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Secretary of Labor, Complainant, v. Southern Pan Services Company, Respondent.	OSHRC Docket No. **08-0866** Remand

Appearances:

Dane L. Steffenson, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

J. Larry Stine, Esquire; Mark A. Waschak, Esquire; and Elizabeth K. Dorminey, Esquire, Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER ON REMAND

On June 2, 2008, the Occupational Safety and Health Administration (OSHA) issued two citations to Southern Pan Services Co. (Southern Pan or SP) alleging two serious and two willful violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act). OSHA issued the citations as a result of a fatality investigation it conducted following the December 6, 2007, partial collapse of a six-story concrete parking structure that was part of a project known as Berkman Plaza II in Jacksonville, Florida. Southern Pan was the concrete formwork contractor on the project. One of its employees was killed in the collapse and another was seriously injured. More than twenty other workers were injured in the collapse.

Following an eight day hearing in this matter, Administrative Law Judge Ken S. Welsch (now retired) issued a Decision and Order on March 8, 2010, in which he vacated both serious citation items. At issue here are the two willful citation items. Amended Item 1 of Citation No. 2 alleged a willful violation of 29 C.F.R. § 1926.701(a) for failing to determine, based on information received from a person who was qualified in structural design, that the structure or

portion of the structure was capable of supporting a construction load. The Secretary proposed a penalty of $55,000.00 for Item 1. Judge Welsch vacated Item 1, finding the cited standard did not apply. Item 2 of Citation No. 2 alleged a willful violation of 29 C.F.R. § 1926.703(a)(2) for failing to have revised drawings or plans available at the worksite. The Secretary proposed a penalty of $70,000.00 for Item 2. Judge Welsch affirmed Item 2 and assessed a penalty of $40,000.00.

On December 18, 2014, the Commission issued a Decision and Remand in this proceeding in which it "set aside the judge's decision in full as to Item 1 and in part as to Item 2" and remanded this case to the Chief Judge for reassignment and further proceedings consistent with the Commission's Decision. *Southern Pan Services Co.,* 25 BNA OSHC 1081, 1082 (No. 08-0866, 2014). The Chief Judge reassigned the case to me the following day.

The parties took additional depositions for the purpose of this proceeding.[1] They filed briefs on remand on November 20, 2015, and reply briefs on December 4, 2015.[2] In accordance with the Commission's remand instructions and upon consideration of the underlying record, additional depositions, and the parties' briefs and reply briefs on remand, I **AFFIRM** Items 1 and 2 of Citation No. 2, and assess penalties of $55,000.00 and $70,000.00 respectively.

[1] Southern Pan supervisors James Smith, Timothy Marlow, Charles Mathis, and Southern Pan president Kenneth Dickey were deposed.

[2] In its Brief on Remand, Southern Pan makes a number of extraneous arguments. Southern Pan contends Judge Welsch did not err in vacating Item 1 of Citation No. 2 (Brief on Remand, p. 21). The Commission disagreed. *Southern Pan,* 25 BNA OSHC at 1082. Southern Pan argues it cannot be an exposing employer under Item 1 "unless the Secretary can prove an underlying violation of a standard by another employer[.]" (Brief on Remand, p. 23). The Commission found "the evidence unequivocally establishes that Southern Pan was an exposing employer." *Southern Pan,* 25 BNA OSHC at 1085. Southern Pan contends Judge Welsch erred in affirming Item 2 of Citation No. 2 (Brief on Remand, p. 29). The Commission found "the Secretary established Southern Pan's noncompliance with the cited provision," but directed the judge on remand to make a *ComTran* determination. *Southern Pan,* 25 BNA OSHC at 1088. Southern Pan contends the Secretary cannot cite it under § 1926.703(a)(2) because it complied with § 1926.703(e), "an alternative to written plans for removal." (Brief on Remand, p. 30). The Commission characterized this as a preemption argument (which Southern Pan takes issue with in its Brief on Remand) and held, "we conclude that the duties imposed by § 1926.703(a) are not preempted by those imposed by § 1926.703(e)." *Southern Pan,* 25 BNA OSHC at 1089. Southern Pan argues Judge Welsch erred in finding Southern Pan could not rely on the email from the Engineer of Record in compliance with § 1926.703(a)(2) (Brief on Remand, p. 35). The Commission found "it is impossible that the e-mail could have led Southern Pan to believe it was in compliance with § 1926.703(a)(2) at that time" because removal of the shoring and reshoring predated it. *Southern Pan,* 25 BNA OSHC at 1090. Southern Pan contends Judge Welsch erred in finding the Secretary established exposure to the cited hazard under Item 2 of Citation No.2 (Brief on Remand, p. 35). The Commission, however, found, "Exposure has been established because Southern Pan's employees were removing reshoring without having revised drawings on site[.]" *Southern Pan,* 25 BNA OSHC at 1090. These arguments have been decided by the Commission and are outside the scope of this decision. I will not address them further.

