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**

DECISION AND ORDER

COUNSEL: M. PATRICIA SMITH, Solicitor of Labor, STANLEY E. KEEN, Regional Solicitor, CHRISTOPHER D. HELMS, Counsel, LYDIA J. CHASTAIN, Esq., for Complainant

COUNSEL: ANDREW N. GROSS, Esq., for Respondent

BEFORE: JOHN B. GATTO, Judge

I. INTRODUCTION

The Eleventh Circuit remanded this action "for further development of the record," *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1318 (11th Cir. 2013), and a remand trial was subsequently held on July 29, 2014.[1] The action originally came before the Commission after the Secretary charged ComTran with two violations, both of which the Secretary classified as "serious,"[2] and proposed penalties totaling $9,800.00 for ComTran's failure to avoid a potential cave-in hazard under 29 C.F.R. §§ 1926.651(j)(2) and 1926.652(a)(1). ComTran timely contested the violations. Former Commission Judge Stephen J. Simko, Jr.

[1] The remand record was closed upon the filing of the parties' briefs on September 5, 2014.

[2] *See* 29 U.S.C. § 666(k) (defining a "serious violation" as one that carries "a substantial probability that death or serious physical harm could result").

affirmed the Secretary's two citations but reduced the penalty, from $9,800.00 to $5,000.00, because ComTran showed "good faith" by taking "decisive steps" to strengthen its safety program after the violations were discovered. Judge Simko's order became a final decision when the Commission denied discretionary review. *Id.* at 1310-11.

On appeal the Eleventh Circuit reversed and remanded, holding 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." *Id.* at 1318. Thus, the only issue before the Commission on remand is whether the Secretary can establish that ComTran's safety program was inadequate, such that "ComTran had knowledge" of the safety violations. *Id.* at 1311. For the reasons that follow, Item 1 and Item 2 of Citation 1 are affirmed; a penalty of $2,500.00 is assessed for Item 1 of the Citation; and a penalty of $2,500.00 is assessed for Item 2 of the Citation, as set forth herein.

II. PROCEDURAL ISSUES

The Secretary argues in *Complainant Secretary of Labor's Post-Hearing Brief* that the Eleventh Circuit's opinion "contains no instruction supporting the Court's June 2, 2014, Order [on *Plaintiff's Unopposed Request for Judicial Notice of Trial Record*], which would allow ComTran to rely on the full record below, while prohibiting the Secretary from doing so." (Compl't Sec'y of Labor's Post Hr'g Br., p. 7 n. 6.) However, contrary to the Secretary's assertion, the Court's June 2, 2014, Order simply provided that "until the Secretary makes his prima facie case *first* at trial regarding the 'employer knowledge' element, any evidence

judicially noticed [from] *ComTran I* rebutting the 'employer knowledge' element of the case shall not be considered by the Court." (Order on Pl.'s Unopposed Req. for Judicial Notice of Tr. R., pp. 1-2, June 2, 2014.)

Although the Court recognizes that generally "[t]he burden of proof is satisfied by actual proof of the facts of which proof is necessary, regardless of which party introduces the evidence" (citations omitted), *Aetna Ins. Co. of Hartford, Conn., v. Taylor,* 86 F.2d 225, 227 (5th Cir. 1936),[3] the Eleventh Circuit nonetheless held in the present case that although the Secretary may establish the element of knowledge with evidence of lax safety standards, "*the Secretary* is the one who must provide such evidence." (Emphasis added.) *ComTran Grp., Inc.*, 722 F.3d. at 1318. As the Eleventh Circuit admonished,

> Had the Secretary been required to carry [his] prima facie burden by attempting to show employer knowledge (which, on the facts presented here, and as discussed above, should have been through a showing of lax safety standards), then ComTran might have been able to more effectively rebut the Secretary's offer of proof with *specific* evidence in direct response to the alleged inadequacies. As it was, ComTran had to guess what particular evidence might have been sufficient to rebut the Secretary and establish the adequacy of its safety program. This was not harmless error.

Id. As the Court held in its *Order Denying Secretary's Motion for Reconsideration*, "[it] 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

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

letter and spirit of the mandate." (Order Den. Sec'y's Mot. for Recons., p. 4, June 6, 2014) (citing *Friedman* v. *Mkt. St. Mortg. Corp.,* 520 F.3d 1289, 1294 (11th Cir. 2008)).

The Court also finds no merit in the Secretary's assertion in his post-trial brief that the Court's June 2, 2014, Order "substantially prejudice[d] the Secretary's ability to present his case." (Compl't Sec'y of Labor's Post Hr'g Br., p. 6.) The Secretary admits that at the remand trial he re-called the five same ComTran employee and representative witnesses called at the original 2011 trial and re-elicited their testimony "establishing that [ComTran]'s safety program at the relevant time was inadequate." (*Id.* at 8.) The Secretary also cross-examined ComTran's safety director, Joel Miller, who did not testify at the 2011 trial. (*Id.*) Thus, even assuming *arguendo*, that the Court erred in its ruling, the Court finds that the Secretary was not substantially prejudiced in his ability to present his case.

The Secretary also argues again in his post-trial brief, as he did in *Plaintiff's Motion for Summary Judgment and Supporting Memorandum of Law*, that "[u]nder the law of the case doctrine, [Judge Simko's] factual findings [that ComTran's safety program was lax] should bind the Court on remand, unless [ComTran] can present 'substantially different' evidence on remand." (*Id.*, p. 6 n. 4; Pl.'s Mem. Supp. Summ. J. p. 9.) The Court previously found no merit in this argument, (see *Mem. Op. and Order*, p. 4, Mar. 21, 2014), and still finds no merit in this argument, but will nonetheless address it one last time.

