No. 12-10275

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

COMTRAN GROUP, INC.,

Petitioner,

v.

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

BRIEF FOR THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor of Labor for
Occupational Safety and Health

HEATHER R. PHILLIPS
Counsel for Appellate Litigation

BENJAMIN R. BOTTS
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W., Suite S4004
Washington, D.C. 20210
(202) 693-5697
botts.benjamin.r@dol.gov

MAY 9, 2012

No. 12-10275, ComTran Group, Inc. v. Secretary of Labor

CERTIFICATE OF INTERESTED PERSONS & CORPORATE DISCLOSURE STATEMENT

In addition to those listed by the Petitioner, the following persons may have an interest in the outcome of this matter for purposes of Circuit Rule 26.1-1:

Smith, M. Patricia, Attorney for the Secretary of Labor

Spencer, Caliestro, OSHA Compliance Officer

Woodward, Joseph M., Attorney for the Secretary of Labor

STATEMENT ON ORAL ARGUMENT

The Secretary requests oral argument because she believes oral presentation of the issues would aid the Court's disposition of the appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

STATUTES AND REGULATIONS:

MISCELLANEOUS:

STATEMENT OF JURISDICTION

This appeal arises from a citation contest proceeding before the Occupational Safety and Health Review Commission (Commission) challenging a citation that the United States Secretary of Labor (Secretary) issued to ComTran Group, Inc. (Comtran) for violations of standards promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act).[1] The Commission had jurisdiction over the proceeding under 29 U.S.C. § 659(c). A Commission administrative law judge (ALJ) issued a decision affirming the citation, and after the Commission did not direct review, the decision became a final order of the Commission by operation of law. *See id.* 661(j). ComTran timely filed a petition for review on January 18, 2012. *Id.* § 660(a). This Court has jurisdiction over the petition for review under because the violations are alleged to have occurred in Georgia. *Id.*

STATEMENT OF THE ISSUES

1. Whether the ALJ properly imputed a worksite supervisor's knowledge of his own safety violation to ComTran where ComTran had delegated to the supervisor the duty to ensure safety at the worksite and well-settled principles of

[1] The Secretary has delegated her responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA). This brief uses the terms "Secretary" and "OSHA" interchangeably.

agency law support imputing an agent's knowledge of facts obtained during the course of his employment and within the scope of his authority to his employer.

2. Whether, assuming that the ALJ erred in imputing the worksite supervisor's knowledge of his own safety violation to Comtran, such error was harmless where the record establishes ComTran's constructive knowledge of the violation based on the inadequacy of Comtran's safety program.

3. Whether substantial evidence supports the ALJ's determination that ComTran failed to establish the affirmative defense of unpreventable employee misconduct where ComTran lacked a written safety policy for excavation hazards, did not discipline a worksite supervisor for his admitted safety violations, and offered no evidence that it documents safety violations.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below

On December 2, 2010, during an inspection of a ComTran worksite, an OSHA compliance officer (CO) observed ComTran project manager Walter Cobb working in an unprotected six-foot-deep excavation immediately adjacent to an unsupported five-foot pile of excavated dirt, which together created an eleven-foot high wall of earth. Dec, 4; Tr. 15, 18, 22-23.[2] Based on this inspection, OSHA

[2] "Dec." citations refer to the Commission ALJ's decision and order. "T." citations refer to the transcript of the Commission hearing. "Ex." citations refer to exhibits introduced at the hearing.

cited ComTran for serious violations of two OSHA excavation standards, 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1). Dec. 4-5. ComTran contested the citation, and a Commission ALJ held a hearing on the merits on July 18, 2011. Dec. 1. The ALJ affirmed the citation in a decision and order issued October 6, 2011. Dec 13. ComTran filed a timely petition for discretionary review with the Commission on November 14, 2011. Commission Notice of Final Order (Nov. 30, 2011) (ComTran Record Excerpts, Tab B at 1). Because the Commission did not direct the case for review, by operation of law the ALJ's decision became a final order of the Commission on November 25, 2011. *Id.*; 29 U.S.C. § 661(j); 29 C.F.R. § 2200.90(d). On January 18, 2012, ComTran timely filed this appeal. 29 U.S.C. § 660(a).

B. Statement of Facts

1. OSHA's Inspection of a ComTran Worksite and Citation for Comtran's Violation of Excavation Standards

In late 2010, Gwinnett County, Georgia, hired ComTran, a communications utility contractor, to relocate some underground communications lines that ran parallel to a parkway in the city of Lawrenceville, Georgia.[3] Dec. 2; Tr. 144. The company assigned the job to a two-man crew made up of project manager Walter Cobb and Chris Jernigan, a "fairly new" ComTran employee. Dec. 2; Tr. 57-58.

[3] The ALJ's decision erroneously states that Gwinnett County hired ComTran in late 2011. Dec. 2.

Mr. Cobb was ComTran's supervisor and "competent person"—OSHA's term for the person responsible for identifying excavation-related hazards and eliminating them—at the worksite. Tr. 26-28, 58, 124, 139; 29 C.F.R. § 1926.650(b) (defining competent person).

Mr. Cobb and Mr. Jernigan began the job on December 1, 2010. Dec 3; Tr. 141. Work proceeded without incident that day. Dec. 3; Tr. 141. Using an excavator, Mr. Cobb dug an excavation, initially placing the spoil pile behind a silt fence (a piece of synthetic fabric stretched between a series of wooden fence stakes), which prevented the accumulated soil from falling into the excavation. Dec. 3; Tr. 133-34.

The next morning, Mr. Cobb's supervisor, project manager Sam Arno, who was also supervising two other ComTran projects that day, visited the worksite to briefly discuss the day's work plan with Mr. Cobb. Dec. 3; Tr. 60. Mr. Arno found no problems at the site and left shortly after he arrived. Dec 3; Tr. 63-64. Mr. Cobb continued excavating, but because he was unable to find the utility line he was looking for, he removed the silt fence along a portion of the excavation in order to dig a larger area. Dec. 3; Tr. 134-35, 153-54. He went deeper than he had on the previous day and deposited the excavated earth at the immediate edge of the excavation where there was no silt fence to support it. Dec. 3; Tr. 134-35. Admitting that he had lost track of the depth of the excavation and the location of

the spoil pile, Mr. Cobb stated, "I just kept digging. I had problems and was trying to get out of there, and really I didn't pay no attention to it until OSHA come up and started asking me questions . . . ." Dec. 3; Tr. 135. Mr. Cobb eventually located the utility line and got into the excavation to complete his work. Dec. 3; Tr. 12-14, 142-43.

While Mr. Cobb was working in the excavation, an OSHA CO drove by the worksite, and saw that only part of Mr. Cobb's head was showing out of the top of the excavation, suggesting that Mr. Cobb was standing in an area more than five feet below ground level. Dec. 4; Tr. 11. The CO called OSHA's area office, and OSHA sent another CO, Caliestro Spencer, to investigate. Dec. 4; Tr. 11. Hillary Whitehall, an OSHA trainee, accompanied CO Spencer. Dec. 4; Tr. 12. At the site, Ms. Whitehall took several photographs of Mr. Cobb in the excavation, and CO Spencer instructed him to climb out of it. Dec. 4; Tr. 13-14; Exs. C-1 - C-4 (OSHA's initial worksite photographs). Mr. Cobb then called Mr. Arno, who returned to the site shortly thereafter. Dec. 4; Tr. 14, 28-29, 64-65.

CO Spencer took statements from Mr. Cobb and Mr. Arno, measured the excavation, took a soil sample, and had Ms. Whitehall take additional photographs. Dec. 4; Tr. 24, 41-42; Exs. C-5 - C-10 (additional worksite photographs). CO Spencer's measurements showed that the excavation was six feet deep and that the spoil pile, which was at the immediate edge of the excavation, was five feet tall,

effectively creating an eleven-foot wall of unsupported earth. Dec. 4; Tr. 15, 18, 22-23. CO Spencer also observed that the walls of the excavation were not sloped or benched, and that there was no trench box or other protective system in the excavation or on site. Dec. 4; Tr. 20. OSHA's Salt Lake City technical laboratory later analyzed the soil sample and confirmed that the soil was "Type B," which under OSHA standards meant that the excavation should have been sloped at a maximum of 45 degrees measured from the horizontal, or reinforced by a protective system. Dec. 4; Tr. 24-25; Ex. C-11 at 1; *see* 29 C.F.R. § 1926.652(a), (b)(2), (c); 29 C.F.R. Pt. 1926, Subpt. A, App. B, Table B-1.

Based on CO Spencer's inspection, OSHA cited ComTran for serious violations of two OSHA excavation standards: (1) 29 C.F.R. § 1926.651(j)(2), for keeping excavated material within two feet of the edge of the excavation without using a retaining device; and (2) 29 C.F.R. § 1926.652(a)(1), for failing to protect an employee in an excavation five feet or more in depth with an adequate protective system. Dec. 4-5. OSHA proposed penalties totaling $9800 for the two violations. Tr. 35-36, 40.