Background

The facts relevant to this case were set out by the Commission in its Decision.

> In January 2006, construction of a new six-story parking garage and adjacent condominium tower began at the Berkman worksite. The project owner, Berkman Plaza II, LLC, hired architecture firm Pucciano and English, Incorporated and general contractor Choate Construction Company to oversee the project. Pucciano and English employed the project's Engineer of Record, who prepared "signed and sealed" structural drawings for the project. Choate hired various subcontractors, including A.A. Pittman and Sons, a concrete finishing company, and Southern Pan. Southern Pan was contractually responsible for: (1) obtaining shoring and reshoring drawings for both the garage and tower; (2) building the formwork; and (3) placing concrete for some of the vertical pours, but not the horizontal pours. It is undisputed that placing the concrete for the horizontal pours—including the pour that resulted in the collapse—was Pittman's responsibility.
>
> Southern Pan hired Patent Engineering to provide the signed and sealed drawings for the shoring and reshoring that were available at the worksite. Patent's plans show that the formwork, which would hold the poured concrete for the garage, was to be supported by shoring and reshoring that extended all the way down to the ground. Once installed, the shoring and reshoring, as well as the formwork, were subject to two levels of scrutiny. Universal Engineering Sciences was hired by Southern Pan to inspect the shoring and reshoring to determine whether these components were correctly constructed according to Patent's drawings. Synergy Structural Engineering was hired by Berkman to serve as the project's threshold inspector and was required to provide periodic inspections at different stages of the construction process to ensure that: (1) the construction of all load-bearing components complied with the permit documents; and (2) the shoring and reshoring conformed to the shoring and reshoring plans.
>
> Even though Patent's plans showed that shoring or reshoring was to extend down to the ground until the end of the construction phase, Southern Pan removed reshoring from the first, second, and third levels of the garage over three different days in October and November of 2007, well before the end of construction, but it neither made nor requested changes to Patent's drawings to reflect the removal. James Smith, Southern Pan's superintendent for the project, testified that the reshoring was removed because he believed that Timothy Postma, Southern Pan's senior project manager, wanted to switch the shoring method, which instead of shoring to the ground, would shore the top level and reshore only the two levels immediately below it (known as the "one-over-two method"). On November 7 and 20, 2007, Choate and Pittman placed two concrete pours in the garage without incident. However, during the next pour (known as 6A) on December 6, 2007, the garage collapsed.

Southern Pan, 25 BNA OSHC at 1082-1083 (footnotes omitted).

DISCUSSION

I. Item 1: Alleged Willful Violation of § 1926.701(a)

Amended Item 1 of Citation No. 2 alleges Southern Pan "did not determine, based on information received from a person who was qualified in structural design, the concrete garage structure or portion of the concrete garage structure was capable of supporting the weight of the wet concrete for pour 6a, exposing employees to a structural collapse hazard." *Southern Pan Services Co.*, slip op. at 14 (No. 08-0866, 2010) (ALJ).

Section 1926.701(a) provides:

> No construction loads shall be placed on a concrete structure or portion of a concrete structure unless the employer determines, based on information received from a person who is qualified in structural design, that the structure or portion of the structure is capable of supporting the loads.

Judge Welsch vacated Item 1, "finding that based on the plain language of the cited standard and the preamble to the final rule, the requirements of the standard apply only to 'the employers directly responsible for the concrete operation'—in this case Choate, the general contractor, and Pittman, the concrete finishing subcontractor. . . . Thus, he concluded the cited standard did not apply." *Southern Pan,* 25 BNA OSHC at 1084.

The Commission's Decision and Remand

The Commission found the judge erred in analyzing applicability in terms of whether the cited standard applied to Southern Pan, as the formwork subcontractor, rather than whether it applied to the cited condition. "Under Commission precedent, however, the focus of the Secretary's burden of proving that the cited standard applies pertains to the cited conditions, not the particular cited employer." *Id.* at 1085.

