THE UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor, Complainant-Respondent, v. COMTRAN GROUP, INC., Respondent-Petitioner.	OSHRC DOCKET NO.:11-0646

ORDER DENYING SECRETARY'S MOTION FOR RECONSIDERATION

This action was remanded on July 24, 2013 from the Eleventh Circuit Court of Appeals in *ComTran Group, Inc., v. DOL (ComTran I),* 722 F.3d 1304 (2013). On June 2, 2014, Thomas E. Perez, Secretary of Labor, United States Department of Labor ("Secretary"), filed a motion seeking reconsideration of the Court's Order on Plaintiff's Unopposed Request for Judicial Notice of Trial Record. The motion argues that "the Court clearly erred in ordering" that "any evidence in the *ComTran I* trial record judicially noticed that was adduced by ComTran Group, Inc. pursuant to its affirmative defense of employee misconduct *may not be used or relied on* by the Secretary at trial in his prima facie case regarding the 'employer knowledge' element" and is "contrary to the Eleventh Circuit's mandate" in *ComTran I*.[1]

A motion for reconsideration is appropriate only where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact. *Pres. Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Eng'rs,* 916 F.Supp. 1557, 1560 (N.D.Ga.1995), *aff'd,* 87 F.3d 1242 (11th Cir.1996). A motion

[1] The Court notes that the Secretary failed to comply with Commission Rule 40(a), which mandates that "[p]rior to filing a motion, the moving party shall confer or make reasonable efforts to confer with the other *parties and shall state in the motion if any other party opposes or does not oppose the motion*." (Emphasis added.) 29 C.F.R. 2200.40(a). Since the timeframe to respond to the Secretary's motion expires the day before the trial, the Court sua sponte elects to rule on the motion prior to the expiration of the response period since Commission Rule 40(c) provides that "[a] procedural motion may be ruled upon prior to the expiration of the time for response . . . ." 29 C.F.R. 2200.40(c).

for reconsideration should not be used to present the Court with arguments already heard and dismissed, or to offer new legal theories or evidence that could have been presented in the previously-filed motion. *See Arthur v. King,* 500 F.3d 1335, 1343 (11th Cir.2007); *see also Pres. Endangered Areas,* 916 F.Supp. at 1560 ("A motion for reconsideration is not an opportunity for the moving party and their counsel to instruct the court on how the court 'could have done it better' the first time.").

The Secretary's Motion for Reconsideration, which merely asserts this Court's Order was incorrect and should be changed, fails to qualify under any of these categories; it does not point to the discovery of new evidence, a change in the controlling law, or manifest injustice that will result from the Order. Rather, the Secretary's request for reconsideration can only be said to argue that the Order represents clear error by this Court. "In order to demonstrate clear error of law or manifest injustice, [the Secretary] must base its motion on arguments that were previously raised but were overlooked by the Court. *See O'Neal v. Kennamer,* 958 F.2d 1044, 1047 (11th Cir.1992); *Mays v. U.S. Postal Serv.,* 122 F.3d 43, 46 (11th Cir.1997).

Here, the arguments made by the Secretary were not were overlooked by the Court but rather, were specifically addressed in the Court's Memorandum Opinion and Order ("Opinion") denying the Secretary's Motion for Summary Judgment. The Secretary essentially states his disagreement with the Court's previous Order. This disagreement is not an appropriate ground for reconsideration and on that basis alone should be denied. However, the Court nonetheless will address the merits of the Secretary's motion *infra*.

The Secretary argues that "the sworn testimony and exhibits already a part of the record are unaffected by the Eleventh Circuit's decision, and may be relied upon by either party to

support its position regarding the adequacy of ComTran's safety program." The Court does not agree. As this Court previously indicated in its Opinion:

> Not only do those factual findings not "bind the Court on remand," *ComTran I* is clear that the findings made by the ALJ in discussing ComTran's employee misconduct defense cannot be considered by this Court *until* the Secretary first meets his prima facie burden on knowledge. "[T]he employer bears the burden on affirmative defenses *only* if the Secretary proves a prima facie case first." *ComTran I* at 1314.

(Opinion, June 2, 2014, p, 4.) The Secretary argues that *New York State Electric & Gas Corp.*, 88 F.3d 98, 108-09 (2d. Cir. 1996), cited by both the Eleventh Circuit in *ComTran I*, and this Court in its Opinion, also supports his position. The Court again does not agree. Both this Court's Opinion and the Eleventh Circuit's Opinion in *ComTran I* cite favorably *New York State Electric's* holding that "the employer bears the burden on affirmative defenses *only* if the Secretary proves a prima facie case first." *ComTran I,* 722 F.3d 1304, 1314.

Thus, the Eleventh Circuit held that "the Commission acted arbitrarily, capriciously, and otherwise not in accordance with the law when it relieved the Secretary of [his] burden to prove the essential "knowledge" element of [his] prima facie case and *prematurely* shifted the burden to ComTran." (Emphasis added.) *Id.* It is true that the Secretary's alternative method to show employer knowledge and ComTran's unforeseeable employee misconduct affirmative defense "involve an identical issue: whether the employer had an adequate safety policy." *New York State Elec. & Gas Corp. v. Secretary of Labor,* 88 F.3d 98, 106 (2d Cir.1996).

Nonetheless, "*[t]his does not lessen the Secretary's prima facie burden [ ]*." (Emphasis added.) *ComTran I* at 1308 n.3. "The fact that the employer might litigate a similar or even an identical issue as an affirmative defense does not logically remove an element from the complainant's case." *New York State Elec. & Gas Corp.,* 88 F.3d 98, 106, 107. The Eleventh

Circuit reiterated that *"[i]f (and only if)* the Secretary makes out [his] prima facie case with respect to all four elements, the employer may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct" (Emphasis added.) *Id.* at 1308. Thus, the Eleventh Circuit held that "in the absence of the Secretary making [his] prima facie case, ComTran was not obligated to present *any* evidence on the adequacy of its safety program." *Id.* at 1318. The Eleventh Circuit agreed that the Secretary may establish the element of knowledge with evidence of lax safety standards, with the caveat, *"[b]ut, the Secretary is the one who must provide such evidence*." (Emphasis added.) *Id*.

The Court is not free to ignore the mandate and opinion of the Eleventh Circuit, but instead must proceed in conformity with the express or implied rulings of the appellate court, implementing both the letter and spirit of the mandate. *See Friedman* v. *Mkt. St. Mortg. Corp.,* 520 F.3d 1289, 1294 (11th Cir. 2008). In implementing both the letter and spirit of the mandate, the Court concluded in its Opinion, and reaffirms again now, that since the Secretary failed to introduce *any* evidence of ComTran's safety program --- inadequate or otherwise --- in *ComTran I*, he must make his prima facie case regarding the "employer knowledge" element without the use of prior evidence in *ComTran I*, which was only offered as an affirmative defense in rebuttal of the "employer knowledge" element of the Secretary's case, since "*the Secretary is the one who must provide such evidence*." (Emphasis added.) *ComTran I* at 1318. Accordingly,

IT IS HEREBY ORDERED THAT the Secretary's motion for reconsideration of the Court's Order Dated June 2, 2014 is **DENIED**.

SO ORDERED THIS 6th day of **June, 2014**.

/s/
JOHN B. GATTO, Judge
U.S. Occupational Safety and
Health Review Commission