Resp't's Br. 3). The Secretary did not address the issue at all.

[41] At one point, apparently referring to himself and Redden, Riddle testified: "We're two individuals managing 200 individuals." (Tr. 124).

diligence. *Martin v. Commission*, 947 F.2d 1483, 1485 (11th Cir. 1991). "What constitutes reasonable diligence will vary with the facts of each case." *Id.* The record here amply demonstrates that Summit's superintendents could have uncovered the fall protection violations with the exercise of reasonable diligence. As evidenced by Carrion-Ruiz's testimony, a fall protection violation was immediately visible to him upon entering the worksite when he observed workers on a roof from 200 to 300 feet away without using fall protection. Within 10 to 15 minutes of driving around and inspecting the remaining buildings on site, Carrion-Ruiz was able to observe nine fall protection violations on three buildings, all from the ground. In fact, he saw a fall protection violation on every building with active construction that day. Such violations in "plain view" could have easily been uncovered by Summit's superintendents with reasonable diligence. *See Kokosing Construction Co.*, 17 BNA OSHC 1869, 1871 (No. 92-2596, 1996).

Although Riddle and Redden conducted daily walks of the worksite, the evidence bears out that these walks fell well short of reasonable diligence to root out fall protection violations. Redden repeatedly emphasized that he was focused on groundwork and therefore not generally concerned with fall protection violations, even if he corrected those violations when he found them. (Tr. 153, 169-71, 198-99, 207; Exs. C-3 & 6). Riddle testified as to no particular method he employed during his walks to detect fall protection violations and admitted there was no particular schedule for these walks. (Tr. 121-22). Rather, he testified it was difficult to see whether a worker was tied off from the vantage point of the ground and complained that Carrion-Ruiz's photographs were "deceiving" because they were taken with the zoom lens of a camera. (Tr. 153-54, 157). However, Summit introduced no evidence to suggest that its superintendents could not utilize similar equipment or other alternative means, such as physically inspecting the roofs, to uncover fall protection violations. *See M.C. Dean, Inc.*, 505 F. App'x at 935-36 (finding that a supervisor's further investigation of a skylight, a known hazard, would have uncovered the hazard).

Summit's duty to exercise reasonable diligence to uncover the violations at issue was particularly acute in light of past fall protection violations occurring at the worksite. As a general matter, Riddle testified that it was a common occurrence for workers to forget to tie off while on the buildings' roofs. (Tr. 120-21). Nelson, Gunner-Houston's Superintendent, likewise recognized this to be a common occurrence. (Tr. 282). More specifically, however, Morrow observed violations during both his February and March inspections and relayed his findings to Summit's superintendents. (Tr. 226-27, 253, 265, 268; Exs. J-1(i), R-6). Just days before Carrion-Ruiz's

inspection. Redden was informed by an individual that workers were committing fall protection violations. (Ex. C-6). Such knowledge of Summit's superintendents increased their obligation to exercise reasonable diligence in detecting violations. *See Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1389 (No. 97-0755, 2003) (noting that multiple previous OSHA violations should have led the foreman to do "more to discover safety violations than he did.").

Summit argues that the "duration" of the violation must be considered and argues "[t]he Secretary did not proffer any evidence to suggest that the violative condition extended for any significant period of time. Since the timing of the inspection occurred shortly after lunch, it is unlikely that the violative conditions existed for any substantial period of time." (Resp't's Br. 17). Summit is correct in arguing that the "nature, duration, and location" factor into whether an employer's reasonable diligence would have uncovered a safety violation. *See David Weekley Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898, 2000). However, the Court finds Summit's proffered timeline to be speculative. Carrion-Ruiz testified that his inspection started at 2 p.m. (Tr. 76). Redden could not remember when the inspection occurred at all, or even whether it was in the morning or afternoon. (Tr. 203-04). Riddle's testimony that the believed Carrion-Ruiz was there "closer to 1:00" was conjecture. Even accepting Riddle's timeline, the Court notes his testimony at most acknowledged that he knew there was a problem with workers failing to tie off after lunch. However, Riddle admitted that he had taken no measures to address this known problem. (Tr. 121-22).

