

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant,  
v.  
Quinlan Enterprises,  
Respondent.

OSHRC Docket No. 12-1698  
(REMAND)

Appearances:

Uche N. Egemonye, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, Georgia  
For Complainant

Frank L. Kollman, Esq., Kollman & Saucier, P.A., Timonium, Maryland  
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER ON REMAND**

On August 7, 2012, the Secretary issued a three-item Citation and Notification of Penalty to Quinlan Enterprises following an inspection conducted by CSHO Gordon Bower at a multi-employer construction site in Albany, Georgia. Quinlan was the steel erection subcontractor on the project (an expansion of an existing high school). The general contractor for the project was Kinney Construction and the structural steel subcontractor was Gerdau AmeriSteel.

On July 26, 2013, the undersigned issued a Decision and Order in this proceeding affirming Items 1 and 3 of the Citation and vacating Item 2. On September 26, 2013, the Commission remanded this case to the undersigned with instructions (1) to make factual findings and legal conclusions regarding whether the exposed workers were employed by Quinlan at the time of the alleged violation, and (2) to consider the applicability of the Eleventh Circuit's decision in *Comtran Group, Inc. v. DOL*, 722 F.3d 1304 (11<sup>th</sup> Cir. 2013), to the two affirmed violations if it is determined that Quinlan employed the exposed workers.

The factual findings and legal conclusions appear in the next section. It is determined the application of the *Comtran* decision does not alter the dispositions of the affirmed violations. Items 1 and 3 remain affirmed.

### **(1) Quinlan Employed the Exposed Workers at the Time of the Violative Conduct**

In the underlying case, Quinlan argued that its employees (leadman Miguel Pacheco and welder Humberto Vargas) were not employed by Quinlan on February 9, 2012, when CSHO Bower observed them working near the edge of a 15-foot high wall without fall protection. Quinlan contended that Charles Hall, the superintendent for general contractor Kinney Construction, ordered Pacheco and Vargas to perform work for which Quinlan had not contracted and for which Quinlan did not pay the workers.

Four witnesses testified at the hearing and one testified later in a trial deposition. Of the four witnesses who testified at the hearing, only two were actually on site at the time of the violative conduct. Miguel Pacheco, who testified at the trial deposition, was one of the two workers engaged in the violative conduct.

*CSHO Gordon Bower*

CSHO Bower conducted the inspection of the construction site that resulted in the instant Citation. He was retired from OSHA at the time of the hearing. CSHO Bower determined Pacheco and Vargas were employees of Quinlan based on statements made by various people at the worksite, including representatives of Kinney Construction, a Quinlan foreman called from another site, and Pacheco himself (Tr. 54-55, 57-58). CSHO Bower interviewed Pacheco regarding his status as a supervisory employee for Quinlan:

I asked [Pacheco] what his title was and he told me, he says, “I’m the bossman foreman,” and I said, “Excuse me,” and he says, “Foreman.” And I said, “Well, is there any other supervisor from Quinlan Enterprises on this project? He said, “No, I’m the bossman from Quinlan.” I asked him if bossman meant—he meant that he was a foreman, and he says, “Yes, I am a foreman.”

(Tr. 60).

CSHO Bower gave Pacheco a standard form (Construction Site Inspection Information) to fill out (Exh. C-2). Because Pacheco is not as fluent in written English as he is with spoken English, he called on another Quinlan supervisor working on a different site to help him fill out the form. CSHO Bower testified:

It was later on in the inspection in a pick-up truck that was there at the site, there were two individuals sitting in a pick-up truck. One was Miguel [Pacheco] and the other person I asked for identification of, and I showed them both my identification again, and the second person with Miguel was—identified himself as another Hall, Joseph Hall, I believe. . . . He said he was a foreman on another job, on a different job in Albany, that Miguel had called him and asked him to help him fill out this

form, this construction information form, and that's what he was writing here. He then gave the form to Miguel. Miguel signed it and he gave it to me.

(Tr. 62).

The form, filled out by Quinlan foreman Joseph Hall and signed by Pacheco, lists the company name as "Quinlan Enterprises," the employee's name as "Miguel Pacheco," and the employee's title as "Foreman" (Exh. C-2; Tr. 63). After CSHO Bower completed his walkaround, he returned to John Hall and Pacheco. CSHO Bower stated that at that point, "Miguel told me that his boss [John Quinlan] told them to get off the jobsite and not talk to OSHA. I then asked Mr. Hall, I said, 'Are you aware of that?' He said, 'Yes, we were told to leave the jobsite and not speak to OSHA'" (Tr. 65).