"Under the law-of-the-case doctrine, an issue decided at one stage of a case is binding at later stages of the same case." *United States v. Harris*, 546 F. App'x 898, 900 (11th Cir. 2013) (citation omitted.) "There are three exceptions to the doctrine: (1) the later decision is based on substantially different evidence; (2) **controlling authority has since made a contrary decision**

of the law applicable; and (3) the decision was clearly erroneous and would work a manifest injustice." (Emphasis added.) *Id.* (citing *United States v. Escobar–Urrego,* 110 F.3d 1556, 1561 (11th Cir.1997) (quoting *White v. Murtha,* 377 F.2d 428, 431–32 (5th Cir.1967).) In the present case, there clearly **was** a change in the controlling authority. As the Eleventh Circuit noted:

> This appeal presents an **issue of first impression in our circuit**: Is it 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? Upon close review of the record, briefs, and case law from other circuits, and with the benefit of oral argument, we answer that question in the negative.

(Emphasis added.) *ComTran Grp., Inc.*, 722 F.3d at 1306. Thus, it should be intuitively obvious to the most casual of observers that since there **has** been a change in the controlling authority, the law-of-the-case doctrine is inapplicable in the present case on the narrow issue remanded by the Eleventh Circuit, *supra*, "whether ComTran had knowledge" of the safety violations. *Id.* at 1311.

Furthermore, since the Eleventh Circuit held that the Commission inappropriately "relieved the Secretary of [his] burden to prove the essential 'knowledge' element of [his] prima facie case and prematurely shifted the burden to ComTran," if the Court had done what the Secretary insisted the Court must do, that is, to bind itself to Judge Simko's factual findings that ComTran's safety program was lax, unless ComTran can present "substantially different" evidence on remand, the Court would have committed the very same error for which this case was remanded, by again relieving the Secretary of his burden to prove the essential "knowledge" element of his prima facie case. The Court declined to do so.

III. BACKGROUND

ComTran is a communications utilities company located in Buford, Georgia. It has approximately 50 employees and performs indoor and outdoor utilities work that sometimes requires underground construction at a shallow depth, generally not more than three to four feet.[4] Its work normally involves directional drilling instead of digging. In 2010, Gwinnett County hired ComTran for a small, two-day project that consisted of relocating some existing Department of Transportation utilities that ran along a road in Lawrenceville, Georgia. It involved a simple "tie-in" of the existing duct to a new duct and setting the new junction box. ComTran assigned a two-man crew for the project: Walter Cobb, the supervisor (or foreman) at the site, and Chris Jernigan, a helper who was "fairly new." *Id.* at 1308-09.

The crew broke ground on December 1, 2010. On the first day, Cobb used an excavator to dig a trench that was approximately four feet deep. He placed the "spoil pile" for the excavation at least two feet away from the edge of the trench, and he erected a silt fence between the pile and the excavation. There does not seem to be any dispute that this excavation was done properly and in compliance with OSHA. *Id.* at 1309. On the second morning of the job, ComTran's project manager Sam Arno stopped by to check on the progress. The crew had not yet started digging for the day, and there were no problems with (or hazard in) the trench at that time, so he left shortly thereafter to visit two other projects he was overseeing. Once Arno left, Cobb got into the trench and began digging around to find the utilities conduit, but he was unsuccessful. At some point, he took down the silt fence because he had to "dig back" to find

[4] "ComTran does not often (if ever) have to dig further than four feet because utility cables—in contrast to water and sewer lines, for example—are not typically installed more than 36 to 48 inches underground." *Id.* at 1309 n. 4.

the utilities. As he continued to dig, he widened and deepened the trench (to six feet) and the spoil [pile] came closer to the edge of the excavation. Eventually, it got to the point that Cobb had a five-feet high spoil pile at the edge of the excavation, which—given its six feet depth—created an eleven-feet high wall of earth that was not sloped, benched, or otherwise properly supported. Cobb was the only exposed employee in the trench.[5] *Id.*

While Cobb was still in the trench, an OSHA compliance officer drove by and saw the spoil pile and only part of Cobb's head showing out of the top of the excavation. The officer called the local OSHA office, which then sent a different compliance officer, Caliestro Spencer, to investigate. When he arrived at the site, Spencer saw Cobb digging in the trench. He ordered Cobb out of the excavation and proceeded to photograph the scene, take measurements, and interview Cobb and Arno (who by that time had been called back to the site[6]). As a result of this inspection, the Secretary issued ComTran with two violations and assessed penalties totaling $9,800.00 for Cobb's failure to avoid a potential cave-in hazard under 29 C.F.R. § 1926.651(j)(2) (excavated material must be kept at least two feet from the edge of an excavation) and § 1926.652(a)(1) (requiring sloping, benching, and adequate support systems to protect employees from possible cave-in hazards.) ComTran timely contested the violations. *Id.*

IV. POST REMAND

As the *ComTran* Court reiterated, under the law of the Eleventh Circuit, "the Secretary will make out a prima facie case for the violation of an OSHA standard by showing (1) that the

[5] Jernigan was working at the road during this time and was apparently not involved in the excavation. *Id.* n. 5.

[6] Arno testified at the initial trial that when he returned to the jobsite during the investigation he was "taken aback" by how large the trench was. That size excavation was very unusual, not consistent with his instructions, not planned for, and not "[priced] into the job." *Id.* n. 6.

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. See also *All Erection & Crane Rental Corp.*, 24 BNA OSHC 1353 (No. 09-1451, 2014) (where the Commission held that in order to prove a violation, "the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence.") In the present case, it is undisputed . . . "that the Secretary has satisfied the first three elements of [his] prima facie case. The parties thus agree . . . that (1) the regulations applied; (2) Cobb did not comply with them; and (3) an employee was exposed to the hazardous condition. Consequently, our inquiry is narrowed down to (4) whether ComTran had knowledge." *Id.* at 1311.