2. The Deficits in ComTran's Safety Program

When ComTran hires a new employee, the company's safety director gives the employee the company's safety manual, employee policy manual, and safety

plan. Tr. 159; *see* Exs. R-4, R-5.[4] As Mr. Arno explained, the safety manual and policy manual "set[] the guidelines" for employees to follow with respect to safety and terms of employment. Tr. 76.

Excavation is a regular part of ComTran's work. Tr. 144; 166. While Mr. Arno and ComTran owner and president Greg Bostwick stated that the company infrequently excavates below four feet, Mr. Bostwick admitted that ComTran keeps a trench box on hand for jobs that require excavating to a depth that requires a protective system. Tr. 67, 166-67. Mr. Bostwick also stated that the company had completed jobs, including the Lawrenceville job, where plans indicating that the underground utilities would be at a particular depth were inaccurate, and that in such cases it was foreseeable that the company would have to excavate to depths greater than four or five feet. Tr. 167-68.

While ComTran's safety manual has a chapter addressing excavations, the manual does not address cave-in hazards or the danger associated with spoil pile material falling into an excavation. Dec. 10; *see* Ex. R-4 at 30-32. The excavation chapter requires employees to comply with 29 C.F.R. §§ 1926.956(a)(2)-(3) and (b), which discuss precautions employees must take during work in manholes and unvented vaults. Ex. R-4 at 31-32. The manual also reproduces those standards in full. *Id.* It does not refer anywhere, however, to § 1926.956(c), which covers

[4] ComTran did not introduce its "safety plan" into evidence and it is not part of the record before this Court.

trenching and excavating and specifically notes that trenching and excavation operations must comply with §§ 1926.651 and 1926.652 (the cited standards in this case). *See* Ex. R-4.

Although ComTran had held internal trainings related to excavation and trenching, the company offered no evidence that these trainings covered cave-in hazards. *See* Exs. R-2, R-9. For example, the "training certification" from ComTran's in-house training held on June 17, 2010, lacked any reference to this class of hazards. *See* Exs. R-2, R-9. The topics covered in that training were "backhoe, excavator, & loader operation maintenance & safety," "safety designee on site," "safety video," "company safety manual policy & procedures," and "on-the-job-training." *Id*. Similarly, while one of the two handouts from an October 20, 2010 "toolbox safety" meeting mentions an excavation project requirement that hazardous surface encumbrances be removed or supported, neither handout mentions excavation protective systems. *Id.*

ComTran's other evidence of its safety program—Mr. Cobb and Mr. Arno's 2008 excavation training certificates and cards—was from training provided by an outside vendor. Tr. 68, 125-26; Exs. R-2, R-9. While these training cards listed OSHA standards, protective systems, and trench shoring as covered topics, *see* Exs. R-2, R-9, ComTran offered no evidence of how it adopted this outside training as company work rules or whether it made any effort to apprise non-

supervisory employees of the information covered in the outside training.

Despite acknowledging that Mr. Cobb had violated OSHA standards, ComTran officials were unable to identify a particular ComTran work rule that he violated. Dec. 10; Tr. 94, 169. According to Mr. Bostwick, Mr. Cobb violated "the OSHA regulations, which are part of our work rules." Dec 10; Tr. 169. Similarly, Mr. Arno stated that Mr. Cobb had violated the "work rule about safe environment, identifying a hazard and correcting it." Tr. 94.

ComTran's manual also discusses the duties of supervisory employees. It states that "[t]he typical employee has little or no contact with top management personnel. In most cases, the foremen and other supervisory staff members represent top management to him." Ex. R-4 at 6. The manual provides further that "[s]upervisors are responsible for developing the proper attitudes toward safety and health in themselves and in those they supervise; and for ensuring that all operations are performed with the utmost regard for the safety and health of all personnel involved, including themselves." *Id*. at 2. A handout ComTran distributed to employees during an in-house training similarly states that "[s]upervisors play a key role in jobsite safety and are the Company Designee Onsite." Ex. R-2.

ComTran neither presented evidence that it documented safety violations when they occured, nor offered any documentary proof that the company had ever

punished an employee for committing a safety violation. Instead, it introduced three lists of verbal warnings given to employees for minor infractions such as failing to wear a hard hat on a fork lift, failing to properly mount a fire extinguisher on a company truck, and failing to wear a safety vest and gloves while on a worksite. Exs. R-6, R-7, R-8; Tr. 80, 118-19.

ComTran officials did not record these verbal warnings at the time they made them. Tr. 97; 114-15. Rather, they created the lists from memory during the course of the litigation in this matter. Dec. 10; Tr. 96, 114-15. Furthermore, all of the verbal "warnings" noted on the three lists involved nothing more than telling an employee to correct a violation—to put on a hard hat or to properly mount a fire extinguisher, for example—not actual discipline or even a threat of it. Tr. 79-80; 110-12, 117-20. Mr. Arno explained, "[a]ll of these instances were actions that could be corrected immediately and were done and that was the end of it." Tr. 80-81. Mr. Arno also admitted that, despite ComTran's "progressive" discipline policy, the discipline he imposed on the one employee he identified who had committed violations on two separate occasions was the same in both instances—a verbal correction of the violation. Tr. 96. The only evidence of discipline more severe than a verbal correction was Mr. Bostwick's testimony that the company had fired an unnamed employee after multiple "wrecks." Tr. 161. ComTran, however, offered no written record of the unnamed employee's termination.

While ComTran's employment manual states that violation of safety rules or practices or exposing oneself or others to a safety hazard is grounds for "disciplinary action, up to and including immediate termination," Ex. R-5 at 20-21, and Mr. Cobb and Mr. Bostwick alike acknowledged that Mr. Cobb knowingly violated the cited OSHA standards, Tr. 139-40, 169, Comtran had not disciplined Mr. Cobb or given him any form of warning, Tr. 94, 165; Dec. 11. Mr. Arno explained, "We were waiting for the outcome of this hearing. . . . I went to Mr. Bostwick, the owner of the company, and discussed it, and we made the decision to wait to see what kind of punishment ComTran was going to be given." Tr. 94-95. Mr. Bostwick confirmed that although Mr. Cobb had offered to resign the day after the incident, Mr. Cobb still held the same position he did at the time of the OSHA inspection although he was no longer "managing jobs on his own by himself without immediate supervision." Tr. 165-66.

3. The ALJ's Decision Affirming the Citation

After a hearing on the merits, the ALJ affirmed the citation for serious violations of 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1), and assessed a $5,000 total penalty. Dec. 13. Noting that it was undisputed that the Secretary had proved three of the four elements of her *prima facie* case for violations of the cited standards—applicability of the standards, failure to comply with the standards, and employee access to the violative conditions—the ALJ reviewed those elements and

concluded that the Secretary had indeed satisfied them. *Id*. at 6-8.

The ALJ then held that the Secretary had established the only disputed element of her *prima facie* case, ComTran's knowledge of Mr. Cobb's violations. Dec. 8. Because Mr. Cobb had actual knowledge of his own safety violations and was a supervisory employee, the ALJ concluded that under Commission precedent it was appropriate to impute Mr. Cobb's knowledge to ComTran. *Id.* The ALJ rejected ComTran's argument that under *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604 (5th Cir. 2006), a supervisor's knowledge of his own violation cannot be imputed to his employer. Dec. 8. Noting that there was disagreement among the circuits on this issue and that the Eleventh Circuit had not addressed it, the ALJ held that Commission precedent applied. *Id.* at 9.

The ALJ also rejected ComTran's unpreventable employee misconduct defense. Dec. 9-11. First, the ALJ found that ComTran did not have a specific work rule designed to prevent the types of hazards present in its excavation project. Dec. 10. The ALJ noted that ComTran's safety manual did not address the dangers of excavation cave-ins or of spoil pile debris falling into an excavation, and that company officials were unable to identify a specific company rule that Mr. Cobb had violated. *Id.* The ALJ also rejected ComTran's training records as inadequate to show an established work rule. *Id.* Given that ComTran lacked established work rules relevant to the cited violations, the ALJ found that it could not have

adequately communicated such rules to its employees. *Id.*

Additionally, the ALJ held that ComTran had not taken reasonable steps to discover violations, since the company presented no evidence that it contemporaneously documented safety violations. Dec. 10. The lists of verbal warnings for minor safety infractions ComTran introduced at the hearing, the ALJ found, were due "no weight" because company officials created them from memory during the course of the litigation. *Id.*

Finally, given that ComTran had not disciplined Mr. Cobb for conduct that undisputedly ran afoul of OSHA standards, but instead was waiting for the result of the litigation, the ALJ concluded that ComTran did not effectively enforce its work rules, assuming that it had relevant rules at all. Dec. 11. The ALJ found that ComTran's decision to wait for the outcome of the litigation "signal[ed] to its employees that it does not take safety rules seriously. This emboldens other employees to disregard their safety training." *Id*.