The Commission set aside the judge's determination that the cited standard did not apply, finding "§ 1926.701(a) clearly applies to the cited conditions. . . . That element of the Secretary's burden has been established." *Id.* The Commission found Southern Pan "unequivocally" was an "exposing employer" on the site. An exposing employer "has a statutory duty to comply with a particular standard even where it did not create or control the hazard." *Id.* The Commission also found two of Southern Pan's employees were exposed to the structural collapse hazard. "Two Southern Pan employees were on the fifth floor of the garage during the 6A pour observing the formwork to ensure it was compliant and stable. . . .

Therefore, both employees, one of whom died as a result of injuries sustained in the garage collapse, were exposed to the violative condition." *Id.*[3]

Having found § 1926.701(a) applies to the cited condition, the Commission concludes "the issue for consideration is whether, under applicable precedent, Southern Pan made reasonable efforts to protect the two employees exposed to the violative condition. . . . Accordingly, we remand this case for a determination of whether the Secretary has established that Southern Pan failed to take reasonable measures to comply with the standard as an exposing employer." *Id.* at 1087. If I determine Southern Pan failed to comply with § 1926.701(a), the Commission further instructs me to make a knowledge determination along with a specific finding regarding whether the basis for the Secretary's case is the imputation of Smith's knowledge of his own misconduct.

> In the event the Secretary bases his case for knowledge on the imputation of superintendent Smith's knowledge of his own misconduct, i.e. his failure to take steps to obtain and provide the required information, we direct the judge to determine on remand whether this case falls within the scope of the Eleventh Circuit's recent decision in *ComTran Grp., Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304 (11th Cir. 2013). In *ComTran*, the court held 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." 722 F.3d 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."' *Id*. (quoting *W.G. Yates & Sons Constr. Co. v. OSHRC*, 459 F.3d 604, 609 n.8 (5th Cir. 2006)). Depending on the resolution of this issue, the judge may allow both parties to "further develop[]" the record with evidence related to the foreseeability of Smith's unsafe conduct. *See ComTran Grp., Inc*., 722 F.3d at 1318.

Id.

If I find the Secretary established Southern Pan knew of the violative condition and I affirm Item 1, the Commission instructs me to "then address whether the violation was properly characterized as willful by the Secretary and determine an appropriate penalty." *Id.*

[3] Thus, the Commission has determined the Secretary established two of the four elements required to meet his burden of proof for a *prima facie* violation of § 1926.701(a) in the underlying proceeding. *See Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) (to establish a violation of a specific OSHA standard, Secretary must prove (1) the cited standard applies; (2) its terms were violated; (3) employees were exposed to the violative condition; and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

Did Southern Pan Make Reasonable Efforts to Protect Employees Exposed to the Violative Condition?

The Commission has previously listed reasonable efforts an exposing employer might make in order to protect its employees.

> [An exposing employer] can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, instruct its employees to avoid the area where the hazard exists if this alternative is practical, or in some instances provide an alternative means of protection against the hazard. . . . In the absence of such actions, we will still hold each employer responsible for all violative conditions to which its employees have access.

Grossman Steel & Alum. Corp., 4 BNA OSHC 1185, 1189, (No. 12775, 1975) (footnote omitted). The Secretary has the burden of identifying the "measures the employer can reasonably take to protect its employees." *Southern Pan,* 25 BNA OSHC at 1086. In a footnote, the Commission lists the measures identified on review the Secretary contends Southern Pan was required to take in order to comply with § 1926.701(a):

> 1) obtain the necessary information from a shoring engineer and provide it to Choate and Pittman, and (2) verify before the pour that Pittman or Choate had determined that the structure could support the wet concrete load, on the basis of information from Southern Pan's shoring engineer or from another qualified source if Southern Pan was unable or unwilling to meet its contractual obligation to provide these contractors with the necessary information from its shoring engineer.

Id. at n. 8.

In the underlying proceeding, the parties stipulated the following:

> 7. Southern Pan was responsible for obtaining shoring and reshoring drawings for both the garage and the tower, building the formwork and placing the concrete for some of the vertical pours.
>
> * * *
>
> 14. Southern Pan hired Patent to provide its plans and drawings for shoring and reshoring.
>
> 15. Patent provided the only signed and sealed drawings pertaining to the shoring and/or reshoring for the garage. . . . There were no other written plans or drawings pertaining to the shoring and/or reshoring for the garage.
>
> 16. The Patent drawings included a typical reshore diagram that shows the garage to have shoring and/or reshoring to the ground.