"As for the knowledge element, the Secretary can prove employer knowledge of the violation in one of two ways." *Id.* "First, where the Secretary shows that a supervisor had either actual or constructive knowledge[7] of the violation, such knowledge is generally imputed to the employer."[8] *Id.* at 1307-08. "In the alternative, the Secretary can show knowledge based upon the employer's failure to implement an adequate safety program, *see New York State Elec. &*

[7] "An example of actual knowledge is where a supervisor directly sees a subordinate's misconduct." *Id.* at 1308. "An example of constructive knowledge is where the supervisor may not have directly seen the subordinate's misconduct, but he was in close enough proximity that he should have." *Id.*

[8] "We say that a supervisor's knowledge is 'generally imputed to the employer' because that is the outcome in the ordinary case. The 'ordinary case,' however, is where the supervisor knew or should have known that subordinate employees were engaged in misconduct, and not, as here, where the supervisor is the actual malfeasant who acts contrary to the law. *See W.G. Yates & Sons Constr. Co., Inc. v. Occupational Safety & Health Review Comm'n,* 459 F.3d 604, 609 n. 7 (5th Cir.2006) (noting same). As will be seen, that important factual distinction is ultimately what this case is all about." *Id.* at 1308 n. 2.

Gas Corp., 88 F.3d [98,] 105–06 [2d Cir. 1996], with the rationale being that—in the absence of such a program—the misconduct was reasonably foreseeable." *Id.*

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 BNA OSHC 1281, 1288 (No. 91-862, 1993), the Commission held that the supervisor's knowledge of his own malfeasances was imputable to ComTran. *Id.* at 1310. However, as indicated *supra*, and in accordance with decisions in the Third, Fourth, Fifth, and Tenth Circuits,[9] the Eleventh Circuit held as a matter of first impression 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." (Emphasis in original.) *Id.* at 1305.

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" since a supervisor's "rogue conduct" cannot be imputed to the employer in that situation. *Id.* at 1316. Rather, employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor [that is, with evidence of lax safety standards.) (Brackets in original.) *Id*. "Without

[9] 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 one decision from the Sixth Circuit, *Danis-Shook Joint Venture XXV v. Secretary of Labor*, 319 F.3d 805 (6th Cir. 2003), which held that "knowledge of a supervisor may be imputed to the employer."

such evidence, a supervisor's conduct may be viewed as an isolated incident of unforeseeable or idiosyncratic behavior." (Citations omitted.) *Id.*

In *North Landing Line Construction Company*, the Commission recognized the Secretary's dilemma of having the burden of establishing that a company's safety program was inadequate and cited with approval the Fourth's Circuit's opinion in *Ocean Electric Corporation v. Secretary of Labor*, that "[t]here is no reason, of course, that, when a question concerning the adequacy of a training program is under consideration by the Secretary, he may not require the employer to produce all relevant information as in any other civil case." *N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1475 (No. 96-0721, 2001) (citing *Ocean Elec. Corp.*, 594 F.2d 396, 403 n. 4 (4th Cir. 1979)). Thus, the Commission held in *North Landing Line* that "any deficiencies in NLL's response should be taken as establishing that there was no such evidence, not that the Secretary failed to carry [his] burden." *Id.* "Moreover, evidence of NLL's safety program and rules, including their communication and enforcement, is within NLL's own control, and the Secretary properly requested its production. Responsibility for any evidentiary deficiencies on these points, therefore, rests with NLL." *Id.* at 1476 (citing *CF&T Available Concrete Pumping*, 15 BNA OSHC 2195, 2197 n. 6 (no text of footnote 6) (No. 90-329, 1993)).

Thus, the Court finds here, as the Commission did in *North Landing*, that evidence of ComTran's safety program and rules, including their communication and enforcement, is within ComTran's own control, and the Secretary properly requested its production. Responsibility for any evidentiary deficiencies on these points, therefore, rests with ComTran, and any deficiencies

in ComTran's responses establish that there was no such evidence, not that the Secretary failed to carry his burden.[10]

Established Work Rule

ComTran argues that its relevant work safety rules in 2010 were contained in its 2012 *Employee Handout – Excavation and Trenching Safety* and its 2012 *Miscellaneous Materials – Excavation and Trenching* (collectively, the 2012 Training Materials), and described in the employee handouts distributed at quarterly safety training meetings.[11] (Trial Tr. 20, July 29, 2014; Ex. R-11, Ex. R-12; *see also* Ex. B, pp. 017-066.) According to ComTran, the 2010 Training Materials were discarded after it received the newer edition of the publication sometime in 2011. (Tr. 72, 75, 92, 97-99.)

However, the 2012 Training Materials were not in ComTran's Safety Manual Policy & Procedures entered into evidence at the initial trial. (*See* Ex. R-4.) Although the Safety Manual did include a section called "Excavations," the only rules it references were related to underground utilities and the only OSHA standard mentioned was 29 C. F. R. § 1926.956, which addressed underground lines. (*Id.*, R-4, pp. 30-32.) None of the rules in ComTran's Safety Manual addressed the hazards of spoil pile material falling into the excavation and cave-ins.

[10] The Commission referenced *North Landing Line* again in a recent opinion where the Secretary argued, relying on *North Landing Line*, that "a party's deficient response to a request for documents within its own control is evidence that documents do not exist." *E.R. Zeiler Excavating, Inc.*, 2014 WL 4745565 * 2 (No. 10-0610, Sept. 15, 2014) (citing *N. Landing Line Constr. Co.*, 19 BNA OSHRC at 1474). However, in *E.R. Zeiler*, the Commission noted that "neither the questions nor the requests to which Zeiler was responding were introduced into evidence, making it impossible to determine the meaning of the company's responses." *Id.* In the present case, unlike *E.R. Zeiler*, both the questions and requests to which ComTran was responding are in the record.

[11] The 2012 Training Materials are excerpts from Chapter 11 of a guide published by Blue Gavel Press entitled *OSHA Training Guide for the Construction Industry 24 - 6th Edition*. (*Id.*)

ComTran admitted that the 2012 Training Materials were published well after the time frame relevant to the December 2010 inspection but argues that the 2012 version was "almost identical to" the documents it asserted that it had used in 2010. (Tr. 23, 92, 96.) However, Miller admitted that he had not seen or reviewed the alleged 2010 version of the 2012 Training Materials since "probably the day that [he] threw it out" when the next edition came out. (Tr. 92.) Significantly, Miller admitted that he had made no efforts to obtain a copy of the alleged 2010 version of the 2012 Training Materials from the publisher even though he didn't think that it would have been hard to do. (Tr. 93.)