As to the actual duration of the employees' exposure, while the issue was not discussed in detail at trial, Carrion-Ruiz's violation worksheet indicated the durations of the observed employees' exposure to be at least 20 minutes. (Ex. C-2, p. 2). The Court concludes the employees had been exposed for at least the duration of Carrion-Ruiz's inspection of the worksite, which took approximately 10 to 15 minutes before Carrion-Ruiz went to the trailer conduct the opening conference.[42] (Tr. 47-50, 78-80). Summit offered no evidence to rebut this minimum duration of exposure or to even suggest that the workers had ever been properly tied off at all while working

[42] The record is less clear if the exposed employees continued working on the roofs without fall protection while the Carrion-Ruiz conducted the opening conference. However, nothing in the record indicates the employees were brought down from the roofs in between the time Carrion-Ruiz was directed to the trailer by Redden and the holding of the opening conference.

on the site the day Carrion-Ruiz visited.[43] Especially given that the violations were plainly visible to Carrion-Ruiz immediately upon entering the worksite, the Court does not find this to be an instance where the condition was "of brief or indeterminate duration" such that Summit's reasonable diligence could not have uncovered the violations. *See David Weekley Homes*, 19 BNA OSHC at 1119; *see also Centex-Rooney*, 16 BNA OSHC at 2130 (where conditions were in plain view and existed for a significant period of time, general contractor could have ascertained their existence through the exercise of reasonable diligence). Thus, the Court concludes the Secretary has demonstrated that Summit's superintendents failed to exercise reasonable diligence to uncover the fall protection violations. As the Court finds both superintendents were supervisors, their constructive knowledge is imputed to Summit. *See ComTran*, 722 F.3d at 1307-08. Summit could have known of the violative condition with the exercise of reasonable diligence.

b. Inadequate Safety Program

The Secretary can independently demonstrate Summit's constructive knowledge by establishing that it lacked an adequate safety program. *Quinlan v. Sec'y, U.S. Dep't of Labor*, 812 F.3d 832, 837 (11th Cir. 2016); *ComTran*, 722 F.3d at 1307-08. An adequate safety program requires an employer to have work rules in place to prevent safety violations, adequate communication of those rules to employees through training, and effective enforcement of the work rule through employee discipline. *See Fla. Lemark Corp. v. Sec'y, U.S. Dep't of Labor*, 634 F. App'x 681, 688 (11th Cir. 2015) (noting employer's failure to train its employees in the specific hazard as evidence of an inadequate safety program); *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803-804 (11th Cir. 2014) (work rules and communication to employees are elements of an adequate safety program); *Daniel Int'l Corp. v. Commission*, 683 F.2d 361, 364 (11th Cir. 1982) (discussing enforcement of work rule through discipline in the context of an adequate safety program). *See also S.J. Louis Constr. of Tex.*, 25 BNA OSHC 1892, 1894 (No. 12-1045, 2016); *Thomas Indus. Coatings*, 23 BNA OSHC 2082, 2088-89 (No. 06-1542, 2012). Here, Summit had multiple deficiencies in its safety program.

i. Summit Did Not Have Work Rule to Address Fall Hazards

[43] Although Riddle and Redden testified that they walked the worksite at least once a day, neither testified that his respective walk had occurred by the time Carrion-Ruiz arrived for the inspection. Riddle testified that no one from Summit went around in the morning or afternoon to see if workers were tied off and further that there was no specific schedule for those walks. (Tr. 121-22).