17. Southern Pan removed some of the shoring and reshoring from the first level in the non-20" section of the garage beginning on or about October 22, 2007.

18. Southern Pan was removing some shoring and reshoring from the second level of the non-20" garage on or about October 26, 2007.

19. Southern Pan started removing some of the shoring and reshoring between the ground and the third floor, which is referred to as the high bay area, on or about November 19, 2007.

20. Pour 5A occurred on November 7, 2007. Pour 5B occurred on November 20, 2007. Pour 6A occurred on December 6, 2007.

(Exh. J-A)

Douglas Rose, Patent's shoring engineer, testified that when shoring extends to the ground, no weight is imposed on the structure. "[T]he load would be passed through the slab and into the reshore legs below, but there wouldn't be any load on the column." (Tr. 124) Superintendent James Smith testified that once shoring or reshoring is removed, "the weight load is transferred to the last level . . . that you have your shoring on." (Tr. 197)[4] Under § 1926.701(a), before placing construction loads on a concrete structure, the employer must determine, based on information received from a person who is qualified in structural design, that the structure is capable of supporting the load. Rose, as the shoring and reshoring engineer of record, testified the Patent drawings show the shoring and reshoring was supposed to go to the ground (Tr. 118). Therefore Patent's engineer, a person who is qualified in structural design, initially determined the structure was capable of supporting placement of a construction load. However, each time the shoring and reshoring components were removed from the various levels of the garage structure, the employer was required to determine whether the structure was capable of supporting the load of the scheduled pours, based on new calculations by a person who is qualified in structural design.

[4] A "shore" is defined by OSHA regulations as "a supporting member that resists a compressive force imposed by a load." 29 C.F.R. § 1926.700(b)(7). It is placed on the level immediately below that which is currently being built and is used to support the formwork before and during the concrete pour. "Reshoring" is defined as "the construction operation in which shoring equipment (also called reshores or reshoring equipment) is placed, as the original forms and shores are removed, in order to support partially cured concrete and construction loads." 29 C.F.R. § 1926.700(b)(6). It is placed on the completed levels below and does not support the structure, but carries the load of the wet concrete placed above.

Southern Pan, 25 BNA OSHC at n. 2.

Southern Pan contends it took reasonable measures to protect its employees in compliance with the requirements of § 1926.701(a).

> Southern Pan had its formwork inspected by Choate, the general contractor; Universal, a professional engineering company; and Synergy, the threshold inspectors. Additionally, Southern Pan knew that Synergy had given written approval for the pour, and it knew that one of Synergy's principal responsibilities was to ensure that it was safe to pour the concrete. Furthermore, both engineers verified that the calculations showed that the pour was safe.

(Southern Pan's Brief on Remand, p. 24)

Southern Pan's contentions are not supported by the record. There is no evidence any Choate employee qualified in structural design inspected the formwork and determined the structure was capable of supporting Pour 6A. Kirk Gilbert, Choate's project manager, testified Southern Pan was responsible for obtaining shoring and reshoring drawings "because that's what they agreed to do for a stipulated sum, and they're the experts that we hired to do that." (Tr. 52) Southern Pan obtained the shoring and reshoring drawings from Patent and, Gilbert testified, "introduced them as the drawings that they were going to erect shoring off of, and then subsequent inspections were made off of those drawings." (Tr. 53) Gilbert stated, "Anybody who is inspecting [Southern Pan's] work" would need to look at Patent's drawings (Tr. 55).

Choate's contract with Southern Pan required Southern Pan to hire a third party to perform shoring and reshoring inspections. Southern Pan hired Universal Engineering Sciences to fulfill that contractual requirement (Exh. J-1; Tr. 52). Universal completed reports for each inspection, copies of which it gave to Southern Pan and Choate. When asked the purpose of Universal's reports, Gilbert replied, "My understanding of the purpose is to have an expert in the field of shoring and reshoring identifying that the shoring and the reshoring is in place per design and specifications." (Tr. 86) Neither Gilbert nor any other witness testified a Choate employee qualified in structural design inspected the formwork. Rather, the evidence establishes Choate contractually required Southern Pan to hire a third party "expert in the field of shoring and reshoring" to perform that task.

Southern Pan claims it relied on the shoring and reshoring inspections of Universal and Synergy, the threshold inspector, as reasonable measures it took to protect its employees. Southern Pan contends "it was reasonable for it, as an exposing employer, to rely on written approvals by professional engineers." (Southern Pan's Brief on Remand, p. 27) The record

establishes, however, that Southern Pan failed to provide Universal and Synergy with accurate drawings to which the inspectors could compare the existing shoring and reshoring. It is undisputed Southern Pan removed shoring and reshoring from the first three levels of garage structure, in deviation from Patent's drawings.

