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

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the Secretary of Labor's ("Secretary") summary judgment motion,[1] which argues that "[t]he evidence already in the record, as well as the evidence developed by the Secretary on remand, establishes as a matter of law that the Citation should be affirmed." (Pl.'s Mem. Supp. Summ. J. p. 1.) In response, ComTran Group, Inc. ("ComTran") argues that the Secretary invites the Court to "rubber stamp" the findings of the former Commission Administrative Law Judge ("ALJ") "without hearing the evidence that ComTran is relying on to further develop the record by explaining its safety program through additional live testimony including an additional witness." (Resp't's Resp. Sec'y's Mot. Summ. J p. 1.) The Court having considered the motion and response thereto, exhibits, and relevant law, and being otherwise fully informed, concludes that the Secretary's summary judgment motion should be denied.

BACKGROUND

This litigation is before the Court on remand from the Court of Appeals for the Eleventh Circuit "for further development of the record." *ComTran Group, Inc., v. DOL (ComTran I),* 722

[1] The Secretary's summary judgment motion was filed pursuant to Rule 56 of the Federal Rules of Civil Procedure, as provided for in Commission Rule 61 ("Motions for summary judgment are covered by Federal Rule of Civil Procedure 56."). 29 C.F.R. § 2200.61.

F.3d 1304, 1318 (2013). In *ComTran I*, the Commission held that ComTran violated standards under the Occupational Safety and Health Act ("OSHA" or the "Act"), 29 U.S.C. §§ 651 et seq., when one of its supervisors was caught digging in a six-feet deep trench with an unprotected five-feet high "spoil pile" at the edge of the excavation. *Id*. at 1306. On appeal, the Eleventh Circuit held as a matter of first impression, and in accordance with decisions in the Third, Fourth, Fifth, and Tenth Circuits,[2] that it is not "appropriate to impute a supervisor's knowledge of his *own* violative conduct to his employer under the Act, thereby relieving the [Secretary] of [his] burden to prove the 'knowledge' element of [his] prima facie case."[3] (Emphasis in original.) *Id.*

Thus, the Eleventh Circuit held for the first time that "the Secretary does not carry [his] burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct."[4] *Id.* at 1316. "A supervisor's "rogue conduct" cannot be imputed to the employer in that situation." *Id*.

> Rather, employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its

[2] *See Pennsylvania Power & Light Co. v. Occupational Safety & Health Review Comm'n,* 737 F.2d 350 (3d Cir.1984); *Ocean Electric Corp. v. Secretary of Labor,* 594 F.2d 396 (4th Cir.1979); *W.G. Yates & Sons Construction Co., Inc.,* 459 F.3d 604 (5th Cir. 2006); *Mountain States Telephone & Telegraph Co. v. Occupational Safety & Health Review Comm'n,* 623 F.2d 155 (10th Cir.1980). Against these decisions out of the Fourth, Tenth, Third, and Fifth Circuits is a decision from the Sixth Circuit, *Danis-Shook Joint Venture XXV v. Secretary of Labor*, 319 F.3d 805 (6th Cir. 2003), that with relatively little analysis of the issue, held that "knowledge of a supervisor may be imputed to the employer, without drawing a distinction, as the other circuits have, between a supervisor's knowledge of misconduct by subordinate employees and knowledge of his own misconduct.

[3] Insofar as the Eleventh Circuit had not yet weighed in and "directly addressed this issue," and relying on Commission precedent, *see e.g., Dover Elevator Co., Inc.,* 16 O.S.H. Cas. (BNA) 1281, at *7 (1993), the Commission held that the supervisor's knowledge of his own malfeasances was imputable to ComTran. *ComTran I* at 1310.

[4] A prima facie case for the violation of an OSHA standard is made by the Secretary by showing (1) that the regulation applied; (2) that it was violated; (3) that an employee was exposed to the hazard that was created; and importantly, (4) that the employer "knowingly disregarded" the Act's requirements. *Id*. at 1307.

> constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].

(Brackets in original.) *Id*. The Eleventh Circuit held in *ComTran I* that "the Secretary made no effort to establish employer knowledge by the second method." *Id*. at 1311. "[H]e called only one witness during [his] case-in-chief, Compliance Officer Spencer, and he provided no evidence as to ComTran's safety program." *Id*. "It is thus clear . . . that [h]e sought to establish employer knowledge in this case solely by utilizing the first method." *Id*.

In evaluating a motion for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 1572 (1970). The movant has the burden of establishing that there are no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In responding to a motion for summary judgment, the nonmoving party "may not rest upon its mere allegations ... but ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Celotex*, 477 U.S. at 324. For the reasons indicated *infra*, the Court concludes that genuine issues of material fact exist regarding the "employer knowledge" element of the Secretary's case in chief and the adequacy of ComTran's safety program.

The Secretary asserts that:

> In this case, the [former] Commission ALJ has already considered a significant amount of evidence of Respondent's safety program and, in the context of the employee misconduct defense, found that the safety program was lax. Under the law of the case doctrine, these factual findings should bind the court on remand, unless Respondent can present substantially different evidence on retrial.

