



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

EMPIRE ROOFING COMPANY SOUTHEAST,
LLC,

Respondent.

OSHRC Docket No. 13-1034

BRIEFING NOTICE

The Commission requests briefs on the following issue:

With respect to the alleged violation of 29 C.F.R. § 1926.453(b)(2)(v) (fall protection required when working from an aerial lift), did the judge err in finding that the Secretary established knowledge? In addressing this issue, the parties are asked to discuss the court's holding in *Comtran Group, Inc. v. DOL*, 722 F.3d 1304, 1318 (11th Cir. 2013), that the Secretary must meet his prima facie burden of establishing knowledge by "do[ing] more than merely point[ing] to the misconduct" of a supervisor. Specifically, does the court's holding address a situation where a supervisor both engages in misconduct and directly supervises other employees engaged in the same violative conduct?

The parties are advised that when the merits or characterization of an item are before the Commission for review, the appropriateness of the penalty is also subject to review. Accordingly, the parties may address the amount of the penalty if they so choose.

All briefs are to be filed in accordance with Commission Rule 93.¹ The first brief is to be filed within 40 days of this notice. A party who does not intend to file a brief must notify the

¹ The Commission requests that all briefs include an alphabetical table of authorities with references to the pages on which they are cited, and that an asterisk be placed in the left-hand margin of the table to indicate those authorities on which the brief principally relies. The Commission also requests that copies of cited authority, other than statutes, case law, law journal articles and legal treatises, be provided to the Commission and to the opposing party. Parties should be cautioned that these materials will be considered only if appropriate.

Commission in writing setting forth the reason therefor within the applicable time for filing briefs, and shall serve a copy on all other parties. The time for filing briefs (or similar notices of intent) of opposing parties shall commence on the date of service.

BY DIRECTION OF THE COMMISSION

Dated: May 15, 2014

/s/ _____
John X. Cervený
Executive Secretary