Assuming, *arguendo*, that the 2010 Training Materials did exist, the Secretary argues that he is entitled to an adverse inference against ComTran under the rule against spoliation since they were destroyed during the pendency of this litigation. (*See* Compl't Sec'y of Labor's Post Hr'g Br., p. 11.) The Court does not agree. "In the Eleventh Circuit, an adverse inference is drawn from a party's failure to preserve evidence *only* when the absence of that evidence is predicated on bad faith." (Emphasis added.) *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (citing *Vick v. Texas Employment Comm'n,* 514 F.2d 734, 737 (5th Cir.1975).) "'Mere negligence' in losing or destroying the records is not enough for an adverse inference, as 'it does not sustain an inference of consciousness of a weak case.'" *Id.* (quoting McCormick, Evidence § 273 at 660-61 (1972), 31A C.J.S. Evidence § 156(2) (1964).)

"Thus, under the 'adverse inference rule,' we will not infer that the missing speed tape contained evidence unfavorable to appellees unless the circumstances surrounding the tape's absence indicate bad faith, *e.g.*, that appellees tampered with the evidence." *Id.* Here, the Court concludes that there is no evidence in this case to indicate that ComTran purposely lost or

destroyed the relevant portion of the 2010 training materials, if they existed. At best, the evidence indicates that the destruction resulted from negligence.[12] Therefore, the Court declines to draw an adverse inference from the allegedly missing 2010 training materials.

The Secretary also argues that Federal Rule of Evidence 1002 and the "best evidence rule" both demand that the 2012 Training Materials be discounted in their entirety, as they cannot be relied upon to establish the contents of any training materials allegedly used in 2010. (Compl't Sec'y of Labor's Post Hr'g Br., p. 11; see also *Id.* at n. 8.) The Court agrees with the Secretary. Though somewhat expanded, Rule 1002 "is otherwise a conventional restatement of the so-called 'best evidence' rule." *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir. 1994) (*citing* 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 1002[01], at 1002–3 (1993)). Rule 1002 mandates that "[a]n original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise." Fed.R.Evid. 1002.[13] "Thus, [t]he best evidence rule provides that the original documents must be produced to prove the content of any writing, recording or photograph." *United States v. Flanders*, 752 F.3d 1317, 1336 (11th Cir. 2014) (citing *United States v. Howard,* 953 F.2d 610, 612 n. 1 (11th Cir.1992.)

The Court notes that an original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

[12] Miller testified that "I wouldn't have kept that because the new version came out." (Tr. 97.)

[13] Although Federal Rule of Evidence 1007 provides that "[t]he proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement" it must be from "the party against whom the evidence is offered." Fed.R.Evid. 1007. Here, the testimony offered by ComTran was not offered as an admission by the Secretary (i.e., the party against whom the evidence is offered). Thus, Rule 1007 is not applicable.

> (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
> (b) an original cannot be obtained by any available judicial process;
> (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
> (d) the writing, recording, or photograph is not closely related to a controlling issue.

Fed.R.Evid. 1004. Here, there is no evidence that the original 2010 Training Materials, if they existed, were lost or destroyed through bad faith on the part of ComTran or because the Secretary had control of the original. Nonetheless, the original 2010 Training Materials, if they existed, are closely related to the controlling issue on remand and ComTran failed to establish that they could not be obtained by any available judicial process.

The Notes of the Advisory Committee indicate that "the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible." Fed.R.Evid. 1004, Notes of the Advisory Committee. Here, ComTran's explanation for its failure to produce the original 2010 Training Materials, if they existed, was that they were replaced with a more current version. However, after remand, ComTran knew through discovery requests at least as early as December 2013 that it was required to produce evidence of the 2010 Training Materials. Thus, even assuming, *arguendo*, that the 2010 version existed, but that ComTran no longer had them in its possession, ComTran had over seven months prior to the remand trial to obtain copies of those records from the publisher, either voluntarily or through the Court's available judicial process. ComTran admitted that it made no such efforts. Therefore, the Court does not find satisfactory ComTran's explanation for its failure to produce the originals. Thus, the original

2010 version was required and other evidence of the content of the writing, *i.e.*, the 2012 version, was therefore not admissible.

Nonetheless, ComTran argues that the "best evidence" rule is not applicable here "because ComTran only sought to prove its policy of regularly distributing safety training materials covering the safety rules for spoil piles and cave in protection." (Resp't's Post Hr'g Br. ComTran, p. 8.) The Court does not agree. The relevant inquiry in this case is not as narrow as ComTran suggests. As the Eleventh Circuit noted, the proper inquiry is whether ComTran had lax safety standards. *ComTran Grp., Inc.*, 722 F.3d at 1316. Critical to this inquiry is proof of ComTran's actual safety standards it had in place at the relevant period—which obviously necessitates proof of the actual *contents* of those safety standards. Since ComTran asserted that the safety standards it had in place at the relevant period included the 2010 version of the 2012 Training Materials, the Court concludes that the "best evidence" rule is applicable and therefore, ComTran's secondary evidence, the 2012 Training Materials, is given no weight. Thus, the Court finds that ComTran did not establish that it had safety standards in place at the relevant period in 2010 vis-à-vis the 2012 Training Materials.

As noted *supra*, ComTran also argues that the relevant work safety rules in 2010 were described in the employee handouts distributed at quarterly safety training meetings. However, the Court accords little weight to any of the October 20, 2010, Weekly Toolbox Safety Meeting forms since, as indicated *infra*, the same October 20, 2010, Weekly Toolbox Safety Meeting form on "Excavation & Trenching #1" was submitted at both the initial trial and the remand trial with attached *different* sign-in sheets.

