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

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

REMAND ORDER

Before: ATTWOOD, Chairman; and LAIHOW, Commissioner.

BY THE COMMISSION:

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

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

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

DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: March 29, 2023