As to the existence of a work rule, the Secretary correctly observes the record contains little evidence of the existence of a specific work rule in place to address fall hazards or fall protection violations. Riddle made a passing reference to Summit's general rule that "if they're above four foot, then they're to be tied off." (Tr. 96). Redden testified that subcontractors on the site were required to follow "Summit's rules and Gunner Houston's rules," without further elaboration as to the contours of those rules. (Tr. 196). Although Summit had a fall protection plan which contained rules regarding fall protection, the testimony at trial bore out that this plan was only for Summit's employees; Summit did not train or instruct its subcontractors in this plan and relied on its subcontractors to have their own fall protection plans. (Tr. 129, 232-33; Ex. C-12). The Court therefore finds little evidence of a work rule that was "sufficiently precise to implement the requirements of the standard or be functionally equivalent to it." *Beta Constr. Co.*, 16 BNA OSHC 1435, 1444 (No. 91-102, 1993).

ii. Summit Did Not Adequately Communicate Its Work Rules

Even assuming, *arguendo*, that Summit had a work rule to address fall hazards, the evidence further demonstrates that Summit put minimal effort into communicating the rule to workers at the worksite. The only training Summit gave to workers at the worksite was a fifteen-minute training video and only a portion of this video covered the subject of fall protection. (Tr. 93-94, 195-96; Ex. J-1(h)). Although Summit ostensibly had a sticker-on-hardhat system in place to be able to verify whether a given worker had viewed the video, Riddle later admitted there was no system in place to ensure every worker had indeed viewed it. (Tr. 102-05).

Other than this video, the precise content of which is unclear from the record, there is little evidence that Summit, or anyone else for that matter, trained workers at the worksite to protect themselves from fall hazards. Morrow offered brief, indeterminate testimony regarding training he *may* have given Gunner-Houston's subcontractors. (Tr. 237). And, although Nelson testified that Gunner-Houston provided its subcontractors with training in fall protection, he offered no specifics as to the content of this training and stated there were no records of workers actually attending it. (Tr. 285-287). Rather, Nelson repeatedly referred back to the video shown by Summit as evidence of adequate training. (Tr. 273-74, 285-86). Although Summit introduced records of weekly safety meeting topics prepared by Morrow, none of the records submitted related to fall protection. (Ex. R-7). In any event, generally only superintendents, not the subcontractors' employees, attended these meetings. (Tr. 140-41; Ex. C-16). Finally, there is evidence of safety meetings held by

Gunner-Houston. (Ex. C-16). However, only one of these meetings related to "Falls," and it was held in response to Carrion-Ruiz's inspection, not as a means of communicating a work rule to employees before they encountered fall hazards. (Tr. 145-46, 277-78; Ex. R-7). Therefore, the Court concludes Summit did not adequately communicate any work rules regarding fall protection to the workers at the worksite.

iii. Summit Did Not Effectively Monitor or Discipline Workers

The Secretary has further demonstrated that Summit failed to consistently monitor and discipline employees who committed fall protection violations. As to monitoring, Summit points to the hiring of Morrow as a safety consultant for worksite as well as the walks of the worksite conducted by Summit's superintendents. (Resp't's Br. 16-17). While it is true that Morrow visited the worksite and corrected any fall protection violations he observed, he only visited the worksite once a month. (Tr. 212-13, 226-27, 250-51; Ex. R-6). Riddle and Redden both testified they walked the worksite at least once daily and would correct safety violations if any were observed. (Tr. 87-88, 112-13, 190-91; Exs. C-6 & 7). However, Riddle admitted there was no schedule to these walks, and no effort was made to ensure that all workers were properly employing fall protection at any point during the day. (Tr. 121-22). Redden testified similarly. (Tr. 192). There was also no evidence that Summit's superintendents visited the roofs on which the framers were working to monitor the use of fall protection equipment even though Riddle admitted it was substantially more difficult to detect fall protection violations from the ground. (Tr. 153-54). Redden focused almost entirely on the ground during his walks of the worksite. (Tr. 153, 170-71, 198-99; Ex. C-3, Ex. C-6). Further, the walks conducted by Summit's superintendents were clearly not sufficient to uncover any of the nine fall protection violations that occurred at the worksite on the day of Carrion-Ruiz's inspection.