At the initial trial before Judge Simko, a Weekly Toolbox Safety Meeting form was admitted indicating that training on "Excavation & Trenching #1" was held on *October 20, 2010*. (Ex. R-2, p. 3.) However, the sign-in sheets attached to that form included four pages, each dated *June 17, 2010*, and each indicated that the training topic was on "Backhoe, Excavator & Loader Operation, Maintenance and Safety."[14] (*Id.*, pp. 4-6.) Miller also admitted that the *June 17, 2010*, sign-in sheets attached to the October 20, 2010, "Excavation & Trenching #1" form did not indicate that excavation safety or spoil pile safety was addressed at that meeting. (Tr. 94-95.)

After remand of this matter, the Secretary issued written discovery to ComTran in December 2013 "to determine what, if any, additional evidence [ComTran] failed to present at the 2011 [trial] regarding the sufficiency of its safety program." (Compl't Sec'y of Labor's Post Hr'g Br., p.7; Ex. A.) Specifically, in his interrogatories the Secretary asked ComTran to (a) identify all applicable work rules which were allegedly violated and all documents containing such work rules and (b) describe all communication of such work rule(s) to employees indicating whether such communication was oral or in writing. (Ex. A, pp. 003, 005.) Likewise, in his request to produce, the Secretary asked ComTran to "[p]rovide a complete and true copy each work rule related to Citation I, Item I, and Citation I, Item 2" and to "[p]rovide a complete and true copy of [ComTran]'s work rules communicated to its employees in effect at the time of the December 2, 2010 inspection." (*Id.*, pp. 012, 013.)

[14] At the remand trial ComTran also submitted copies of those same June 17, 2010 sign-in sheets and additional sign-in sheets indicating training was also held on June 17, 2010 on "Utility Damage Prevention." (Ex. R-13, pp. 1-6.)

In both of its responses, ComTran referred the Secretary to the evidence already part of the record from the initial trial, "as well as other documents listed on the [ComTran's] PreHearing Statement" and "[as]s a supplement to those materials," training handouts and related instructional materials related to company rules and practices described in ComTran's response to the interrogatories. (Ex. B, pp. 003, 014-015.) The Secretary subsequently requested for further clarification, (Ex. C, Ex. F), and ComTran responded by producing additional toolbox training materials. (Ex. D.) Most of the additional toolbox training materials were not relevant to the cited potential cave-in hazard.[15] However, ComTran's production did include two Weekly Toolbox Safety Meeting forms indicating again that training was held on October 20, 2010, one on "Excavation & Trenching #1" and another on "Excavation & Trenching # 2." (Ex. D., pp. 031, 033). However, unlike the sign-in sheets introduced at the initial trial, the sign-in sheets attached to these Weekly Toolbox Safety Meeting forms were *undated* and indicated that the training was related to "Excavation & Trenching #1" and "Excavation & Trenching # 2 respectively. (*Id.*, pp. 032, 034).[16] Therefore, the Court accords little weight to these October 20, 2010, Weekly Toolbox Safety Meeting forms.

There was also a Training Certificate admitted into the record at the initial trial, which indicated that Arno completed a "Trench Shoring Services Safety Training in Excavation Course" on October 28, 2008, more than two years prior to the inspection and citation at issue in

[15] A Training Certificate indicating that Cobb had completed "Fall Protection" training was completed on July 6, 2010. (Ex. D., p. 007). The topics mentioned in the toolbox training materials included personal protective equipment (Ex. D., pp. 008-011), ladder safety (Ex. D., p. 012), Backhoe, Excavation & Loader Operation, Maintenance & Safety (Ex. D., pp. 013-015), Utility Damage Prevention (Ex. D., pp. 016-018), antifreeze, (Ex. D., pp. 019-022), paint additive (Ex. D., pp. 023-024), noalox anti-oxidant (Ex. D., pp. 025-026), driving (Ex. D., pp. 027-028), moving equipment (Ex. D., pp. 029-030).

[16] At the remand trial, ComTran submitted the same two Weekly Toolbox Safety Meeting forms again. (Ex. R-14.)

this case. (Ex. R-2, p. 1.) The Court gives some weight to this evidence but notes that since it is more than two years prior to the inspection and citation, it is not indicative of the adequacy of ComTran's safety program at the time of the inspection and citation.[17]

ComTran also submitted at the initial trial an unsigned, undated form titled "Sam Arno Training List," that indicated that Arno attended Excavation and Trenching training on October 20, 2010; Excavation Safety training on March 17, 2010; and Trenching/Shoring Certification on October 28, 2008. (Ex. R-3.) However, there is no indication in the record as to the creator of that list, when it was created, or any evidence of its accuracy. There is also no credible evidence to support the October 20, 2010 alleged training date, as indicated *supra*. Therefore, the Court gives little weight to this training list. Under these circumstances, the Court finds that the Secretary has established that ComTran did not have specific work rules addressing the proper location for a spoil pile and adequate protective systems for excavations.

Adequate Communication, Violation Detection, and Enforcement of the Rule

Because the Secretary has established that ComTran did not have established work rules designed to avoid violations of the cited standards, the Secretary has also established that ComTran necessarily failed to adequately communicate the required rules. As to employee discipline, ComTran admitted in its supplemental responses to the interrogatories that it had never detected or disciplined an employee for a violation of its work rules relevant to Citation 1, Items 1 and 2. (*See* Ex. D. p. 003.) Further, the record contains only three lists of verbal

[17] The Commission recently held that "[w]e agree that the adequacy of Employee A's prior training is relevant to assessing whether LJC's instructions were sufficient." *LJC Dismantling Corp.*, 24 BNA OSHC 1478, 1482 (No. 08-1318, 2014) (citing *Gary Concrete,* 15 BNA OSHC at 1054-55, 1991 CCH OSHD at p. 39,451 (adequacy of instructions, training and supervision assessed in light of employee's work history and extent of judgment involved in assigned task).

warnings allegedly given to employees for minor infractions, which company officials created after OSHA issued the citations in this case. (*See* Ex. R-6, Ex. R-7, Ex. R-8; Tr. 39-40, 47, 57.) After remand, the Secretary asked ComTran to produce its disciplinary policy and each and every disciplinary record that ComTran has created in the past five years. (*See* Ex. A. p. 013.) In response, ComTran indicated that its disciplinary policy "is included in its Safety Manual that was provided … in connection with the prior [trial]" and that all discipline records "were provided … in connection with the prior [trial]." (*See* Ex. B, p. 015.)