C. Standard of Review

The Court reviews the ALJ's findings of fact for substantial evidence. 29 U.S.C. § 660(a) ("The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall

be conclusive.").[5] This standard of review extends both to the ALJ's findings of fact and to the reasonable inferences drawn from those facts. *Chao v. OSHRC*, 480 F.3d 320, 323 (5th Cir. 2007). Substantial evidence is more than a "scintilla" but less than the "weight of the evidence," *McHenry v. Bond*, 668 F.2d 1185, 1190 (11th Cir. 1982), and is enough "'relevant evidence as a reasonable person would accept as adequate to support a conclusion,'" *Fluor Daniel v. OSHRC*, 295 F.3d 1232, 1236 (11th Cir. 2002) (quoting *J.A.M. Builders, Inc. v. Herman*, 233 F.3d 1350, 1352 (11th Cir.2000)). Findings of fact supported by substantial evidence must be upheld "even if this [C]ourt would reach a different result de novo." *Cleveland Consol., Inc. v. OSHRC*, 649 F.2d 1160, 1167 (5th Cir. Unit B July 1981) (citations omitted).[6]

Under the Administrative Procedure Act (APA) the Court may overturn the ALJ's legal conclusions only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(a)(2); *Fluor Daniel*, 295 F.3d at 1236.

---

[5] Where, as here, the Commission does not direct review of an ALJ's decision, the ALJ's findings become the Commission's, and the substantial evidence standard "applies with undiminished force" to the ALJ's findings. *P. Gioioso & Sons, Inc. v. OSHRC (Gioioso I)*, 115 F.3d 100, 108 (1st Cir. 1997).

[6] The decisions of the Fifth Circuit issued on or before September 30, 1981, and decisions issued after that date by Unit B panels of the former Fifth Circuit, are precedent in this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); *Stein v. Reynolds Securs., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

SUMMARY OF ARUGMENT

The ALJ correctly imputed Mr. Cobb's knowledge of his own misconduct to ComTran. In accordance with basic principles of agency law, this Court has long recognized that a supervisor's knowledge of employees' safety-related misconduct may be imputed to his employer. Given that the OSH Act places a heightened burden on employers to guard against supervisory misconduct on safety matters, the same general rule should apply where a supervisor himself knowingly engages in misconduct. And, the imputation of a supervisor's knowledge is particularly appropriate where, as here, the company's work is structured such that worksite supervisors are likely to be the only company representatives to know about hazardous worksite conditions.

Contrary authority from other circuits is not well reasoned. The principles of agency law apply whether a supervisor observes an employee engage in misconduct or the supervisor himself knowingly engages in the misconduct. In neither case does the imputation of the supervisor's knowledge to the employer impose strict liability, since the employer can avoid blame if it establishes through the affirmative defense of unpreventable employee misconduct that it took all feasible steps to prevent the violation. Nor does imputing knowledge to the employer based on supervisory misconduct impermissibly shift the burden of persuasion to the employer. The Secretary is still required to prove basic facts to

establish the ultimate fact of employer knowledge.

But even if the ALJ incorrectly concluded that the Secretary established employer knowledge by proving Mr. Cobb's knowledge of his own misconduct, that error was harmless. The Secretary can also establish employer knowledge by showing that the employer's safety program was inadequate to prevent the cited violations. Because the evidence shows that ComTran's safety program was plainly inadequate, the evidence establishes ComTran's constructive knowledge.

Substantial evidence also supports the ALJ's determination that ComTran failed to establish the affirmative defense of unpreventable employee misconduct. The record is devoid of evidence that ComTran engaged in any systematic effort to identify safety violations. Nor did ComTran introduce any documents showing that it keeps track of safety violations when they occur. ComTran's safety manual lacked rules prohibiting the violative conduct, and the scant evidence of safety-related training ComTran provided was inadequate to show that the company had unwritten rules sufficient to fill the gaps in its written policy. Moreover, the company's failure to discipline Mr. Cobb, despite its concession that he engaged in conduct that violated OSHA standards, demonstrated that to the extent the company had relevant work rules, it inadequately enforced them.

ARGUMENT

A. The ALJ Properly Imputed Mr. Cobb's Knowledge of His Violation of 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1) to Comtran.

To establish a *prima facie* violation of a standard promulgated under section 5(a)(2) of the OSH Act, 29 U.S.C. § 654(a)(2), the Commission requires the Secretary to show that: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more employees had access to the relevant hazard; and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violation.[7] *EMCON/OWT, Inc. v. Sec'y of Labor*, 224 Fed. App'x 875, 875-76 (11th Cir. 2007) (per curiam) (citing *Sw. Bell Tel. Co.*, 19 BNA OSHC 1097, 1098 (No. 98-1748, 2000)); *accord AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 71 (D.C. Cir. 2004). There is no dispute that the Secretary has established the first three elements of her *prima facie* case for the cited violations of 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1). ComTran disputes only the knowledge element. *See* ComTran Br. 15-24.

[7] The Secretary's longstanding position is that employer knowledge is not an element of her *prima facie* case, but rather a fact that the employer may disprove as an affirmative defense. This view is grounded in the language of section 17(k) of the OSH Act, which frames lack of employer knowledge as an exception to liability for serious violations. *See* 29 U.S.C. § 666(k) ("a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . in such place of employment *unless* the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation") (emphasis added). Because the evidence in this case established ComTran's knowledge, however, the Court need not reach this issue here.

The Secretary can establish employer knowledge of a violation in two ways. First, where the Secretary shows that a supervisor actually or constructively knew of a violation, that knowledge is imputed to the employer. *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979); *Crowther Roofing & Sheet Metal of Florida v. OSHRC*, 454 Fed. App'x 774, 775-76 (11th Cir. 2011) (per curiam). Alternatively, the Secretary can establish constructive employer knowledge by demonstrating that the employer's safety program was deficient and that the violation was therefore reasonably foreseeable. *E.g.*, *Danco Constr. Co. v. OSHRC*, 586 F.2d 1243, 1246-47 (8th Cir. 1978); *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277-78 (6th Cir. 1987); *see also H.B. Zachry Co. v. OSHRC*, 638 F.2d 812, 819 n.17 (5th Cir. Unit A Mar. 1981) (noting that "an employer 'cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous work practices'" (quoting *Danco*, 586 F.2d at 1247).

Here, ComTran had actual knowledge of the excavation violations through its worksite supervisor, Mr. Cobb.[8] It is undisputed that Mr. Cobb knew that he entered the unprotected excavation in violation of 29 C.F.R. § 1926.652(a)(1), and that he was not protected from the five foot spoil pile at the edge of the excavation in violation of 29 C.F.R. § 1926.651(j)(2). *See* Tr. 139-40, 169; ComTran Br. 28.

[8] As discussed below, *infra* pp. 35-39, Comtran also had constructive knowledge of the violations because its safety program was deficient.

Under basic principles of agency law, a principal is charged with the knowledge of its agent. The ALJ therefore properly imputed Mr. Cobb's actual knowledge to Comtran.

ComTran's assertion that the ALJ impermissibly imputed Mr. Cobb's knowledge of his own misconduct to ComTran, ComTran Br. 17-24, is not well-founded. The cases from other circuits Comtran cites provide no reasoned basis for distinguishing between imputing a supervisor's knowledge of an employee's misconduct and imputing a supervisor's knowledge of his own misconduct. They also incorrectly conclude that imputation of knowledge in the latter situation imposes strict liability and shifts the burden of persuasion from the Secretary to the employer.

1. Basic Principles of Agency Law Support the Imputation of a Supervisor's Knowledge of His Own Safety Violation to His Employer.

Under longstanding Commission precedent, a supervisor's knowledge of a safety violation is imputed to the employer regardless of whether the supervisor himself or a subordinate engaged in the prohibited conduct. *See Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726-27 (No. 95-1449, 1999). In *Access Equipment*, for example, the Commission held that a contractor had knowledge of an OSHA scaffolds standard violation because its supervisor impermissibly modified a scaffold. 18 BNA OSHC at 1726. Because the cited employer's

supervisor committed the prohibited act and the supervisor knew or should have known that the act was prohibited, the Commission found that the employer had the requisite knowledge. *Id.*; *see also, e.g.*, *Fiore Constr. Co.*, 19 BNA OSHC 1408, 1409-10 (No. 99-1217, 2001) (imputing knowledge to employer based on foreman's "conscious decision" not to use excavation protective system required by OSHA standard).

The Sixth Circuit also follows this rule. In *Danis-Shook Joint Venture XXV v. Sec'y of Labor*, 319 F.3d 805 (6th Cir. 2003), the court held that an employer knew about a worksite safety violation because its worksite supervisor, who drowned during work at a wastewater treatment plant, was aware of his own safety violation. 319 F.3d at 812. The court reasoned that "[b]ecause [he] was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to [his employer]." *Id.* (citing *Donovan v. Capital City Excavating Co.*, 712 F.2d 1008, 1010 (6th Cir. 1983)).