CSHO Bower met with John Quinlan the next day. John Quinlan did not use that opportunity to assert that Pacheco and Vargas were working for Kinney Construction at the time of the inspection. In fact, John Quinlan refused to discuss the inspection in any aspect. CSHO Bowers testified:

When I met Mr. Quinlan, when it was pointed out to me who he was, Mr. Quinlan was extremely arrogant. He was disrespectful to me. I attempted to ask him questions, he interrupted me. He used profanity directed towards me several times. I was—I tried to remain calm. I had shown him my credentials and told him who I was and what the purpose of meeting with him was, and he—he consistently swore at me. Mr. Quinlan, from my recollection, told me "I don't have to talk to you." I asked Mr. Quinlan if he ordered the—Miguel and Humberto off of the jobsite the previous day, he said yes. He said I was—told them not to speak to OSHA, that he would not be paid, and to refuse to speak to OSHA and leave the jobsite. I told Mr. Quinlan I'd like to take a statement from him. He said he didn't have to talk to me, that if I wanted a statement I would have to call his attorney. . . . I asked him if I could have the addresses, names, full names and addresses of the two individuals that I had met the previous day, I identified the individuals, he refused. He said, "I don't have to give you any information." He's instructed them not to talk to me. I asked him, "Are you refusing me to talk to your employees, and he said—answered yes, affirmatively. This whole conversation was laced with loud obscenities from Mr. Quinlan directed towards OSHA and directed at me.

(Tr. 107-108).

CSHO Bower's demeanor during his testimony was at all times professional, calm, and forthright. His testimony was consistent and spoken with confidence. He is deemed a highly credible witness.

*John Quinlan*

Quinlan contends that Charles Hall, without Quinlan's authorization, directed Pacheco and Vargas to go up on the wall to perform work for Kinney Construction, work for which Quinlan had not contracted. John Quinlan conceded that Pacheco was working for Quinlan the day of the inspection and was still employed by Quinlan at the time of the hearing (Tr. 206). John Quinlan was not at the worksite the day of the OSHA inspection (Tr. 214, 216). He testified that the assigned task for Pacheco and Vargas that day was to install clips under the roof of the building, a task for which they were not required to go up on the wall where CSHO Bower observed them (Tr. 215, 251).

John Quinlan blamed Charles Hall for Pacheco and Vargas's presence on the wall: "Charlie's the one that sent them up there. Charlie was responsible for getting that wall poured" (Tr. 256). He also claimed Miguel and Vargas "were intimidated by Charlie Hall, basically." When asked if that is what the workers told him, John Quinlan replied, "No, but I know what—I mean, I can tell what happened" (Tr. 259).

In support of Quinlan's claim that its workers had no reason to be on the wall at the time of the inspection, the company adduced a copy of its work proposal to Gerdau AmeriSteel, the structural steel erector on the project (Quinlan was subcontracted by Gerdau, not by Kinney Construction). The proposal lists exclusions to Quinlan's proposed scope of work, including "[a]ll items embedded in concrete or masonry" (Exh. R-2). John Quinlan stated that Pacheco told him that he and Vargas were helping Charles Hall "dry fit the embedded angle" the day of the inspection (Tr. 254). Embedded angle is embedded in concrete or masonry, therefore, Quinlan asserts, Pacheco and Vargas were engaged in an activity outside Quinlan's contractual scope.

The flaw with Quinlan's theory is the adduced proposal is just that, a proposal. When asked by Quinlan's own counsel whether Gerdau accepted the listed exclusions, John Quinlan replied, "Well, I never signed the contract" (Tr. 262). When asked if he had signed any document for Gerdau relating to the project at issue, John Quinlan stated, "I signed their safety plan that would be used in their own facilities that really didn't all the way apply to an outside jobsite; that'd be like if you went to their steel plant and was working in their plant" (Tr. 263). Quinlan did not adduce any documents to which it and Gerdau were signatories. In fact, the work proposal that was adduced does not appear to be the complete document. The exclusions paragraph ends at the very bottom of the page and there is no closing or signature (Exh. C-2).