However, ComTran's Safety Manual submitted at the initial trial had only one reference to discipline: "It is the responsibility of management to see that these rules, policies, and programs are carried out, and anyone violating these should be immediately warned as to the dangers of violating these rules. Continual violation of these safety rules, policies, and programs will be considered grounds for dismissal." (Ex. R-4, p. i.) Further, the only "discipline records" submitted at the initial trial were the lists of verbal warnings given by supervisors Arno, Cobb, and Clark, which were compiled in preparation for that litigation. (*See* Ex. R-6, Ex. R-7, Ex. R-8.)

After remand, although the Secretary asked ComTran through discovery for any additional evidence that it took steps to discover safety violations, ComTran produced none. Further, when ComTran was asked to admit that it "did not keep daily logs or other records showing that it took steps to discovery [sic] violations of its work rules," ComTran admitted that it "d[id] not maintain a central coordinated repository for discipline records." (*See* Ex. A, p. 009; Ex. B, p. 009.) Although ComTran asserted that its "supervisors maintain[ed] file notes in connection with their projects to which they [could] refer, if necessary;" it did not claim that

those "notes" were used by the Company in any organized way to discover safety violations. Similarly, when asked if it had presented "all existing documentary evidence of the steps it took to discover violations of the relevant work rules" at the original trial in 2011, ComTran asserted that supervisors maintained "informal file notes" but admitted that those informal file notes were "not formal Company documents." (Ex. A, p. 010; Ex. B, p. 010.) In any event, ComTran failed to produce any of those "informal file notes" in response to the Secretary's request that it produce all evidence of discipline. (*See* Ex. A, p. 013.)

ComTran also admitted failing to timely discipline Cobb, despite its concession that he violated the terms of the cited standards. Counsel: "So isn't it true that you and Mr. Bostwick wanted to wait and see what kind of penalty ComTran was going to receive before deciding how to discipline Mr. Cobb?" Mr. Arno: "It would appear, yes." (Tr. 51.) However, Bostwick testified that he immediately demoted Cobb and took his company vehicle away from him, following the OSHA inspection. (Tr. 16.) Despite that assertion, however, Bostwick later admitted that he himself did not consider the alleged demotion or removal of company truck to be discipline. (Tr. 17.) Cobb also did not suffer any action he recognized as discipline within the months following his misconduct in December of 2011. Counsel: "But at the time of the [trial] six months after the inspection ComTran had not disciplined you, is that right?" Cobb: "I just had a verbal agreement that – they just told me that there was going to be some discipline. They didn't know exactly what was going to happen right then." (Tr. 51.) At the initial trial, Arno also testified that he "went to Mr. Bostwick, the owner of the company, and we discussed it, and we made the decision to wait and see what kind of punishment ComTran was going to be given." *ComTran Grp., Inc.*, 23 BNA OSHC 2143 * 8 (No. 11-0646, 2011).

Based upon the foregoing, the Court finds that the Secretary has established that ComTran had knowledge of the violations, based upon its failure to implement an adequate safety program.

Affirmative Defenses

Since the Secretary established a *prima facie* case with respect to all four elements, ComTran "may then come forward and assert the affirmative defense of unpreventable or unforeseeable employee misconduct." *Eller-Ito Stevedoring Co., LLC v. Sec'y of Labor*, 567 F. App'x 801, 803 (11th Cir. 2014) (citing *ComTran Grp., Inc.* at 1308. "This defense requires the employer to show that it: (1) created a work rule to prevent the violation at issue; (2) adequately communicated that rule to its employees; (3) took all reasonable steps to discover noncompliance; and (4) enforced the rule against employees when violations were discovered." *Id.* at 804 (citing *Id.* at 1307). See also *Schuler-Haas Electric Corp.,* 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006) (where the Commission also held that to establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule). The Court notes, as did the Eleventh Circuit, that the Secretary's alternative method to show employer knowledge and the unforeseeable employee misconduct affirmative defense "involve an identical issue: whether the employer had an adequate safety policy." *ComTran Grp., Inc.* at 1308 n. 3. "The issue arises as part of the Secretary's case because a finding of an employer's constructive knowledge may rest on a failure to implement policies adequate to prevent unsafe practices. This

question is, in substance, the same as the one presented when the employer invokes the unpreventable misconduct defense: the employer can avoid liability by showing that it established and communicated a rule designed to prevent the violation, and that it reasonably monitored and enforced compliance with the rule." *New York State Elec. & Gas Corp.* at 106 (citing *Pride Oil Well Serv.,* 15 BNA OSHC 1809, 1816 (No. 87-692, 1992)). Thus, much of the Court's analysis of ComTran's affirmative defense will necessarily involve similar or identical evidence analyzed in the Secretary's *prima facie* case.

A. Established Work Rule.

The employer must show it has a specific work rule designed to prevent the violative conduct. ComTran argues that it has a specific work rule, but as indicated *supra*, the Secretary established that ComTran did not have specific work rules addressing the proper location for a spoil pile and adequate protective systems for excavations. No such rule appeared in its Safety Manual. Further, none of the rules in ComTran's Safety Manual addressed the hazards of spoil pile material falling into the excavation and cave-ins.

Nonetheless, ComTran argues that "witnesses pointed to rules described in employee handouts distributed at quarterly safety training meetings" and that "[t]hese handouts describe additional ComTran work safety rules that specifically cite the OSHA standards at issue, with witnesses identifying them as 'part of the ComTran work rules that Walter Cobb had been schooled in, was certified in, and to which he was expected to adhere; that the handouts of training materials distributed at [quarterly safety training] meetings are part of the company's work rules.'" (Resp't's Post Hr'g Br. ComTran, p. 7.) The Court does not agree.