The Court should follow Commission and Sixth Circuit precedents, as these are in accordance with longstanding principles of agency law.[9] "'The general rule

[9] ComTran unpersuasively argues, ComTran Br. 17-23, that neither Commission nor Sixth Circuit case law calls for imputation of a supervisor's knowledge of his own misconduct. ComTran Br. 20, 22-23. The Commission decisions ComTran cites, however, do not support this assertion. The *Engineers Construction, Inc.* case stands for the well-settled proposition that the OSH Act does not impose "absolute liability upon employers when an employee fails to follow established safety practices," a rule whose validity the Secretary does not dispute. 3 BNA

is well established'" that a corporation is charged with knowledge of material facts of which its agent "'acquires knowledge while acting in the course of his employment within the scope of his authority, even though the officer or agent does not in fact communicate his knowledge to the corporation.'" *Badger v. S. Farm Bureau Life Ins. Co.*, 612 F.3d 1334, 1347 (11th Cir. 2010) (quoting *Am. Standard Credit, Inc. v. Nat'l Cement Co.*, 643 F.2d 248, 271 n. 16 (5th Cir. Apr. 1981)); *see also Catterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93-373, 1996) (discussing Commission's longstanding rule, "[i]n accord with well settled principles of agency law," that a supervisor's knowledge of hazardous conditions is imputed to his employer (citing *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (No. 86-360, 1992))), *aff'd*, 122 F.3d 437 (7th Cir. 1997).

Additionally, given that a "corporation can only be said to 'know' information by imputing to it the knowledge of natural persons who serve as agents," the only way to prove an employer's actual knowledge of a worksite

---

OSHC 1537, 1538 (No. 3551, 1975). And the ALJ in *Butch Thompson Enterprises* imputed the worksite supervisor's knowledge of safety violations to the employer and rejected the employer's unpreventable employee misconduct defense. 22 BNA OSHC 1985, 1990-93 (No. 08-1273, 2009). Moreover, while other members of the supervisor's crew in *Danis-Shook* had worked as foremen on other jobs, the notion that their presence distinguishes *Danis-Shook* from the instant matter because the crewmembers should have "made an effort to stop, or at least warn" the *Danis-Shook* supervisor, ComTran Br. 20, is factually inaccurate. The court found that neither the work crew nor their supervisor could "appreciate the danger of [the supervisor's] actions, and they had not been appropriately warned of the danger." 319 F.3d at 811.

safety violation is to establish the knowledge of the company's representative at the worksite. *See Central Soya de Puerto Rico, Inc. v. Sec'y of Labor*, 653 F.2d 38, 39 (1st Cir. 1981). As this Court has acknowledged, "[c]orporations, of course, have no state of mind of their own. Instead, the scienter of their agents must be imputed to them." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008)).

Imputation of an agent's knowledge to his employer also has special resonance in the worksite safety context. Given that "the behavior of supervisory personnel sets an example at the workplace, an employer has if anything a heightened duty to ensure the proper conduct of such personnel." *Floyd S. Pike Elec. Contractor, Inc. v. OSHRC*, 576 F.2d 72, 77 (5th Cir. 1978) (citing *Nat'l Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 n. 38 (1973)). In light of this special duty to ensure supervisors' compliance with occupational safety laws, employers should be charged with knowledge when a supervisor violates them.

Likewise, imputation of a worksite supervisor's knowledge of his own safety violation to his employer makes particular sense where the employer delegates its safety-related duties to the worksite supervisor and structures the work such that the worksite supervisor is likely the only supervisory employee who will know about potential worksite hazards. ComTran, through the guidance materials it distributes to its employees, acknowledges that "[t]he typical employee has little or

no contact with top management personnel. In most cases, the foremen and other supervisory staff members represent top management to him." Ex. R-4 at 6. For that reason, ComTran designates supervisors like Mr. Cobb as the "Company Designee Onsite," *see* Ex. R-2, and has them certified as "competent persons," *see* Ex. R-9; Tr. 139. ComTran left it to Mr. Cobb to ensure that the excavation work was completed in a safe manner. Indeed, Mr. Cobb's supervisor acknowledged that he saw no reason to "waste [his] time" being on site during the work day. Tr. 93. Having delegated to its worksite supervisors the authority and responsibility to identify and correct safety hazards, ComTran should be charged with the knowledge these supervisors obtained in discharging—or failing to discharge—those delegated duties. *See United States v. Ladish Malting Co.*, 135 F.3d 484, 492-93 (7th Cir. 1998) ("Corporations 'know' what their employees who are responsible for an aspect of the business know. . . . If 'authorized agents' with [safety-related] reporting duties acquire actual knowledge, it is entirely sensible to say that the corporation has acquired knowledge.").

In sum, Mr. Cobb, as the worksite supervisor and "competent person" charged with identifying excavation-related hazards and eliminating them, *see* 29 C.F.R. § 1926.650(b), acted as ComTran's agent, at least for purposes of worksite safety matters. *See Ladish Malting*, 135 F.3d at 493 (describing employees with safety-related inspection and reporting duties, regardless of supervisory status, as

"authorized agents" for safety-related purposes). And while Mr. Cobb's work in the excavation violated OSHA standards, the work was plainly within the scope of his authority; it was the very work ComTran assigned him to do. Tr. 58. Thus, given the facts of this case and the principles of agency law, the ALJ correctly imputed Mr. Cobb's knowledge to ComTran. *See Dakota Underground, Inc. v. Sec'y of Labor*, 200 F.3d 564, 567 (8th Cir. 2000) (the safety-related knowledge and actions (or inactions) of a "competent person" are attributable to the employer (citation omitted)); *cf. Breda v. Wolf Camera & Video*, 222 F.3d 886, 890 (11th Cir. 2000) ("by specifically designating store managers as the company representatives to whom complaints of sexual harassment must be made," employer established that information provided to the managers constituted actual notice to the employer).

2. Contrary Authority From Other Circuits Fails to Provide a Well-Reasoned Basis For Departing from the Agency Imputation Rule.

As the ALJ in this case acknowledged, there is a split in the circuits on whether a supervisor's knowledge of his own misconduct may be imputed to his employer. Dec. 8. The Sixth Circuit permits imputation in such cases. *Danis-Shook*, 319 F.3d at 812. *Yates* in the Fifth Circuit, and similar cases in the Third and Tenth Circuits, do not.[10] *See Yates*, 459 F.3d at 608-09; *Pennsylvania Power*

[10] Notwithstanding ComTran's suggestion to the contrary, *see* ComTran Br. 21, *New York State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98 (2d Cir. 1996),

& Light Co. v. OSHRC, 737 F.2d 350, 357-58 (3d Cir. 1984); *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). In addition, the Fourth Circuit has held, contrary to the law of this circuit, that the Secretary can never establish the knowledge element of her case by imputing a supervisor's knowledge of misconduct to his employer. *Compare Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 401-03 (4th Cir. 1979) *with Georgia Elec.*, 595 F.2d at 321.

Notably, however, the holdings in *Mountain States*, *Pennsylvania Power*, and *Ocean Electric* relied on a former Commission procedural rule, since rescinded, which provided that "the burden of proof shall rest at all times with the Secretary." *See Mountain States*, 623 F.2d at 157-58; *Pennsylvania Power*, 737 F.2d at 357; Ocean *Elec.*, 594 F.2d at 401-02; *see also infra* p. 34 (discussing rescission of Commission's rule).

In addition, the *Yates* line of cases perpetuates three critical errors. First, these cases fail to provide a reasoned basis for distinguishing between the imputation of a supervisor's knowledge of a subordinate's misconduct and the imputation of a supervisor's knowledge of his own misconduct. They also conflate

---

does not support ComTran's view that a supervisor's knowledge of his own violation cannot be imputed to his employer. That case did not involve supervisory misconduct, so the issue was not before the court. *See* 88 F.3d at 101 (alleged violation involved subordinate employee's failure to wear protective gear). Although the court vacated the Commission's decision as arbitrary and capricious, it reached that conclusion because the Commission failed to require the Secretary to prove employer knowledge in the first instance. *Id.* at 107-09.

imputing knowledge to an employer based on supervisory violations with strict liability. In so doing, they overlook the well-established affirmative defense of unpreventable employee misconduct, which allows an employer to avoid liability by showing that its safety program is sufficient to make the violations unforeseeable. Finally, they incorrectly conclude that imputing a supervisor's knowledge of his own misconduct shifts to the employer the burden of disproving knowledge in the first instance.

a. There Is No Reasoned Basis to Distinguish Imputation Based on a Supervisor's Knowledge of a Subordinate's Misconduct from Imputation Based on a Supervisor's Knowledge of His Own Misconduct.

As discussed above, *supra* pp. 20-22, the general agency law rule is that an agent's knowledge of material facts learned in the course of his employment is imputed to his employer. *Badger*, 612 F.3d at 1347. Neither *Yates* nor the related cases from other circuits provide a reasoned basis for departing from this default rule simply because the knowledge at issue happens to be a supervisor's knowledge of his own misconduct.

ComTran concedes that "it is reasonable to charge the employer with the supervisor's knowledge, both actual and constructive, of the non-complying conduct of a subordinate." ComTran Br. 19. And yet, when a supervisor engages in misconduct, ComTran asserts, without explanation, that "a different situation is presented." ComTran Br. 19 (quoting *Yates*, 459 F.3d at 607). This is simply not

the case.