John Quinlan's testimony failed to advance Quinlan's argument that Pacheco and Vargas were working for Kinney Construction when they were observed on the wall. John Quinlan was not on site the day of the OSHA inspection. His unsubstantiated feeling that Charles Hall intimidated his employees into going up on the wall has no probative value. It is mere conjecture and is accorded no weight. The partial unsigned work proposal is also of no probative value. John Quinlan admitted he did not sign it. Quinlan failed to adduce any contractual document detailing Quinlan's scope of work.

*Rodney Hanniford*

Quinlan called Rodney Hanniford as its witness. Hanniford was Gerdau's project manager on the project at issue (Tr. 234-235). He was not present on the site the day of the OSHA inspection (Tr. 239). Quinlan's counsel showed Hanniford the photographs taken by CSHO Bower and asked him questions about them (Exhs. C-3 and C-7).

On cross-examination, Hanniford conceded he was speculating on what the photographs depicted. Hanniford's speculative testimony also fails to advance Quinlan's theory of the case. He was not on site the day of the inspection and he had no personal knowledge regarding the reasons Pacheco and Vargas were on the wall.

*Charles Hall*

Charles Hall, Kinney Construction's superintendent, was on site the day of the OSHA inspection (Tr. 160). He flatly denied that he had instructed Pacheco and Vargas to go up on the wall to help him with embedded angle or with any other task. He stated he had no authority to do so (Tr. 162, 194).

Charles Hall was subjected to the most aggressive cross-examination of the hearing. At one point, Charles Hall stated Pacheco and Vargas may have been handling embedded angle, but it was not at his request and he did not know whether that task was within the scope of Quinlan's contractual obligations (Tr. 176). He refused to let Quinlan's counsel mischaracterize his statement:

Q. So what you're saying is, that based on those photographs, Quinlan employees are doing Kinney work and that's not typical on any jobsite, correct?

Hall: I'm not -- what I'm saying is, I'm not -- I don't know if that embedded item was Quinlan's or not, is what I'm saying.

Q. Well, you said earlier that it was Kinney's.

Hall: No, you said it was Kinney's. I said I don't know. All I know is, Gerdau had all the steel erection except for rebar. As far as I'm concerned that's a steel item that belongs to Gerdau, could be Gerdau put it in there.

(Tr. 178-179).

Q. Okay. Do you know what Miguel and Humberto were doing immediately before they went up to do Kinney's work?

Counsel for the Secretary: Objection, Your Honor.

Counsel for Quinlan: He's already testified they were doing Kinney's work.

Counsel for the Secretary: No.

JUDGE CALHOUN: Just a minute. Just a minute.

Hall: No, it was you that testified they were doing Kinney's work.

(Tr. 184-185).

Q. Okay. Isn't it true, Mr. Hall, that you bullied the Quinlan employees into going up there?

Hall: Bullied them?

Q. Bullied them.

Hall: I can say that I'm not much of a bully.

Q. You're saying that your reputation isn't that you're a bully?

Hall: Miguel is bigger than I am, how am I going to bully him?

Q. Okay. Never threatened to get them fired or anything like that?

Hall: How am I going to fire them?

(Tr. 190-191).

Q. [Y]ou have the authority to hire and fire, right?

Hall: For Kinney.

Q. And you have the authority to direct a subcontractor to go to Kinney's work, --

Hall: No.

Q. --correct?

Hall: No.

(Tr. 194).

Q. Okay. So saying that Quinlan was responsible for all steel erection activities is just a guess, right, because there may be other things that you believe to be steel erection that aren't, true?

Hall: In this case, no. I mean, it's pretty cut and dry.

Q. Okay. There was steel work that Kinney had to do, right, they were dealing with steel, putting it in the embedded angles, right?

Hall: That was the only place that embedded angle was in the whole job.

Q. Right. So that was Kinney's work and that was steel erection activities, was it not?

Hall: You keep saying it was Kinney's, but I've yet to-- I mean, nobody has proved that.

(Tr. 202-203).

The undersigned concurs that Quinlan failed to prove that Pacheco and Vargas were performing work for Charles Hall and, by extension, Kinney Construction, through this witness. Charles Hall's testimony may have been self-serving (he did not want to be held responsible for directing Pacheco and Vargas to go on top of the wall), but it was consistent and unwavering in the face of aggressive cross-examination. Charles Hall was candid about his own violative conduct (the Secretary cited Kinney Construction for Hall's failure to tie off and for using an unsecured ladder) and resolute in his position that he did not commandeer Quinlan's employees to perform Kinney Construction's work. The undersigned finds Charles Hall to be a credible witness.