Superintendent James Smith's supervisor was Timothy Postma, Southern Pan's senior project manager for the Berkman Plaza II project. Smith and Postma understood the shoring and reshoring drawings are the ultimate authority for installing and removing shoring and reshoring on a project. Smith stated, "You never deviate from the plans, the original things you got, until something else, a revision comes in." (Tr. 242) Postma testified, "Always according to the drawings. The drawings that are on the site is the Bible of what you're going to go by." (Tr. 565) Smith acknowledged if Southern Pan chose to remove shoring and reshoring in deviation from Patent's drawings, Southern Pan needed to "have an engineer review that" before removing the components (Tr. 241).

Furthermore, the inspectors for Universal and Synergy testified Southern Pan's supervisors did not let them handle the drawings, did not have a complete set of drawings with them during the inspection, directed them to only inspect certain areas of the shoring and reshoring, and told them the inspections were not necessary. Gregory Holtz was a project engineer for Universal who conducted inspections on the Berkman Plaza II project (Tr. 398). He testified Universal never initiated the shoring and reshoring inspections but responded to requests for inspection by Southern Pan (Tr. 403). Holtz stated Southern Pan dictated the extent of the inspection:

> My understanding of our scope of services was to look at anything that Southern Pan asked us to look at. . . . Basically, I was told that Southern Pan has requested our services to do a preinspection prior to the threshold inspection and that we were only to look at what they asked us to look at and that's it.

(Tr. 405)

The first time Holtz inspected the shoring and reshoring in the garage, a Southern Pan supervisor who Holtz identified as "Jim"[5] showed him the shoring plans but not the reshoring plans. "He did not bring those." (Tr. 408) The shoring plans the supervisor had on site during the inspection "were quite tattered on the edges, so they looked like they were well-used field

[5] Based on the totality of the record, I find the Secretary established by a preponderance of the evidence the Southern Pan supervisor Holtz refers to as "Jim" is superintendent James Smith (Tr. 222-223, 236-237, 326, 455).

copies." (Tr. 409) Holtz stated Smith briefly showed him the drawings but did not hand them to him (Tr. 439). Holtz said Smith "had drawings in his hands. I assumed they were drawings for the project, but, like I said, he was very specific about what I was to look at, the specification I needed to check and he went about that way, and I never found anything that he told me was wrong. So, there was no reason to question what he was telling me was what I was supposed to look at." (Tr. 440) Holtz testified Smith asked him to look only at specific items. "It was always that we would just concentrate on the joist spaces, scaffolding spaces, because he told me that—basically, he said, he told me that I wasn't the real inspector." (Tr. 412) He also stated, "I never asked to read the plans because they were telling me exactly what to look at, and it was my understanding that that was my job to do exactly what they told me." (Tr. 456)

Holtz conceded he issued a written report stating the shoring and reshoring met the specifications of Patent's drawings, even though they did not. On November 19, 2007, Holtz signed a report in which he had written, "Observed conditions appeared to meet project specifications as shown on project approved plans prepared by Patent." (Exh. J-3) Counsel for Southern Pan questioned Holtz about the discrepancy between Patent's drawings and the configuration of the shoring and reshoring during his inspection on November 19, 2007.

Q. So, [Patent's drawing] shows the shoring?

Holtz: Yes.

Q. Now, during your testimony, you indicated that you went through the first floor and I believe noted there were no reshores on the first level; is that correct?

Holtz: That's correct.

Q. This plan shows reshoring on the first floor, correct?

Holtz: That's correct.

Q. So, your observations, from what you testified today, is that this plan specification was not met; isn't that correct?

Holtz: That's correct.

Q. So, when you wrote on your exhibit that it comported with the Patent plans, that wasn't true, was it?

Holtz: No, it wasn't.

Q. And, you signed it as a professional engineer, didn't you?

Holtz: That's correct, I did.