Under ComTran's view of the law, if Mr. Jernigan, Mr. Cobb's co-worker, had climbed into the trench to assist Mr. Cobb, Mr. Cobb's knowledge of Mr. Jernigan's misconduct would be imputable to ComTran. Practically speaking, however, there is little difference between this hypothetical and the facts of this case. In both scenarios, a supervisor has created the hazardous condition (by digging an excavation deeper than five feet, placing an unsupported spoil pile immediately adjacent to it, and failing to use a protective system while working in it), a supervisor has knowingly engaged in and observed misconduct (his own or his own and another employee's), and a supervisor has modeled unsafe conduct to a subordinate (regardless of whether the subordinate is inside the excavation or outside it looking in). The notion that the supervisor is the "eyes and ears" of the employer when he observes subordinates engaged in misconduct, but not when he himself engages in misconduct, *see* ComTran Br. 18, cannot be correct. In either situation, the employer depends on the supervisor to oversee the work and inform it when an unsafe condition arises.

If anything, there is a stronger case for imputing a supervisor's knowledge of his own misconduct than that of a subordinate. The OSH Act places a heightened burden on employers to prevent safety-related misconduct by supervisors because supervisors serve as models for subordinate employees. *Floyd S. Pike*, 576 F.2d at

77 (citing *Nat'l Realty*, 489 F.2d at 1267 n.38). Thus, whether a supervisor alone engages in misconduct or he observes a subordinate engage in it, the default agency rule applies, and the supervisor's knowledge is imputable to his employer.

b. Imputing Knowledge Based on a Supervisor's Knowledge of His Own Misconduct Does Not Impose Strict Liability Because an Employer May Avoid Liability Where There Is Unpreventable Employee Misconduct.

"Strict liability means liability without regard to fault . . . ." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 712, 115 S. Ct. 2407, 2420 (1995) (O'Connor, J., concurring). In contrast, in proceedings under the OSH Act, once the Secretary has established a *prima facie* violation of an OSHA standard, an employer may still avoid liability by proving the affirmative defense of unpreventable employee misconduct. *See Zachry*, 638 F.2d at 818; *see also infra* pp. 39-52 (discussing ComTran's failure to establish unpreventable employee misconduct). The references to strict liability in *Yates* and related cases are therefore inapt.

A comparison of the OSH Act with the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 801 *et seq.*, confirms that the imputation of a supervisor's knowledge of his own misconduct does not constitute strict liability. By its terms, the Mine Act, unlike the OSH Act, "impose[s] a kind of strict liability on the employer," such that "[i]f the act or its regulations are violated, it is irrelevant whose act precipitated the violation . . . ; the operator is liable." *Allied*

Prods. Co. v. FMSHRC, 666 F.2d 890, 894 (5th Cir. Unit B 1982). Because the Mine Act is a strict liability statute, the court in *Allied* rejected an employer's attempt to import the employee misconduct defense from the OSH Act context. 666 F.2d at 893-94. The court reasoned that the "less-strict" OSH Act "is not analogous." *Id.* at 894; *accord Asarco, Inc. v. FMSHRC*, 868 F.2d 1195, 1198 (10th Cir. 1989) (drawing same distinction between the Mine Act's strict liability scheme and the OSH Act).

Title VII harassment cases involving the affirmative defense of reasonable care also draw an analogous distinction between situations where employers are held strictly liable and where they can avoid blame by proving an affirmative defense. Under these cases, an employer is held vicariously liable when a supervisor creates a hostile work environment resulting in a "tangible employment action." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65, 118 S. Ct. 2257, 2270 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 807-08, 118 S. Ct. 2275, 2292-93 (1998). When there is no tangible employment action, however, the employer can escape liability by establishing an affirmative defense that it exercised reasonable care to prevent and correct the harassment, and that the plaintiff unreasonably failed to take advantage of employer-provided preventive or corrective opportunities. *Id.* As this Court has explained, supervisory harassment resulting in an adverse tangible employment action thus makes the employer

"automatically" liable. *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1311 (11th Cir. 2001). By contrast, an employer is not automatically liable where there is no tangible employment action, since the employer can avoid liability if it proves the affirmative defense. *Id.* Likewise, an employer is not subject to strict liability for violation of an OSHA standard given that it can avoid liability by establishing the unpreventable employee misconduct defense.

ComTran's reliance on the pre-split Fifth Circuit's decision in *Horne Plumbing & Heating Corp. v. OSHRC*, 528 F.2d 564 (1976), is misplaced. In that case, two employees, one the job foreman, died when the unsupported portion of a trench collapsed on top of them. 528 F.2d at 566. The ALJ concluded that because the foreman was part of management, the employer was responsible for his conduct, notwithstanding undisputed evidence that the employer had an "outstanding" safety program and "took virtually every conceivable precaution to ensure" compliance with OSHA standards. *Id*. at 566-67, 569. Based on the foreman's role in management, the ALJ rejected the employer's affirmative defense of unpreventable employee misconduct. *Id.* at 567. The Fifth Circuit reversed, reasoning that the OSH Act does not permit imposing liability on an employer where the employer has done everything it feasibly can do to prevent a violation. *Id.* at 571. Imposing liability "on [those] facts," the court concluded, would impose as standard "virtually indistinguishable from" strict liability. *Id.* at

570-71.

But in reaching this conclusion, the court did not reject the imputation of a supervisor's knowledge of his own misconduct under other factual circumstances. *Horne Plumbing* only prohibits employer liability based on the imputed knowledge of a supervisor where the employer has already established through its affirmative defense that it has an exemplary safety program.[11] *See Horne Plumbing*, 528 F.2d at 571. The court said nothing to disturb the default imputation rule where a supervisor engages in misconduct and the employer's unpreventable employee misconduct defense fails. *See id.* Nor did the court hold that the Secretary must establish that a violation was foreseeable before a supervisor's knowledge can be imputed to his employer. *See id.*

While finding *Horne Plumbing* "instructive," the *Yates* majority acknowledged that the Fifth Circuit had not yet "directly answered" whether the Secretary can establish employer knowledge based on supervisory misconduct.

[11] The ALJ decision appealed in *Horne Plumbing* unmistakably considered the unpreventable employee misconduct issue as an affirmative defense. *See Horne Plumbing & Heating Corp.*, Nos. 1096 & 1261, 1974 WL 4420, at *7 (Rev. Comm'n Oct. 9, 1974) (Commission decision reprinting original ALJ decision) (rejecting employer's attempt to establish, "as an affirmative defense to the alleged violations, that he has met his responsibility to insure compliance with the safety standards"). Thus, when the Fifth Circuit reversed the ALJ on appeal, the court reversed on the ground that the employer had successfully established the affirmative defense. *See Horne Plumbing*, 528 F.2d at 567 (noting that ALJ rejected the employer's "defense 'that he should not be liable for violations which occurred as the result of his employee's misconduct'").

Yates, 459 F.3d at 608. The *Yates* majority extended the holding of *Horne Plumbing* by requiring the Secretary to establish the unforeseeability of a supervisor's misconduct, *see id.* at 608-09, and in so doing, confused imputation of supervisory knowledge with strict liability despite the availability of the unpreventable employee misconduct defense. This reading of *Horne Plumbing* was incorrect. As the dissenting judge in *Yates* noted, *Horne Plumbing* prohibited the "usual imputation of knowledge of an agent to the employer" only where the employer establishes through an affirmative defense that its safety program sufficed to make the supervisor's conduct unforeseeable. *See id.* at 610 (Reavley, J., dissenting).

c. Imputing Knowledge Based on a Supervisor's Knowledge of His Own Misconduct Does Not Shift the Initial Burden of Persuasion to the Employer.

Whether the Secretary proves employer knowledge based on a supervisor's knowledge of a subordinate's misconduct, or based on a supervisor's knowledge of his own misconduct, it is still the Secretary's burden to prove basic facts—that a supervisor actually or constructively knew of a violation because he knowingly committed the violation, witnessed another employee engage in misconduct, or reasonably should have known about such employee misconduct—to establish the ultimate fact of employer knowledge. *See Georgia Elec.*, 595 F.2d at 322 (in finding that employee was supervisor and imputing his knowledge to the employer,

"the ALJ did not supply a missing element in the Secretary's case. The ALJ merely put a legal characterization upon facts established in the record"). The Secretary therefore in all cases bears the initial burden of proving knowledge by establishing the knowledge of an individual at the worksite acting on the employer's behalf. Only then does the burden shift to the employer to show that it has an adequate safety program and is therefore entitled to the affirmative defense of unpreventable employee misconduct. Imputing a supervisor's knowledge of his own misconduct thus does not require the employer to disprove knowledge in the first instance, and ComTran's assertion, relying on the *Yates* line of cases, that the ALJ improperly shifted the burden of persuasion, is incorrect. *See* ComTran Br. 22**.**

This allocation of burdens reflects the availability of information to the parties in OSH Act litigation. "By its nature, information with respect to the implementation of [a] written safety program will be in the hands of the employer, and it is not unduly burdensome to require it to come forward with such evidence." *L.E. Myers*, 818 F.2d at 1277; *see also Danco*, 586 F.2d at 1247 n.6 (the employer "is in the best position to demonstrate the sufficiency of its safety programs"). Thus, the Secretary establishes the knowledge element of her case by showing that there was a supervisor present at the worksite and that the supervisor knowingly engaged in prohibited conduct. The burden of persuasion then shifts to the

employer to introduce evidence, which by its nature is in the employer's hands, to show that its safety program was adequate to make the violation unforeseeable.