*Miguel Pacheco*

The Secretary properly served Pacheco with a subpoena to appear at the January 29, 2013, hearing. At Quinlan's direction, Pacheco failed to appear (Tr. 24-31, 34). The undersigned left the record open so that the Secretary could take a trial deposition of Pacheco, which he did on February 28, 2013. Pacheco testified through an interpreter. The undersigned did not attend the deposition and so could not observe the demeanor of Pacheco.

Pacheco testified that the day before the OSHA inspection, Charles Hall asked him to help put angles up on a wall. Pacheco told him he did not have time. The next day, Pacheco and Vargas were installing clips when Charles Hall came up to him and told him the cement truck had

arrived and asked him for help. Pacheco went up on the wall, which was when he saw CSHO Bower (Deposition Tr. 25-26).

Pacheco's testimony contains a number of discrepancies with the rest of the record. Pacheco stated he was tied off while on the wall (Deposition Tr. 26) despite the credible testimony to the contrary of CSHO Bower and the photographic evidence. Even John Quinlan acknowledges Pacheco and Vargas were not tied off. In a reprimand letter that he wrote to Pacheco, Quinlan stated, "When you were asked about fall protection you told me, 'I was tied off,' which was not true. The OSHA inspectors' pictures clearly show that you and Humberto were not tied off. I believed what you told me until my attorney forwarded OSHA pictures on August 1, 2012" (Exh. R-3).

Pacheco also stated, "I was the only one that went up," meaning Vargas did not go up (Deposition Tr. 26). Again, this is contrary to the photographic evidence and the testimony of CSHO Bower and Charles Hall.

Pacheco stated he did not recognize the signature pages of the weekly safety meetings on which he was listed as the supervisor (Exh. C-10) and he stated he did not sign the Construction Site Inspection Information form on which his signature appears (Exh. C-2). Pacheco admitted he called Quinlan foreman John Hall to the site to help him fill out the form, but denied that he participated in any way in filling out the form: "I was inside the truck with [John Hall], but I didn't acknowledge what he was filling out" (Deposition Tr. 32).

Despite his testimony that he was the only one who went up on the wall, when confronted with the OSHA photographs, he acknowledged that Vargas also went up on the wall (Deposition Tr. 39). Pacheco stated that he and Vargas were handling angles for Charles Hall, which requires no welding. The photographs show Vargas wearing a welding hood (Exh. C-7). When asked why Vargas was wearing his welding hood if they were just handling embedded angle, Pacheco replied, "Because he thought that the angle was going to be welded on. It wasn't being welded. It was going to be anchored into the cement. That's why the people were laying out the cement, pouring out the cement" (Deposition Tr. 40). Pacheco then seemed to contradict his testimony that he (and now Vargas) went up on the wall at the request of Charles Hall: "We didn't have to weld. We didn't have to do any of it. *We were already up there with the harness, doing it, so he asked us for that favor*" (Tr. 40).

Pacheco also denied speaking with CSHO Bower. When asked what conversation he had with CSHO Bower, Pacheco stated, “Nothing. A gentleman from OSHA, he wanted to speak with me ten minutes before 12:00, which was lunchtime. He said, ‘I’m going to lunch.’ I said, ‘I as well.’ He at no moment did he ask me any questions, and I didn’t ask and answer any questions” (Tr. 52).

The undersigned finds Pacheco is not a credible witness. Pacheco stated only he went up on the wall and that he was tied off. It is undisputed that both Pacheco and Vargas were on the wall and that neither was tied off. Pacheco admits calling John Hall to help him fill out the information form, but then declares he did not participate in filling out the form or in signing it. Pacheco also denied speaking with CSHO Bower when Bower testified convincingly that he did so. Pacheco appears determined to minimize his interaction with CSHO Bower the day of the inspection, despite documentation and credible testimony establishing he answered questions and signed the information form. Pacheco’s testimony is accorded no weight.

#### *The Darden Doctrine*

“[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site.” *Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035 (No. 97-1631, 2005). In determining whether the Secretary has satisfied this burden, the Commission applies the *Darden* doctrine set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316 (1992):

To decide whether the party in question was an employer under common law, the *Darden* Court looked primarily to the hiring party’s right to “control the manner and means by which the product [was] accomplished.” Factors pertinent to that issue include “the skill required for the job, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party’s discretion over when and how long to work, the method of payment, the hired party’s role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in business, the provision of employee benefits and the tax treatment of the hired party.” *Darden*, 503 U.S. at 322, citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers. See *Don Davis*, [19 BNA OSHC 1477 (No. 96-1378, 2001)].