In examining Summit's monitoring efforts at the worksite, the Court notes that, prior to Carrion-Ruiz's inspections, Summit's superintendents: (1) had been informed by Morrow of fall protection violations occurring at the worksite during his visits in both February and March (Tr. 268); (2) had been informed by another individual a few days before of potential fall protection violations at the worksite (Ex. C-6); and (3) knew that fall protection violations were a common issue at the worksite (Tr. 120-21). The Court finds, especially in light of these facts, Summit's monitoring efforts were inadequate. *Cf. Stahl Roofing Inc.*, 19 BNA OSHC at 2182 (finding close supervision was not necessary in light of frequent visits to the worksite of different managers and

safety officers); *Hackensack Steel Corp.*, 20 BNA OSHC at 1394 (finding closer supervision of employees was required in part because of the employer's "lengthy history of OSHA citations for failure to use safety belts and hardhats").

As to enforcement, Summit ostensibly had a progressive disciplinary policy in force at the worksite. (Ex. C-13). As written, the policy called first for verbal warnings, several of which may be issued before resorting to two successive written warnings, and finally termination. However, Riddle testified to an entirely different disciplinary policy that called for "one verbal warning. Second time, we'll pull them off the roof. Make them sit out a day. And then the third time, they're gone." (Tr. 116). Nelson's account tracked Riddle's. (Tr. 279-80). Whatever disciplinary policy may have been nominally in force at the worksite, the Court finds little evidence in the record to demonstrates that this policy was ever meaningfully or uniformly enforced. *See Daniel Int'l Co. v. Commission*, 683 F.3d 361, 364 (11th Cir. 1982); *Gem Indus., Inc.*, 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996), *aff'd*, 149 F.3d 1183 (6th Cir. 1998) (unpublished). The only documented instances of employee discipline in the record were for another worksite altogether. (Ex. C-19). There is no documentary evidence to suggest that the progressive disciplinary policy was followed at the worksite, despite the policy calling for written documentation. (Ex. C-13). Summit's superintendents, as well as Nelson and Morrow, testified with no particularity as to verbal warnings allegedly given for fall protection violations at the worksite. (Tr. 114, 194-95, 242, 289). As to the employees observed by Carrion-Ruiz, there is no evidence that they were ever disciplined in connection with their violations. Indeed, by all accounts, none of the employees were disciplined at all.[44] (Tr. 86-86, 117, 243). The Court concludes Summit did not have a work rule regarding fall protection that was "uniformly and effectively communicated and enforced" at the worksite. *See Daniel Int'l Co. v. Occupational Safety & Health Review Comm'n*, 683 F.2d at 364.

B. Characterization

The Secretary has classified the violation as "serious." A violation is classified as "serious" under the Act if "there is substantial probability that death or serious physical harm could result."

[44] Nelson testified that 33 workers, representing those who attended the fall protection meeting *after* Carrion-Ruiz's inspection, were fired in connection with Carrion-Ruiz's observations. (Tr. 280, 283-84; Ex. R-7). Even taken on its own terms, this testimony makes little sense because Carrion-Ruiz only observed nine employees committing fall protection violations, not all 33 people who later attended the fall protection meeting. (Tr. 49). In any event, Nelson later retracted his statement and said he did not know if anyone had been disciplined at all. (Tr. 290-92).

29 U.S.C. § 666(k). The Secretary need not show there was a substantial probability an accident would occur, only that if an accident did occur, serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010). Here, the workers observed without employing fall protection were exposed to fall distances of at least 12 feet with those working near the roof edge being exposed to a fall distance of 34 feet. (Tr. 155-57; Ex. J-1 ¶ (e)). Both distances are well in excess of the six-foot requirement for fall protection under 29 C.F.R. § 1926.501(b)(13). The Court finds serious physical serious harm could result from falls of these heights and thus the violation was properly categorized as serious. *See* Safety Standards for Fall Protection in the Construction Industry, 59 Fed. Reg. 40,672, 40,682 (Aug. 9, 1994) (to be codified as 29 C.F.R. pt. 1926) (noting the risk of fatality or injury from falling from heights of even six to ten feet). Therefore, the citation was a serious violation.