ComTran's assertion that the ALJ's allocation of the burdens of persuasion violated a Commission procedural rule requiring the Secretary "to establish *prima facie* proof of employer knowledge before obligating ComTran on its affirmative defense" is simply wrong. *See* ComTran Br. 17, 21. As an initial matter, ComTran fails to cite any such Commission rule. To the extent that it is referring to former 29 C.F.R. § 2200.73(a), which previously provided that "[i]n all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest at all times with the Secretary," the Commission rescinded this rule in 1986 through notice-and-comment rulemaking. *See* Occupational Safety & Health Review Commission – Rules of Procedure, 51 Fed. Reg. 32,002, 32,012-13 (Sept. 8, 1986). In the Commission's experience, the language of the rule "misled pro se employers and sometimes even attorneys into believing that they never bore a burden of proof," and, more fundamentally, provided no guidance as to the elements of a case the Secretary had to prove. *Id.* at 32,012. Furthermore, guidance on the elements of the Secretary's case "must be developed and stated in case law." *Id*. at 32,012-13.

Even if ComTran's claim that the ALJ violated a Commission procedural rule can be read to refer to a violation of *substantive* rules developed in

Commission case law that define the essential elements of the Secretary's *prima facie* case, the ALJ's decision plainly satisfied those rules. The ALJ placed the burden of establishing all the elements of a *prima facie* violation on the Secretary and only shifted the burden of persuasion to ComTran after concluding that the Secretary had successfully proved the required elements by a preponderance of the evidence. Dec. 5-11.

B. Any Error in Imputing Mr. Cobb's Knowledge of His Own Misconduct Was Harmless Because the Evidence Demonstrating the Inadequacy of ComTran's Safety Program Also Established ComTran's Constructive Knowledge.

Even assuming that the ALJ erroneously imputed Mr. Cobb's knowledge to ComTran, the record considered as a whole establishes that the error was harmless. This is because the Secretary can prove constructive employer knowledge where the employer's safety program was deficient and the violation therefore reasonably foreseeable. *E.g., Danco*, 586 F.2d at 1247. Given the patent inadequacy of ComTran's safety program, *see infra* pp. 40-52 (discussing defects in safety program), the record evidence establishes that ComTran had constructive knowledge of the cited violations. The Court should therefore affirm the citation.

The APA requires the Court's review of an ALJ decision to take "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706. A misallocation of a burden of persuasion is not prejudicial unless it affects the outcome of the case. *Brown & Root, Inc. v. OSHRC*, 659 F.2d 1291, 1295 (5th Cir. Unit B Oct. 1981); *N*

& N Contractors, Inc. v. OSHRC, 255 F.3d 122, 127 (4th Cir. 2001). And a burden of persuasion of a preponderance of the evidence only affects the outcome of the case if "the trier of fact thinks the plaintiff's and the defendant's positions equiprobable"—it acts as a "tie-breaker" if the evidence on an issue is equally balanced on both sides. *Bristow v. Drake Street Inc.*, 41 F.3d 345, 353 (7th Cir. 1994) (Posner, C.J.); *see also Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1274 (11th Cir. 2008) (outcome on a particular issue varies with the allocation of the burden of proof only where "a factfinder could conclude that the evidence on the issue is evenly balanced"); *Cigaran v. Heston*, 159 F.3d 355, 357 (8th Cir. 1998) ("[t]he shifting of an evidentiary burden of preponderance is of practical consequence only in the rare event of an evidentiary tie").

To determine whether a lower court's decision would have been different but for the allocation of a burden of persuasion, the reviewing court must consider the entire record. *Washington State Dep't of Transp. v. Washington Natural Gas Co.*, 59 F.3d 793, 801 (9th Cir. 1995) (holding, after reviewing entire record, that misallocation of burden of persuasion was harmless); *see also New York State Elec. & Gas*, 88 F.3d at 108 ("In evaluating the sufficiency of the evidence, our review is not confined to the evidence presented in the Secretary's case."); 5 U.S.C. § 706 (in deciding whether agency action was arbitrary and capricious or contrary to law, "court shall review the whole record").

The ALJ's determination that ComTran violated the cited standards did not turn on the allocation of the burden of persuasion. The ALJ considered the record as a whole and found that ComTran's safety program was inadequate to reasonably ensure compliance with OSHA standards and thus insufficient to support an unpreventable employee misconduct defense. Dec. 10-11. As discussed below, substantial evidence supports the finding that the program was inadequate. *See infra* pp. 39-52. Given that "an employer's inability to establish the adequacy of its safety instructions to his employee shows a failure to exercise reasonable diligence," *H.B. Zachry*, 638 F.2d at 819 n.17, and that "[a]n employer has constructive knowledge of a violation if the employer fails to use reasonable diligence," *N & N Contractors*, 255 F.3d at 127, the ALJ's finding of the safety program's inadequacy suffices to establish ComTran's constructive knowledge of the violations. This is because "under the Commission's precedent . . . the Secretary's *prima facie* case and the employer's unpreventable conduct defense both involve an identical issue: whether the employer had an adequate safety policy." *New York State Elec. & Gas*, 88 F.3d at 106.

The Fourth Circuit's opinion in *N&N Contractors* is illustrative. There, the court held that even if the ALJ had erroneously shifted the burden to disprove knowledge to the employer, that error was harmless. *N&N Contractors*, 255 F.3d at 127-28. Because the evidence showed that the employer had failed to use

reasonable diligence to detect safety violations, the cited violations were foreseeable—thus establishing employer knowledge—irrespective of which party had the burden of persuasion on the knowledge issue. *Id.* Likewise, even assuming that the ALJ's imputation of knowledge to ComTran improperly placed the burden of disproving knowledge on Comtran, that error was harmless. The record considered as a whole establishes ComTran's constructive knowledge based on the inadequacy of its safety program.

It is immaterial that the ALJ did not expressly address the adequacy of ComTran's safety program under the heading "knowledge." Dec. 8-9. ComTran had notice that the adequacy of its safety program was at issue in the case, and took testimony from five company employees and introduced numerous documentary exhibits in an attempt—albeit unsuccessful—to establish that its program was sufficient to make safety violations unforeseeable. *See* Tr. 67-81 (Mr. Arno), 109-12 (ComTran vice president Glen Sherwood), 117-20 (ComTran vice president Phillip A. Clark), 125-38 (Mr. Cobb), 156-64 (Mr. Bostwick); Exs. R-2 - R-10. The Secretary likewise cross-examined ComTran's witnesses to call the adequacy of the program into question. *See* Tr. 89-98, 113-15, 121, 143-44, 164-169. The ALJ weighed the evidence from both sides and found that the program fell short in all relevant respects. Dec. 9-11.

Under no reasonable reading of the ALJ's decision can it be said that the

ALJ thought ComTran and the Secretary's positions "equiprobable." *See Bristow*, 41 F.3d at 353. Because the record shows that ComTran's safety program was plainly inadequate, the ALJ's allocation of the burden of persuasion did not affect the outcome of the case. *Cf. Ocean Elec. Corp.*, 594 F.2d at 402-03 (reversing Commission finding of employer knowledge based on inadequacy of safety program where safety program was not mentioned at trial, but acknowledging that if program had been put in issue, "we might have a different case"). Remand to the Commission for further proceedings is therefore unnecessary. *See Ed Taylor Constr. Co. v. OSHRC*, 938 F.2d 1265, 1270-71 (11th Cir. 1991) (court vacates and remands Commission decisions only where party suffered "actual prejudice" from Commission's error).

C. Substantial Evidence Supports the ALJ's Finding that ComTran Failed to Establish the Affirmative Defense of Unpreventable Employee Misconduct.

To establish the affirmative defense of unpreventable employee misconduct in this Court, an employer must show (1) that it took "all feasible steps . . . to avoid the occurrence of the hazard," and (2) "the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule of which departure the employer had neither actual nor constructive knowledge."

Zachry, 638 F.2d at 818 (citations omitted).[12] The test is conjunctive—ComTran's safety program had to satisfy both prongs for the company to prevail. *See id.* at 819 (rejecting defense despite adequately established work rule because of inadequate communication and enforcement of rule). Substantial evidence in the record supports the ALJ's determination that ComTran failed to establish unpreventable employee misconduct.

1. ComTran Failed to Take All Feasible Steps to Avoid the Occurrence of the Hazard.

Implicit in the requirement to take all feasible steps to avoid the occurrence of the hazard is that the employer must take adequate measures to detect safety violations. *See Mineral Indus. & Heavy Constr. Group v. OSHRC*, 639 F.2d 1289, 1294 n.4 (5th Cir. Unit A Mar. 1981) (citing *Gen. Dynamics v. OSHRC*, 599 F.2d 453, 459 (1st Cir. 1979)). Substantial evidence shows that ComTran failed to take such measures.