As indicated *supra*, since ComTran failed to produce the original 2010 Training Materials in order to prove their content, ComTran did not establish that it created a work rule to prevent the violations at issue. ComTran argues that "any alleged deficiency in the documentary exhibit was superceded [sic] by the testimony of the witnesses." (*Id.* at p. 8.) The Court does not agree. At best, the witness testimony could only (theoretically) establish that ComTran had some work rules in place but it certainly could not, and did not, establish what the actual content of the relevant work rules were. Again, only the 2010 Training Materials could prove the actual content of its 2010 safety rules. Furthermore, as indicated *supra*, ComTran admitted that the testimony of its witnesses was only "to prove its policy of regularly distributing safety training materials covering the safety rules for spoil piles and cave in protection" but not the actual content of the safety rules themselves.

ComTran also argues that the "best evidence" rule does not "require production of a document simply because the document contains facts that are also testified to by a witness." (*Id.*) (citing *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir. 1994)). However, in *Swann*, the question posed to the witness "did not seek to elicit the content of any writing; therefore, Rule 1002 was not implicated." (*Id.* 27 F.3d at 1543.) Thus, the *Swann* Court held that the district court abused its discretion in excluding the witness's testimony pursuant to the best evidence rule. In the present case, unlike in *Swann*, the Court did *not* exclude any witness testimony pursuant to the best evidence. Rather, the Court finds that such testimony could not establish the actual content of any 2010 work safety rules in place at the time of the citations.

Therefore, the Court finds that ComTran has failed to establish it had specific work rules addressing the proper location for a spoil pile and adequate protective systems for excavations.

Thus, the Court finds that ComTran "failed to formulate and implement adequate training and work rules necessary to ensure [Cobb] could safely perform the job" since the training Cobb received "was too general in nature to have effectively taught him to be aware of how to prevent the violation of the standard." *Gary Concrete Products Inc.*, 15 BNA OSHC 1051, 1056 (86–1087, 1991).

B. Adequately Communicate.

ComTran must also demonstrate that it had prescribed work rules that satisfy the requirements of the cited standard and that it had adequately communicated and effectively enforced such rules. *Id.* In evaluating the adequacy of a safety program, the substance of the program is determinative rather than its formal aspects. *Jones & Laughlin Steel Corp.*, 10 BNA OSHC 1778, 1782 (No. 76–2636, 1982.) In order to be considered effective, ComTran's work rule must be clear enough to eliminate employee exposure to the hazard covered by the standard, *Foster–Wheeler Constructors, Inc.*, 16 BNA OSHC 1344, 1349 (No. 89–287, 1993), or must be "designed to prevent the cited violation," *Gary Concrete Prods. Inc.*, 15 BNA OSHC 1051, 1056 (No. 86–1087, 1991.) Generally speaking, the work rule must be sufficiently precise to implement the requirements of the standard or be functionally equivalent to it. *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1415 n. 4 (No. 89–1027, 1991); *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88–2642, 1991); *Ormet Corp.*, 14 BNA OSHC 2134, 2139 (No. 85–531, 1991).

However, ComTran is not required to institute a work rule explicitly tracking the precise language of the standard where employees knew of and acted in accordance with safe work practices. *Texland Drilling Corp.*, 9 BNA OSHC 1023 (No. 76–5307, 1980.) Thus, in *Beta*

Constr. Co., 16 BNA OSHC 1435, 1447 n. 8 (No. 91-102, 1993), the Commission rejected the Secretary's specific objections to the adequacy of Beta's safety program that the instructions given to employees were not set forth as formal, established work rules because they do not appear in Beta's written safety manual. The Commission held that while the procedures Beta expected its employees to follow are not fully documented in the written safety program material introduced into evidence, "it is clear that they were adequately communicated to the employees and that the employees understood them." *Id.*

ComTran argued in its *Post Remand Hearing Brief of ComTran The ComTran Group, Inc.* that here, as in *Beta,* "it is clear from the record that while the spoil pile and protective system procedures ComTran expected its employees to follow were not documented in its written safety manual," nonetheless "it is clear that they were adequately communicated to the employees and that the employees understood them." (Post Remand Hr'g Br. of Resp't The ComTran Group, Inc., pp. 14-16.) The Court does not agree. Because ComTran failed to prove it had established work rules designed to avoid violations of the cited standards, *supra*, it necessarily failed to prove it adequately communicated the required rules.

C. Reasonable Steps to Discover Violations.

An "[e]ffective implementation of a safety program requires 'a diligent effort to discover and discourage violations of safety rules by employees.'" *Structural Bldg. Sys., Inc.*, 20 BNA OSHC 1773, 1779 (No. 03-0757, 2004) (quoting *American Sterilizer Co.*, 18 BNA OSHC 1082, 2087 (No. 91-2494, 1997)). Monitoring also means that employees are properly supervised. *L. R. Wilson and Sons, Inc.*, 17 BNA OSHC 2059, 2064 (No. 94-1546, 1997). Here, ComTran

failed to produce during discovery any additional evidence that it took steps to discover safety violations.

As indicated *supra*, when asked to admit that "ComTran did not keep daily logs or other records showing that it took steps to discovery [sic] violations of its work rules," ComTran admitted that it "does not maintain a central coordinated repository for discipline records," and stated that although "ComTran supervisors maintain file notes in connection with their projects to which they can refer, if necessary," ComTran does not claim that these "notes" were used by the Company in any organized way to discover safety violations. Similarly, although ComTran asserted that supervisors maintained "informal file notes," it also admitted that those notes were "not formal Company documents." In any event, the Court concludes that ComTran failed to produce any of these "notes" in response to the Secretary's request that it produce all evidence of discipline.

In addition, ComTran admitted that it had never detected or disciplined an employee for a violation of its work rules relevant to Citation 1, Items 1 and 2. It is not enough for an employer to generally communicate and enforce its safety rules; the employer must effectively communicate and enforce 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). Thus, the Court finds that ComTran did not maintain a record of safety violations even when they were discovered.