C. Affirmative Defense

Summit raised numerous affirmative defenses in its Answer. (Answer ¶¶ IX-XIII). However, in its pretrial statement, Summit only preserved unavoidable employee misconduct for trial. (Resp't's Prehearing Statement ¶ VI(b)). Likewise, Summit's post-trial brief only addressed this defense. (Resp't's Br. 17-18). The Court deems the rest of Summit's affirmative defenses waived. In its post-trial brief, Summit argues the defense of unavoidable employee misconduct "has been applied by the Commission in instances where the cited contractor was found to be the controlling employer …." (Resp't's Br. 18).[45] Summit goes on to argue that the defense requires a progressive discipline policy, but not in the context of a multi-employer worksite,[46] and further that, despite Summit having established the elements of the defense, this "affirmative defense is inapplicable [in multi-employer worksite cases] as it establishes a higher duty on a controlling

[45] Summit's "*Id.*" citation for this proposition is ambiguous, as it could refer to either of the two cases cited in the preceding paragraph: *American Sterilizer Co.*, 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997) and *Eutaw Constr. Co.*, 23 BNA OSHC 2137, 2141 (No. 10-2329, 2011). However, neither case stands for the proposition stated by Summit. *American Sterilizer* did not involve a multi-employer worksite and *Eutaw*, which was an unreviewed judge decision with no precedential value, did involve a multi-employer worksite but the respondent in that case had asserted the defense with regard to its own employee, not the employee of a subcontractor, as Summit has done here.

[46] Summit cites *Evergreen Constr. Co.*, 26 BNA OSHC 1615 (No. 12-2385, 2017) for this proposition. However, in that case the two Commissioners then comprising the Commission were unable to reach agreement on review and therefore vacated the direction for review, leaving the judge's decision undisturbed. *Id.*, 26 BNA OSHC at 1616.

employer than the burden required to be satisfied by the Secretary under its own application of controlling employer liability under the OSH Act." (Resp't's Br. 18). Whatever the Court might make of these scattershot arguments, Summit has only cursorily addressed the requisite elements and failed to cite to the record to support its burden of proof. *See ComTran*, 722 F.3d at 1314 (respondents before the Commission bear the burden of proof for affirmative defenses); *Marson Corp.*, 10 BNA OSHC 1660, 1662 (No. 78-3491, 1982) (burden of proof for unavoidable employee misconduct defense lies with the employer). The Court therefore concludes Summit has failed to carry its burden of proof as to this affirmative defense.

IV. PENALTY DETERMINATION

In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Court to give due consideration to the four criteria: (1) the size of the employer's business; (2) the gravity of the violations; (3) the good faith of the employer; and (4) the employer's prior history of violations. 29 U.S.C. § 666(j); *D & S Grading Co.*, 899 F.2d 1145, 1148 (11th Cir. 1990). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *See ComTran*, 722 F.3d at 1307; *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0293, 1995), *aff'd* 73 F.3d 1466 (8th Cir. 1995); *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975).

Here, the Secretary proposed a penalty of $11,640. Carrion-Ruiz indicated that the gravity of the violation was considered high because of the heights to which the employees were exposed and their proximity to the roof edge. (Tr. 63; Ex. C-2). A 10% reduction in penalty was proposed based on Summit's size but no reduction for good faith or history was proposed, since "[t]here was history." (Tr. 63-64; Ex. C-2). Summit has not disputed any of the factors leading to the Secretary's proposed penalty.

The Court finds the proposed penalty appropriate. Particularly as to gravity, the Court notes that nine employees were exposed to fall hazards of 12 to 34 feet and that a fall from such heights could lead to serious injury or death. Furthermore, Summit was not entitled to a good faith reduction, since, as noted above, Summit's safety program was inadequate to detect or prevent fall

protection violations despite Summit's superintendents being on notice that fall protection violations were common at the worksite. Thus, giving due consideration to the size of the business, the gravity of the violation, good faith, and history, the Court finds the Secretary's proposed penalty of $11,640 to be appropriate.

V. ORDER

IT IS HEREBY ORDERED THAT the Citation is **AFFIRMED** as a serious violation and Summit is **ASSESSED** and directed to pay to the Secretary a civil penalty of $11,640.

SO ORDERED.

/s/

JOHN B. GATTO, Judge

Dated: July 24, 2020
Washington, D.C.