

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING  
COMMISSION REVIEW

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.

Jim Boyd Construction, Inc.,

Respondent.

OSHRC Docket No. 11-2559

Appearances:

Karen E. Mock, Esq., U. S. Department of Labor, Office of the Solicitor  
Atlanta, Georgia  
For Complainant

J. Larry Stine, Esq., & Mark A. Waschak, Esq., Wimberly, Lawson, Steckel, Schneider & Stine, P.C.  
Atlanta, Georgia  
For Respondent

Before: Administrative Law Judge Ken S. Welsch

**DECISION AND ORDER  
ON REMAND**

On September 26, 2013, the Review Commission remanded to the Court its decision in this matter issued June 13, 2013, to consider the applicability of the Eleventh Circuit decision in *ComTran Group, Inc. v. DOL*, 722 F.3d 1304 (11<sup>th</sup> Cir. 2013) which was issued almost two weeks later. In the *ComTran* decision as noted by the Commission, the Eleventh Circuit held that where “the Secretary seeks to establish that an employer had knowledge of misconduct by a supervisor, [he] must do more than merely point to the misconduct itself. To meet [his] prima facie burden, [he] must put forth evidence independent of the misconduct” such as “evidence of lax safety standards.” *Id.* at 1316.

The Review Commission in its Remand Order stated that “[B]ecause it is unclear if the issue of knowledge as presented in the case before us is affected by the court’s decision in *ComTran*, we remand this case in its entirety to the judge for him to consider the applicability of the Eleventh Circuit’s decision.”

Pursuant to the Commission’s instruction, the Court held two telephone conference calls with the parties. As a result of the conference calls, the parties filed a Joint Stipulation on Remand on December 2, 2013. The parties stipulated that:

1. Respondent Jim Boyd Construction, Inc. did not raise unpreventable employee misconduct as a defense to the alleged violations in this case.
2. Respondent is not alleging that the actions of its superintendent at the worksite were malfeasance.
3. The decision in the *ComTran* case should not affect the outcome of the decision in this case.

In view of the parties’ stipulations, the Court concludes that the *ComTran* decision has no applicability to the Court’s decision in *Jim Boyd Construction Inc.* issued June 13, 2013 and the record in this matter does not need any further development.

/s/  
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KEN S. WELSCH  
Judge

Date: December 18, 2013  
Atlanta, Georgia