Further, the record indicates only three lists of verbal warnings allegedly given to employees for minor infractions, which company officials created after OSHA issued the citations in this case. 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 Court finds that these lists are accorded little weight. Even if the lists could be considered 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. Other than evidence 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 prior to the OSHA inspection at issue. Considering ComTran's discovery responses and the testimony developed by the Secretary on remand, the Court finds that ComTran did not take reasonable steps to discover safety violations.

D. ComTran Did Not Effectively Enforce Its Safety Program.

Adequate enforcement is a critical element of the adequacy of an employer's safety program. "To prove that its disciplinary system is more than a paper program[,] an employer must show evidence of having actually administered the discipline outlined in its policy and procedures." *E.G. Connecticut Light & Pwr. Company*, 13 BNA OSHC 2214 (No. 85-1118, 1989) (reprimand letters issued). Evidence of "counseling," without more, does not establish discipline and is 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).

The Commission has also found that programs consisting only of pre-inspection verbal warnings are insufficient to establish the defense of employee misconduct. *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1456 (No. 93-2971, 1995). Further, "a supervisor's breach [of] a company safety policy is strong evidence that the implementation of the policy is lax." *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2098 (No. 10-0359, 2012) (citing *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1480 (No. 76-1538, 1979).

In this case, ComTran did not have a clear policy of progressive discipline which it effectively enforced. The record developed on remand is replete with evidence that ComTran's enforcement was deficient in practice. The most glaring evidence of deficiency is ComTran's admitted failure to timely discipline Cobb, despite its concession that he violated the terms of the cited standards, and evidence that Cobb did not suffer any action he recognized as discipline within the months following his misconduct in December of 2011. Although Bostwick claimed that he immediately demoted Cobb and took his company vehicle away from him following the OSHA inspection, he admitted that he himself did not consider the demotion or removal of company truck to be discipline. The testimony also established that Cobb did not suffer any action he recognized as discipline within the months following his misconduct in December of 2011.

A supervisor's safety-related conduct communicates the employer's expected worksite safety practices to subordinate employees. See *Floyd S. Pike v. OSHRC*, 576 F.2d 72, 77 (5th Cir. 1978) (citing *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 n. 38 (D.C. Cir. 1973)). "Because 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.

Second, the fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax." *Id.* Here, given that Cobb is a supervisory employee, his violations were themselves strong evidence that implementation of the policy was lax.

The Court also finds that since ComTran only issued verbal warnings and counseling for discovered safety violations, and that it did not keep contemporaneous records of the verbal warnings its supervisors allegedly issued, and that it had no evidence of having ever issued any written discipline, ComTran did not effectively enforce its safety program. See *Boh Bros. Constr. Co. LLC*, 18 BNA OSHC 2210, 2216 (No. 99-1590, 2000) (employer failed to establish effective enforcement where corporate safety director did not actually enforce work rules or discipline employees who violated the rules, but instead, would "make suggestions on how to do it the correct way.").

ComTran has admitted that the only evidence of discipline it had were the lists of verbal warnings issued for minor safety infractions. Even if the Court considered these lists, they did not show that ComTran had effectively administered a disciplinary program or that it consistently enforced its work rules. At best, the content of the lists merely showed that company officials occasionally told employees who committed clear, but minor violations of safety rules unrelated to excavations, to correct those violations. Although Cobb testified that he did "some written up warnings," ComTran's discovery responses make clear that no such written discipline existed.

Furthermore, although Arno issued two verbal warnings to Clark within four months, both for safety violations involving failure to use appropriate personal protective equipment, this evidence indicates that ComTran did not discipline Clark progressively, despite his repeated failure to use appropriate personal protective equipment. Accordingly, the Court finds that even assuming, *arguendo*, that ComTran had relevant safety work rules, it did not adequately enforce those rules.

Thus, for the foregoing reasons, ComTran has failed to establish any of the elements of the unpreventable employee defense. Further, the Court finds that ComTran's safety program was inadequate such that the violative conduct of its supervisor was foreseeable.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

As Judge Simko found in the initial trial, which was not disturbed by the Commission or the Eleventh Circuit on appeal, at the time of the inspection, "ComTran employed 48 employees. The company had no history of previous violations. ComTran demonstrated good faith in its implementation of a safety training program. Bostwick, the president of ComTran, testified that

the company took decisive steps to reinforce its safety program." *ComTran Grp., Inc.*, 23 BNA OSHC 2143, 2152 (No. 11-0646, 2011).

> Within two weeks [of the inspection] we had an outside consultant come in and give a four-hour class on trench safety to every single person. We shut down for a Friday afternoon and did it. . . . Our safety program, we've had 1400 days with no time lost to injury at all, and it's a result of our safety program.

Id. "The gravity of each of the violations is high. Excavation cave-ins are a common occurrence in Georgia. In this case, Cobb was working directly below the spoil pile. He was already in an unprotected excavation that was 6 feet deep in Type B soil." *Id*. "The excavation was next to a busy road, and the employees had used excavators on the site. The court credits ComTran for demonstrating good faith following the inspection, and accordingly reduces the penalties proposed by the Secretary." *Id.* Judge Simko assessed a penalty of $2,500.00 each for Item 1 and Item 2. *Id.* The Court finds, for the same reasons indicated by Judge Simko, that the appropriate penalty is $2,500.00 each for Item 1 and Item 2.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

VI. ORDER

IT IS HEREBY ORDERED THAT Item 1 and Item 2 of the Citation, alleging serious violations of §§ 1926.651(j)(2) and 1926.652(a)(1) respectively, are **AFFIRMED**.

IT IS FURTHER ORDERED THAT a penalty of $2,500.00 is assessed for Item 1 of the Citation and a penalty of $2,500.00 is assessed for Item 2 of the Citation.

SO ORDERED THIS 14th day of **October, 2014**.

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