(Tr. 421-422)

Synergy's threshold inspector, Eric Cannon, encountered similar issues during his inspections at the Berkman Plaza II project. Cannon testified he was accompanied on his inspections by either James Smith or Southern Pan superintendent Timothy Marlow (Tr. 717). Cannon testified he did not see a complete set of Patent's drawings for the shoring and reshoring until after the December 6, 2007, collapse (Tr. 720-721). When Cannon noticed during an inspection that some of the reshoring had been removed, he questioned Southern Pan's supervisors about it. "I went and talked to I believe it was Tim Marlow or Jim Smith, someone from Southern Pan, and told them what I thought; that the shoring was supposed to go all the way to the ground. . . . They said, 'No, that's not correct. We're leaving the shoring underneath the area where the rebar is missing only to the ground.'" (Tr. 723-724) Cannon went to his supervisor, Synergy's Tim Frazier, about the discrepancy. Frazier emailed Soheil Rouhi, the engineer of record for the project, to clarify whether the garage was to remain shored to the ground. Frazier informed Cannon that Rouhi intended an area under one of the garage ramps to remain shored to the ground (Tr. 724). As became apparent in the aftermath of the collapse, Cannon was correct—Patent's plans (which were in Southern Pan's possession) required the shoring for the garage to go to the ground.

The email exchange between Rouhi and Frazier is the subject of footnotes in the decisions of both Judge Welsch and the Commission. The email chain started with a message from Choate project manager Gilbert. In the underlying decision, Judge Welsch noted:

> Rouhi's email was ambiguous. On August 31, 2007, Choate project manager Kirk Gilbert emailed Rouhi, seeking permission to proceed with construction despite two structural problems in two different bays in the garage. SP had installed extra reshoring to repair the problems. Rouhi responded, "As long as the shores stay in place I will not have any problem continuing the project." On October 30, 2007, Tim Frazier of Synergy emailed Rouhi after learning SP was removing reshoring: "They are beginning to remove shoring at the garage. Per your email below I just wanted to clarify that the areas you are requesting to stay shored all the way to the ground are only the bays where the repair is required, not the entire garage, correct?" Rouhi responded with one word, "Correct" (Exh. J-7). Rouhi testified he

> was not approving the removal of all of the reshoring on the lower levels, but rather advising Synergy that the additional reshoring should be kept in place in the two bays where there were structural problems (Exh. C-5a, pp.31-32)

Southern Pan Services Co., slip op. at n. 6 (ALJ).

The Commission agreed Rouhi's response was ambiguous, stating, "Synergy's inquiry seeking reassurance about the removal of shoring should have been directed to Patent, which was specifically responsible for the sealed drawings and, in any event, elicited only a vague single-word reply from the Engineer of Record— '[c]orrect'—that did not result in a revision of Patent's on-site drawings." *Southern Pan,* 25 BNA OSHC at 1090, n. 11. The Commission also agreed with Judge Welsch that "there is no evidence that Southern Pan even knew of the e-mail's existence before the garage collapse." *Id.* at 1090.

Smith and Marlow also told Cannon he did not need to inspect the shoring and reshoring because Universal had already inspected it (after telling Universal's Holtz he did not need to inspect the shoring and reshoring because Cannon, the "real" inspector, was going to inspect it). Cannon stated, "Multiple times when I would come to look at the shoring, [Marlow] would tell me that I didn't need to look at it because his guy had already performed the inspection and signed off on it. . . When [Southern Pan] was putting the shoring up in the high bay area of the garage to the second floor, the stringers weren't placed correctly per the plans, and I brought this to either Tim's attention or Jim's attention, but they both became aware of it at some point, and they stated that their guy had already looked at it and signed off on it." (Tr. 730-731) When Cannon pointed out a problem he wanted corrected, Southern Pan's supervisors would say, "You don't need to worry about it. Our guy is working with that." (Tr. 741) Cannon stated Southern Pan would eventually correct problems he pointed out (Tr. 741).

Southern Pan mischaracterizes the Secretary's argument on this issue.

> [T]he Secretary seems intent on proving that Southern Pan was derelict in its duties because its employee Jim Smith, who was <u>not</u> an engineer, failed to second-guess and even contradict three professionals that had performed inspections, plus the general contractor (Choate) and the concrete pouring contractor (Pittman) whose responsibility it was under § 1926.701(a) to ascertain whether the structure could bear the load.