(Pl.'s Mem. Supp. Summ. J. p. 9.) The Court does not agree.

Under the "law of the case" doctrine, generally, "an issue decided at one stage of a case is binding at later stages of the same case." *U.S. v. Harris*, __ Fed.Appx. __, 2013 WL 6234124 (11th Cir. 2013) (citation omitted). However, the doctrine can be overcome if, "since the prior decision, new and substantially different evidence is produced or there has been a change in the controlling authority," or "the prior decision was clearly erroneous and would result in a manifest injustice." (quotation omitted). *This That & the Other Gift & Tobacco, Inc. v. Cobb Cnty., Ga.,* 439 F.3d 1275, 1283–84 (11th Cir. 2006). *See also U.S. v. Krocka*, 522 Fed.Appx. 472 (11th Cir. 2013); *U.S. v. Solomon*, 513 Fed.Appx. 895 (11th Cir. 2013). In the present case, as indicated *supra*, since the prior Commission decision, there has been a change in the controlling authority. Therefore, the law of the case doctrine is inapplicable to this case.

Furthermore, the Secretary's assertion is a misreading of *ComTran I.* 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. The Eleventh Circuit goes on to quote with approval *New York State Elec. & Gas Corp. v. Sec'y of Labor,* 88 F.3d 98, 108 (2d Cir. 1996): "The Secretary must first make out a prima facie case before the affirmative defense comes into play." *Id*. The Eleventh Circuit agrees that the Secretary may establish the element of knowledge with evidence of lax safety standards, with the caveat, "But, the Secretary is the one who must provide such evidence." *Id*. at 1318.

In the underlying decision, all of the evidence regarding ComTran's safety program was adduced by ComTran itself, pursuant to its affirmative defense of employee misconduct. Under the employee misconduct defense, the employer has the burden of establishing, by a preponderance of the evidence, that it met the four elements of the defense (established work rule, communication of the work rule, steps to discover violations of the work rule, and enforcement of the work rule). However, *ComTran I* quoted with approval *Ocean Electric Corp. v. Secretary of Labor,* 594 F.2d 396, 401 (4th Cir.1979), which held that it is "error for the Commission to shift the burden onto" the employer in the absence of the Secretary's proof that the supervisor's misconduct was foreseeable since "no part" of the Secretary's prima facie burden can be "left to speculation or conjecture[.]" *Id*. at 1312.

It is the Secretary's burden to show that the "'the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards].' *W.G. Yates & Sons Constr. Co., Inc. [v. OSHRC,*] 459 F.3d [604,] 609 n. 8[(5th Cir. 2006)]." (First set of brackets in the original). *Id.* at 1316. "Without such evidence, a supervisor's conduct may be viewed as an isolated incident of unforeseeable or idiosyncratic behavior*, see Ocean Elec. Corp.,* 594 F.2d at 401, which is insufficient, by itself, to impose liability under the Act. *See W.G. Yates & Sons Constr. Co., Inc.,* 459 F.3d at 607 [.]" *Id.*

As indicated *supra*, the Eleventh Circuit remanded this case for further proceedings because the ALJ in the underlying case "relieved the Secretary of [his] burden to prove the essential 'knowledge' element of [his] prima facie case and prematurely shifted the burden to ComTran." *Id*. The Secretary now urges the Court to find "as a matter of law," the ALJ's finding that ComTran's safety program is inadequate to make the supervisor's conduct unforeseeable

"should be upheld as a matter of law" (Pl.'s Mem. Supp. Summ. J. p. 9.) To do so would be committing the very same error for which this case was remanded. Such a finding would once again prematurely shift the burden to ComTran. The Court declines to do so.

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); *Williams v. Commissioner,* 1 F.3d 502, 503 (7th Cir.1993); *United States* v. *Polland,* 56 F.3d 776, 779 (7th Cir.1995); *Key v. Sullivan,* 925 F.2d 1056, 1060 (7th Cir.1991). In implementing both the letter and spirit of the mandate, the Court concludes that on remand, 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 *first* regarding the "employer knowledge" element. Therefore, at this stage, prior evidence in the underlying decision and record rebutting the "employer knowledge" element of the case may not be considered, since "*the Secretary is the one who must provide such evidence*." (Emphasis added.) *ComTran I* at 1318.

"The Secretary's alternative method to show employer knowledge and the unforeseeable employee misconduct affirmative defense 'involve an identical issue: whether the employer had an adequate safety policy.' *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98, 106 (2d Cir. 1996). This does not lessen the Secretary's prima facie burden, however. *See id*. at 107 (stating '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')." *Id*. at 1308 n.3.

Thus, viewing the evidence in the light most favorable to ComTran, the Court concludes that the Secretary has not met his burden as the movant of establishing that there are no genuine issues of material fact on the issue of the "employer knowledge" element of his case in chief and the adequacy of ComTran's safety program. Therefore, the Court concludes that summary judgment is not proper. Accordingly,

IT IS HEREBY ORDERED THAT the Secretary's motion for summary judgment is **DENIED**.

SO ORDERED THIS 21st day of **March, 2014**.

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