There was simply no evidence that ComTran engaged in any systematic

[12] The ALJ in this case, following Commission precedent and the approach of most courts of appeals, used a four-part test to analyze the unpreventable employee misconduct defense. Dec. at 9-11. Under this formulation, the employer must prove that it has work rules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations were discovered. *E.g.*, *Frank Lill & Son, Inc. v. Sec'y of Labor*, 362 F.2d 840, 845 (D.C. Cir. 2004); *Schuler-Haas Elec. Corp.*, 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006). The substance of the four-part test and this Court's two-part test, however, is the same.

effort to identify safety violations. Mr. Bostwick testified that Comtran had "recently," *i.e.*, after the violations at issue here, hired "someone independently" to make quarterly unannounced inspections of random jobs. Tr. 160. Measures taken after the violations occurred, however, are irrelevant to the company's practices at the time OSHA issued the citations. *See United States v. Endotech, Inc.*, 563 F.3d 1187, 1201 (11th Cir. 2009) (remedial measures taken after a regulatory violation do not ameliorate the past violation).

Mr. Bostwick's non-specific testimony that "[p]roject managers should constantly be looking" for violations, Tr. 160, is similarly insufficient to show that ComTran took the necessary steps to discover safety violations. For example, the day the violations occurred, Mr. Arno was in charge of two projects in addition to Mr. Cobb's excavation, and saw no reason to return to the site during the course of the workday until Mr. Cobb informed him that OSHA was conducting an inspection. Tr. 60; Tr. 91-93. Indeed, Mr. Arno testified that given Mr. Cobb's experience working in excavations, Mr. Arno "didn't see that I needed to waste my time being there at any given time after the start of that day to come back." Tr. 93.

ComTran also failed to adduce any documentary proof that it keeps track of safety violations when they occur. Instead, the company introduced at trial three lists of verbal warnings given to employees for minor infractions, which company officials created after OSHA issued the citations in this case. Exs. R-6, R-7, R-8;

Tr. 96, 114-15. It is well established, however, that business records created in preparation for litigation do not tend to be accurate. *See United States v. Glasser*, 773 F.2d 1553, 1559 (11th Cir. 1985) (citing *Rosenberg v. Collins*, 624 F.2d 659, 665 (5th Cir. 1980)). Thus, the ALJ properly accorded the lists no weight. *See* Dec. 10.

But even if the ALJ had found the lists to be reliable, their content has little relevance. All of the violations listed were apparently minor enough from ComTran's perspective to warrant only a verbal correction—*i.e.*, an instruction to correct the safety violation—but not a warning or actual punishment. *See* Exs. R-6, R-7, R-8; Tr. 79-81, 109-12, 117-20. Other than Mr. Bostwick's testimony that ComTran fired an unnamed employee after multiple "wrecks," there is no evidence in the record that the company had detected any serious safety violations. *See* Tr. 161.

Given that OSHA issued the citation in this case for serious violations, and considering the gravity of the harm against which the cited standards are designed to protect, it is inconceivable that Mr. Cobb's violations could be considered minor. *See* Dec. 4-5; Occupational Safety and Health Standards – Excavations, 54 Fed. Reg. 45,894, 45,897 (Oct. 31, 1989) (OSHA's preamble to final excavations rule) (describing excavations as "one of the most hazardous types of work done in the construction industry," and noting that cave-ins "are much more likely to be

fatal to the employees involved than other construction-related accidents"); *see also, e.g., Floyd S. Pike*, 576 F.2d at 77 (affirming trenching citation issued after worker died in cave-in accident); *John Carlo Inc. v. Sec'y of Labor*, 234 Fed. App'x 902, 904 (11th Cir. 2007) (per curiam) (same). Thus, even if the ALJ "accept[ed]" ComTran officials' testimony despite giving the company's documentary evidence no weight, *see* ComTran Br. 30, the officials' testimony did not come close to showing that the company took all feasible steps to detect violations. *See P. Gioioso & Sons v. Sec'y of Labor*, 675 F.3d 66, 73 (1st Cir. 2012) ("It is not error for an ALJ to 'count [ ] the absence of documentation against the proponent of [an unpreventable employee misconduct] defense.'" (quoting *Gioioso I*, 115 F.3d at 110)).

2. ComTran Lacked Uniformly and Effectively Communicated Work Rules.

A work rule is "'an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood.'" *Danis Shook*, 19 BNA OSHC 1497, 1501-2 (No. 98-1192, 2001) (quoting *JK Butler Building, Inc.*, 5 BNA OSHC 1075, 1076 (No. 12354, 1977)), *aff'd*, 319 F.3d 805 (6th Cir. 2003). Work rules must be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane and Rigging Co.*, 16 BNA OSHC 1419, 1425 n.7 (No. 90-1106, 1993). They also

must "reflect[] the requirements" of the relevant OSHA standard. *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1287 (No. 02-0520, 2005) (citations omitted).

Specificity in work rules is essential—a general instruction prohibiting a certain activity that fails to state the conditions under which the activity is prohibited is not an adequate work rule. *See Modern Cont'l Constr. v. OSHRC*, 305 F.3d 43, 51 (1st Cir. 2002). Similarly, it is not enough for an employer to establish that it generally communicates and enforces its safety rules; the employer must show that it effectively communicates and enforces the specific work rule at issue. *Hamilton Fixture*, 16 BNA OSHC 1073, 1090 (No. 88-1720, 1993), *aff'd without published op.*, 28 F.3d 1213 (6th Cir. 1994). While it is the substance rather than the form of ComTran's safety rules that is the proper focus of this Court's inquiry, *see Dover Elevator Co.*, 16 BNA OSHC 1281, 1287 (No. 91-862, 1993), there is substantial evidence to support the ALJ's conclusion that the substance of ComTran's program and work rules was lacking.

It is undisputed that ComTran's written safety program lacked rules prohibiting the types of violations at issue. While the company's safety manual includes a section entitled "Excavations," the manual does not mention the dangers associated with excavation cave-ins or falling spoil pile material. Dec. 10; *see* Ex. R-4. Indeed, the excavations section includes an in-depth discussion of ComTran employees' duty to comply with 29 C.F.R. §§ 1926.956(a)(2)-(3) and (b), which

discuss necessary precautions employees must take while working in manholes and unvented vaults, and reproduces those provisions verbatim. Ex. R-4 at 31-32. But despite its precise discussion of those OSHA rules, the manual omits any reference to the remaining paragraph of § 1926.956. *See id.* That paragraph, subsection (c), covers trenching and excavating, and specifically states that trenching and excavation operations must comply with §§ 1926.651 and 1926.652, the cited standards in this case. *See* 29 C.F.R. § 1926.956(c). Nor does the manual discuss the safety precautions that an employee working in an excavation must take. *See* Ex. R-4.

These deficiencies standing alone constitute substantial evidence in support of the ALJ's conclusion that the company's safety program was inadequate. When ComTran hires a new employee, the company's safety director communicates ComTran's safety rules by giving the employee the company's safety manual, employee policy manual, and safety plan. Tr. 158-59. As Mr. Arno explained, ComTran relies on its safety manual to "set[] the guidelines for all of [its employees] to follow"—it serves as the company's primary mode of communicating its rules to its employees. Tr. 76. A defect in ComTran's safety manual thus amounts to a defect in its safety program. And while safety rules do not need to be written provided that they are clearly and effectively communicated to employees, *see Lake Erie*, 21 BNA OSHC at 1287, as discussed below,

ComTran's evidence of safety-related training falls short of showing it had a set of unwritten rules covering all the relevant safety requirements omitted from its safety manual.[13]

Given that ComTran regularly engages in trenching and excavation, Tr. 144, 166, its safety manual at a minimum should have discussed the need to reinforce excavations in certain circumstances and to protect employees in an excavation from falling debris. *See Danis Shook*, 19 BNA OSHC at 1500 (finding employer's general written work rule about wearing personal protective equipment "as needed" inadequate because rule did not explicitly require such equipment in situations employees faced on the job). But ComTran's manual failed to provide even that minimal degree of information. *See* Ex. R-4. A safety manual that specifically instructs employees not to violate certain OSHA standards and

[13] ComTran's reliance on *Pennsylvania Power* and *Beta Constr. Co.*, 16 BNA OSHC 1435 (No. 91-102, 1993), is therefore misplaced. In *Pennsylvania Power*, the Third Circuit held that the cited violation was not foreseeable where the employer had an "excellent" safety program, "swift[ly]" disciplined employees who violated work rules, and promulgated a specific written rule that, although not designed to precisely mirror the Secretary's interpretation of the standard, was a "good faith" effort to mirror the standard's requirements. 737 F.2d at 357-59. Thus, while the court rejected "literal conformance" with OSHA standards as the proper measure of a work rule, it said nothing to question the well-settled rule that an employer needs work rules specific enough to advise employees of the hazards associated with their work. *See id.* In *Beta Construction*, the Commission affirmed the Secretary's citation for a "serious" violation, holding that the employer's work rule was inadequate to ensure employee compliance with the cited standard. 16 BNA OSHC at 1444. The Commission addressed the lack of a written rule only in the context of considering whether the employer's violation was "willful." *Id*. at 1445, n.8.

reproduces those standards in full cannot reasonably be read to address a class of hazards not discussed at all. *See In re Celotex Corp.*, 487 F.3d 1320, 1334 (11th Cir. 2007) (applying *expressio unius exclusio alterius* canon to a contract).