(Southern Pan's Brief on Remand, p. 24) (emphasis in original)

Southern Pan claims it reasonably relied on the inspections of "three professionals" (but not "from a person who is qualified in structural design") to determine the structure was capable

of supporting Pour 6A. Yet Southern Pan is aware it provided inaccurate drawings to the inspectors during each inspection. Although he claims he mistakenly believed revised drawings had been ordered, Smith was fully aware he did not have a revised copy of the drawings on the site. When asked, "If somebody is going to do an inspection of your shoring and reshoring, is there any way that they can do an inspection without reference to [the drawings]?" Smith responded, "No, sir." (Tr. 317-318)

The evidence establishes Smith and Marlow steered the inspections conducted by Universal and Synergy, pointing out only the areas about which they were concerned and discouraging the inspectors from looking closely at the original drawings. Southern Pan faults the competence of the inspectors for approving the shoring and reshoring, but it was Southern Pan who compromised the integrity of the inspections from the start. Smith testified Universal's "job was to come and make sure I had my shoring and reshoring according to the drawings for the inspection prior to any pour made." (Tr. 325) Yet Smith provided Universal and Synergy with outdated drawings he knew were inaccurate. When Universal and Synergy approved the shoring and reshoring, despite the significant deviations from the existing drawings, Southern Pan reasonably should have realized the approvals to pour were not trustworthy.

Dr. Stanley Lindsey testified as an expert witness for Southern Pan. At the time of the hearing, he was a professor of environmental and civil engineering at Georgia Tech Savannah. He has a Ph.D. in Structural Engineering from Vanderbilt University (Exh. R-8). Judge Welsch qualified Dr. Lindsey as an expert in structural engineering and cast-in-place concrete (Tr. 1222). Dr. Lindsey testified the inspections of Universal and Synergy, under the circumstances established by the record, were unreliable. "Their job, to me, was to be sure that they had the right documents that they were looking at. They were hired to do job observations which meant they had to use the construction documents, approved by the state or the governing authority, to do their inspections by, and if they did not use those, then they weren't fulfilling their obligation as you do in an inspection." (Tr. 1316)

Southern Pan had a contractual obligation to obtain shoring and reshoring drawings. When it prematurely removed the shoring and reshoring on the first three floors, Southern Pan deviated from the drawings. "If SP decides not to shore to the ground, then a separate engineering firm (SP used Dansco when it requested revised plans for the tower) must calculate and create a new reshore plan to be signed and sealed. Patent does not create reshore plans that

do not go to the ground (Tr. 122)." *Southern Pan Services Co.,* slip op. at 18 (ALJ). Southern Pan failed to obtain the revised drawings; thus it failed to meet the first measure identified by the Secretary that Southern Pan was required to take in order to comply with § 1926.701(a) ("[O]btain the necessary information from a shoring engineer and provide it to Choate and Pittman[.]" *Southern Pan,* 25 BNA OSHC at n. 8).

The second measure for compliance with the cited standard identified by the Secretary is "verify before the pour that Pittman or Choate had determined that the structure could support the wet concrete, on the basis of information from Southern Pan's shoring engineer or from another qualified source if Southern Pan was unable or unwilling to meet its contractual obligation to provide" the required information. *Id.* It is undisputed Southern Pan did not obtain and thus could not provide the required information to Pittman or Choate. The record also establishes Southern Pan did not verify before Pour 6A that Pittman or Choate had determined the structure could support the addition of the wet concrete. Smith was aware Pour 6A was scheduled. Choate informed Smith it planned to add more concrete to the 20 inches it initially had determined to pour for the slab (Tr. 265-267). When asked if Choate had "engineering approval to add" the extra concrete, Smith replied, "Not to my approval—I mean, I had no way of knowing that. That's between them and the engineers they have a direct line with. That was their responsibility, not mine[.]" (Deposition of Smith, p. 82)

Southern Pan relies on Rouhi's ambiguous email as evidence it verified Choate had secured the approval of the engineer of record to remove the shoring and reshoring. As the Commission notes, however, Rouhi's "approval" consisted of a "vague single-word reply" and "there is no evidence that Southern Pan even knew of the e-mail's existence before the garage collapse." *Id.* at 1090.

Based on the record, I find the Secretary has established Southern Pan failed to make reasonable efforts to protect its employees from the structural collapse hazard. As an exposing employer, Southern Pan could have attempted "to have the general contractor correct the condition, attempt[ed] to persuade the employer responsible for the condition to correct it, [or] instruct[ed] its employees to avoid the area where the hazard exist[ed]" *Grossman Steel & Alum. Corp*., 4 BNA OSHC at 1189. Southern Pan took none of these actions. Southern Pan deviated from the shoring and reshoring drawings, failed to obtain revised drawings from a qualified shoring engineer who had calculated whether the structure could support the construction load

with three levels of the shoring and reshoring removed, and provided the Universal and Synergy inspectors with inaccurate shoring and reshoring plans. After the collapse, Southern Pan claimed it participated in Pour 6A because it relied on the inspectors' approvals of the shoring and reshoring. Such reliance was not reasonable since it knew the shoring and reshoring did not, in fact, meet the specifications of the drawings. It is, therefore, responsible for the violative condition to which its employees had access. Southern Pan failed to comply with the requirements of § 1926.701(a).