*Allstate*, 21 BNA at 1035.

Here, focusing primarily on “whether the putative employer controls the workers” results in a determination that Kinney Construction did not control Pacheco and Vargas, but that Quinlan did. Charles Hall stated he had no authority to direct employees of subcontractors to perform work for Kinney. Quinlan contends Charles Hall was able to “intimidate” and “bully” its workers into doing his bidding. The record does not support that contention.

Assuming for the sake of argument that Pacheco’s testimony regarding Charles Hall’s request for help is credible, it does not establish Charles Hall exercised control over the Quinlan workers. Pacheco testified that the day before the OSHA inspection, Hall asked him at quarter to 5:00 to help him put up an angle. Pacheco stated, “I told him didn’t have time to do that now” (Deposition Tr. 26). Pacheco relates no attempts at intimidation by Hall and reports no negative repercussions resulting from his rebuff of Hall’s request. The next day, Pacheco testified Hall requested help again. The language Pacheco uses to describe Hall’s demeanor does not convey a sense of intimidation or bullying. Rather, Hall is described as “upset” and “anxious,” and “all anxious and desperate” (Deposition Tr. 28, 49). Pacheco describes the work he and Vargas purportedly did for Hall as “a favor” (Deposition Tr. 40).

In contrast, Quinlan had every indicia of control over Pacheco and Vargas. John Quinlan ordered Pacheco and John Hall to leave the worksite and not speak to CSHO Bower the day of the inspection (Vargas had already left). He had the authority to hire and fire Pacheco and Vargas, and in fact stated, “I almost fired them over it” when asked about the photographs showing they were not tied off while on the wall (Tr. 255). John Quinlan spoke to Pacheco every morning and gave him the assignment for the day. He stated that in order to enforce Quinlan’s safety policy, he would “[f]ire people, send them home without pay, reprimand them depending on the violation” (Tr. 268). Pacheco had worked for Quinlan for twelve years at the time of his deposition (Deposition Tr. 5). Pacheco and Vargas were on Quinlan’s payroll (Deposition Tr. 31). They received no pay from Kinney Construction for the work they purportedly did for it. Quinlan refused to pay them for their work the day of the OSHA inspection, not because they were doing work for Kinney Construction, but because Pacheco spoke with CSHO Bower (Deposition Tr. 51; Tr. 65, 107-108).

The undersigned determines that Quinlan was the sole employer of Pacheco and Vargas at the time CSHO Bower observed them standing, without fall protection, near the edge of the 15-foot wall. The Secretary established Quinlan controlled Pacheco and Vargas. The weight of

the evidence failed to establish Charles Hall, Kinney Construction, or any other entity present on the worksite controlled Pacheco and Vargas under the factors set out in *Darden*.

The weight of the evidence also failed to establish that the work Pacheco and Vargas were engaged in at the time CSHO Bower observed them was outside the scope of Quinlan's contract. No contract was adduced at the hearing. The partial work proposal produced was not signed by either Quinlan or Gerdau. Based on the foregoing factual findings, it is concluded that Quinlan was the employer of Pacheco and Vargas, the exposed workers. The Secretary properly issued the Citation and Notification of Penalty in this case to Quinlan.

**(2) The *Comtran* Decision Does Not Alter the Disposition of Items 1 and 3**

If, as here, it is determined that the exposed workers were employed by Quinlan, the Commission then directs the undersigned to "consider whether the issue of knowledge in this case is affected by the Eleventh Circuit's recent decision in *Comtran*." In *Comtran*, the court held for the first time in the Eleventh Circuit that "if the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the conduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct." *Id.* at 1318. Previously, a supervisor's actual or constructive knowledge of a violation could be imputed to the employer. "[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

The Secretary established in the underlying hearing that Pacheco held a supervisory position with Quinlan on February 9, 2012. The Decision states, "The undersigned finds that Pacheco was a supervisor for purposes of imputing knowledge to Quinlan." *Quinlan Enterprises*, p. 10 (No. 12-1698, 2013). The Commission did not direct this issue for review.<sup>1</sup> Therefore,

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<sup>1</sup> Although Quinlan contended Miguel Pacheco had no supervisory authority over Vargas the day of the OSHA inspection, the evidence to the contrary was overwhelming. Specifically, CSHO Bower testified Pacheco identified himself as the "bossman" and foreman (Tr. 60); Charles Hall testified Pacheco "was known to us as the foreman" (Tr. 161); in his deposition, John Quinlan referred to Pacheco as Quinlan's "senior ironworker," and "my lead guy on the job" (Tr. 209, 212); each of the eight signature sheets for Quinlan's weekly safety meeting for the period from December 12, 2011, to February 11, 2012, list "Miguel" in the line following "SUPERVISOR" (Exh. C-10); and Pacheco's title is listed as "Foreman" on the Construction Site Inspection Information form filled out by Pacheco and

Pacheco's knowledge may be imputed to Quinlan if the analysis set forth in *Comtran* allows for it.