The ALJ also correctly rejected ComTran's training records as inadequate evidence of established work rules. There is no evidence that ComTran's in-house trainings covered the relevant excavation safety requirements. The handouts from those trainings say nothing about excavation protective systems. *See* Exs. R-2, R-9. Nor was there testimony to suggest that the trainings discussed such systems. Therefore, even if the content of these training sessions "become work rules to follow," Tr. 70, there is insufficient evidence to show that the purported unwritten rules were "specific enough to advise employees of the hazards associated with their work," or that they "reflect[ed] the requirements of the cited standard[s]." *See El Paso*, 16 BNA OSHC at 1425 n.7; *Lake Erie*, 21 BNA OSHC at 1287.

Similarly, although Mr. Cobb and Mr. Arno attended excavation safety training with an outside vendor and were certified by the vendor as "competent persons," *see* Exs. R-2, R-9, there is no evidence that ComTran adopted the OSHA rules covered in that training as company work rules that its employees had to follow. Nor does the record reflect that the company instructed employees who did not attend the outside course on the course's content. Given that "an employer cannot rely on one employee's training and experience as the sole means of

protecting other employees," the outside training courses therefore do not cure the defects in the ComTran's safety program. *See Stuttgart Machine Works, Inc.*, 9 BNA OSHC 1366, 1369 (No. 77-3021, 1981); *see also Georgia Elec. Co.*, 595 F.2d at 320 (even if employer's experienced personnel were aware of safety requirements, failure to provide specific guidance to novice employees established inadequacy of safety program). ComTran's contrary view—that because Mr. Cobb and Mr. Arno attended outside trainings, the company established relevant work rules—defies common sense. *See* ComTran Br. 27-28. If this is all that is required, an employer that lacks any safety rules of its own could send its supervisory employees to outside training covering all of OSHA's standards and be said to have an "established work rule" on every standard.

Finally, ComTran officials' testimony that the company infrequently excavated below four feet, Tr. 67, 166, does not excuse the company from having an established work rule related to excavation safety. Mr. Bostwick, the company president, admitted that ComTran has trench boxes available for employee use when a job requires excavating to a depth that requires a protective system. Tr. 166-67. He also admitted that ComTran had previously done work where, as here, plans suggesting that underground utilities would be at a particular depth were inaccurate, and that in such cases it was foreseeable that the company would have to excavate to depths greater than four or five feet. Tr. 167-68. Because

excavations requiring the use of protective systems were plainly within the ambit of ComTran's work, the company needed work rules designed to protect employees from the hazards inherent in that work.

3. To the Extent that ComTran Had Relevant Work Rules, It Inadequately Enforced Them.

"To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred." *Gem Indus. Inc.*, 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996), *aff'd without published op.*, 149 F.3d 1183 (6th Cir. 1998). A rule that is not enforced consistently is inadequately enforced. *Frank Lill*, 362 F.3d at 845-46. And, the Commission need not "accept an employer's anecdotal evidence" of safety program enforcement "uncritically." *Gioioso I*, 115 F.3d at 110.

The record is replete with evidence that even if ComTran had an adequate safety program in theory, its enforcement was deficient in practice. The most glaring evidence that ComTran's safety enforcement was inadequate is the company's admitted failure to discipline Mr. Cobb despite its concession that he knowingly violated the terms of the cited standards.[14] *See* Dec. 11; Tr. 94, 165;

[14] Mr. Bostwick's opaque statement that Mr. Cobb was "not managing jobs on his own by himself without immediate supervision," Tr. 166, does not show that there had been "consequences" for Mr. Cobb comparable to formal discipline or suspension. *See* ComTran Br. 31. To the contrary, Mr. Bostwick conceded that he

ComTran Br. 28. The ALJ appropriately reasoned that this lack of enforcement was a signal to other ComTran employees that the company does not take safety seriously and that employees can disregard company rules with impunity. Dec. 11. A supervisor's safety-related conduct communicates the employer's expected worksite safety practices to subordinate employees. *See Floyd S. Pike*, 576 F.2d at 77 (citing *Nat'l Realty & Constr. Co*, 489 F.2d at 1267 n.38). And, given that Mr. Cobb is a supervisory employee, his violations were themselves evidence that ComTran's "implementation of [its] rule[s] was lax." *See Zachry*, 638 F.2d at 819 (citing *Floyd S. Pike*, 576 F.2d at 77).

Commission case law does not support a different view. The only apparently contrary authority ComTran cites, *Stevedoring Servs. of America*, No. 97-1105, 1999 WL 230870 (Rev. Comm'n Apr. 12, 1999), is a non-precedential ALJ decision. *See Fred Wilson Drilling Co., Inc. v. Marshall*, 624 F.2d 38, 40 (5th Cir. 1980) (citation omitted). Regardless, *Stevedoring* is distinguishable because it arose in the Fourth Circuit, where the Secretary must establish the foreseeability of a supervisor's misconduct as part of her *prima facie* case. *See Stevedoring*, 1999 WL 230870, at *2-*3. Given that there was evidence in that case that the employer had "counseled" employees, but no evidence whether the counseling was disciplinary, the ALJ held that the Secretary had not met her burden to prove that

---

had not disciplined Mr. Cobb and that Mr. Cobb remained in the same position he held at the time of the violation. Tr. 165-66.

the employer inadequately enforced its work rules. *Id.* At least one other Commission ALJ decision, which ComTran ignores, holds that evidence of "counseling" did not establish discipline and was thus inadequate to show that the employer adequately enforced its safety rules. *See DeWitt Excavating, Inc.*, 23 BNA OSHC 1834, 1839-40 (No. 10-1515, 2011) (holding that counseling of foreman after excavation violation was not discipline where employer acknowledged that foreman was not written up, suspended, or terminated).

Moreover, ComTran's decision to wait on the outcome of the litigation before deciding whether to discipline Mr. Cobb shows that to the extent that ComTran has and enforces relevant work rules, it enforces them inconsistently. S*ee* Tr. 94-95. If discipline is dependent on the outcome of litigation, ComTran would less severely discipline an employee whose admitted safety violation does not result in a civil penalty than an employee whose violation does result in a penalty. Mr. Bostwick's vacillation at the hearing about the proper discipline to impose underscores the company's ad hoc and subjective approach to discipline. *See* Tr. 165-66 (weighing possible options for disciplining Mr. Cobb and admitting, "I don't know what I'm going to do"). Thus, even assuming ComTran had an unwritten work rule addressing the cited hazards, ComTran's inconsistent enforcement establishes the inadequacy of the company's safety program. *See Frank Lill*, 362 F.3d at 845-46 (rejecting unpreventable employee misconduct

defense where employer disciplined some employees for fall-related safety violations, but failed to discipline employees who were not at the edge of the elevated work surface).

The ALJ also properly rejected ComTran's anecdotal evidence of work rule enforcement—the lists of verbal corrections of minor safety violations that ComTran managers created from memory during the course of the litigation and company officials' testimony about those incidents—as inadequate to show that ComTran consistently enforced its work rules. The lists' creation during the course of litigation calls their reliability into question. *See Celotex*, 487 F.3d at 1334. The ALJ thus acted well within his discretion to give the lists no weight in his analysis. *See Gioioso I*, 115 F.3d at 110. And even if, as ComTran asserts, ComTran Br. 29-30, the ALJ should have credited ComTran officials' testimony about the content of the lists, the officials' testimony did not show that ComTran had an effectively administered disciplinary program or that it consistently enforced its work rules. The content of the lists merely shows that company officials occasionally told employees who committed clear, but minor, violations of safety rules unrelated to excavations to correct those violations.

CONCLUSION

For the foregoing reasons, the Court should affirm the ALJ's decision and deny the petition for review.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

HEATHER R. PHILLIPS
Counsel for Appellate Litigation

/s/ Benjamin Botts
BENJAMIN R. BOTTS
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W., Suite S4004
Washington, D.C. 20210
(202) 693-5697
botts.benjamin.r@dol.gov

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(B)

This brief was produced using Microsoft Word, in Times New Roman 14-point typeface, and complies with the type-volume limitation prescribed in Fed.R.App.P. 32(a)(7)(B), because it contains 12,741 words, excluding the material referenced in 11th Cir. R. 32-4.

/s/ Benjamin Botts
BENJAMIN R. BOTTS
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W., Suite S4004
Washington, D.C. 20210
(202) 693-5697
botts.benjamin.r@dol.gov

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of May, 2012, I served Andrew N. Gross, counsel of record for ComTran Group, Inc., with one copy of the Secretary of Labor's brief by overnight delivery at the following address:

400 Colony Square, Suite 200
1201 Peachtree Street, N.E.
Atlanta, Georgia 30361

/s/ Benjamin Botts
BENJAMIN R. BOTTS
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W., Suite S4004
Washington, D.C. 20210
(202) 693-5697
botts.benjamin.r@dol.gov