In *Comtran*, a foreman, acting alone, excavated a six-foot deep trench with a five-foot high spoil pile next to it. An OSHA CSHO observed the foreman in the unprotected excavation. The Secretary cited *Comtran* for two violations of the Subpart P Excavation standards. The ALJ imputed the foreman's knowledge of his own violative conduct to *Comtran* and affirmed the violations. The Eleventh Circuit reversed and remanded the decision, stating, "We hold that the Secretary does not carry her burden and establish a prima facie case with respect to employer knowledge merely by demonstrating that a supervisor engaged in misconduct. A supervisor's "rogue conduct" cannot be imputed to the employer in that situation." *Id.* at 1316.

The Secretary argues that his burden for establishing the knowledge element of his case is not affected by *Comtran*. He asserts *Comtran* applies to situations where a supervisor is charged with knowledge of only his own malfeasance. Here, Pacheco was aware of Vargas's violative conduct as well as his own. Therefore, the Secretary asserts, Pacheco's actual knowledge of Vargas's violative conduct may be imputed to Quinlan.

Quinlan counters that "there is nothing in the [*Comtran*] decision that suggests that a supervisor must be alone to require the Secretary to bear the burden of proof as to knowledge and foreseeability" (Quinlan's Supplemental Brief on Remand, p. 3). The undersigned disagrees. *Comtran* does more than "suggest" that it applies only to situations where the supervisor is acting alone. It explicitly states that it only applies to scenarios where the supervisor is acting alone.

First, in Footnote 2 of the decision, the court states:

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. *W.G. Yates & Sons, Constr. Co., Inc. v. Occupational Safety and Health Review Comm'n*, 459 F.3d 604, 609 n.7 (5<sup>th</sup> 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.

Secondly, the Secretary argued in *Comtran* that there was no reasoned basis to distinguish between a supervisor's knowledge when he or she is acting alone and a supervisor's knowledge of

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Quinlan foreman John Hall (Exh. C-2). When asked if Vargas had to ask his permission to use the bathroom, Pacheco responded, "Of course" (Deposition Tr. 51).

misconduct by his or her subordinates. The Eleventh Circuit rejected this argument, stating, “[T]here is, in fact, a ‘reasoned basis’ to draw a distinction between a supervisor’s knowledge of a subordinate’s misconduct (*which everyone agrees is imputable to the employer*) and knowledge of his own misconduct (which the clear majority of circuits have held is not).” *Id.* at 1317 (emphasis added). The court explains that it is reasonable to impute a supervisor’s knowledge of a subordinate’s misconduct to the employer because:

[T]he supervisor acts as the “eyes and ears” of the absent employer. That makes his knowledge the employer’s knowledge. However, a “different situation is presented” when the misconduct is the supervisor’s own. [*Mountain States Telephone & Telegraph Co. v. OSHRC*, 623 F.2d. 155, 158 (10<sup>th</sup> Cir. 1980)]. In that situation, the employer has no “eyes and ears.” It is, figuratively speaking, blind and deaf. To impute knowledge in this situation would be fundamentally unfair.

*Id.* (footnote omitted).

Applying *Comtran’s* analysis to the instant case, the undersigned finds that Pacheco’s knowledge of his subordinate’s (Vargas) misconduct is imputed to Quinlan. Pacheco acted as Quinlan’s “eyes and ears” on the site and his knowledge is Quinlan’s knowledge.

It is determined that the Secretary established Quinlan knew of its employees’ violative conduct on February 9, 2012. Items 1 and 3 remain affirmed.

#### **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.

#### **ORDER**

Based upon the foregoing decision, the Order issued with the underlying Decision stands as issued.

SO ORDERED.

/s/  
\_\_\_\_\_  
SHARON D. CALHOUN  
Judge

Date: February 25, 2014  
Atlanta, GA