Did Southern Pan Have Either Actual or Constructive Knowledge of the Violative Condition?

The Commission's instructions provide, "In the event the Secretary bases his case for knowledge on the imputation of superintendent Smith's knowledge of his own misconduct, i.e. his failure to take steps to obtain and provide the required information, we direct the judge to determine on remand whether this case falls within the scope of the Eleventh Circuit's recent decision in *ComTran." Southern Pan,* 25 BNA OSHC at 1087. Although the Secretary contends Smith did have actual knowledge of his own misconduct in failing to obtain and provide the required information, it is not the sole basis for his argument that Southern Pan knew of the violative condition. "SP had multiple managers who knew or could have known that the reshores were removed" without revised drawings based on a shoring engineer's new calculation the structure could support the weight of Pour 6A (Secretary's Brief on Remand, p. 17). The Secretary argues the actual knowledge of Smith, as well as senior project manager Postma, general superintendent Mathis, and superintendent Marlow, are imputable to Southern Pan and thus *ComTran* does not apply in this case. I agree with the Secretary.

In *ComTran,* the Eleventh Circuit stated that in order to prove an employer knew of its supervisor's misconduct, the Secretary "must do more than merely point to the misconduct itself." *ComTran* at 1318. The court's reasoning is premised on the idea that a supervisor acts as the "eyes and ears" of the corporate employer. The corporate employer entrusts the supervisor with the duty to ensure its employees comply with safety standards, making the supervisor's knowledge the corporate employer's knowledge. The court found, however, that a different situation arises when the supervisor alone engages in unsafe conduct. "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.*

In *ComTran*, Walter Cobb, ComTran's supervisor, was working alone in an excavation, digging for a utilities conduit he expected to find approximately four feet below the surface of the ground. He failed to find the conduit and expanded his efforts, taking down a silt fence the employer had put up between the spoil pile and the excavation, and widening and deepening 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." *ComTran* at 1309. This wall of earth caught the eye of an OSHA compliance officer as he drove by. The compliance officer stopped and opened an inspection of the worksite. Cobb told the compliance officer he was not paying attention to what he was doing, an admission Cobb repeated at the Commission hearing, when he stated, "I just kept on digging. I had problems [finding the utilities] and was just trying to get out of there, and really I didn't pay no attention to it until OSHA come up and started asking me questions [about] how deep the hole is and about my spoil pile." *Id.*, n. 7. The ALJ, applying Commission precedent, imputed Cobb's knowledge of his own misconduct to ComTran and affirmed the cited item. The ALJ's decision became a final order of the Commission.

The Eleventh Circuit reversed and remanded the case. It found Cobb's misconduct to be illustrative of its theory that, in the "ordinary case," a supervisor acts as the "eyes and ears" of the corporate employer, but imputing knowledge of a supervisor's own misconduct would be unfair.

> That is especially so in a case like this one, where the supervisor was focused intently on a specific task; he was not paying close attention; he arguably did not know of the dangerous condition (notwithstanding that he should have known); and there was nobody there to observe (and warn) him. This is not the situation where a supervisor was being intentionally careless and watched by others. *Cf. Horne Plumbing & Heating Co. v. Occupational Safety & Health Review Comm'n,* 528 F.2d 564, 566 n. 1 (5th Cir.1976) (noting the "rather cavalier attitude" on the part of a malfeasant foreman who was specifically warned of the dangerous condition by a subordinate employee watching nearby, yet he disregarded the warnings and, in fact, joked that he "wouldn't have to worry ... if (he) was all right with God"). Cobb was digging in the trench by himself and got lost in his work. It is difficult to see how ComTran even arguably had "eyes and ears" at the Lawrenceville project at that time.

Id. at n. 11.

The differences between the conditions cited at the Berkman Plaza II project and the conditions cited in *ComTran* are obvious. ComTran's supervisor was working alone, performing

manual labor, when he "got lost" in his work and actively created an unprotected eleven-foot tall "wall of earth" in the course of one day, when no other supervisors were present. Southern Pan supervisor Smith worked onsite on a large project with numerous other employees, including other Southern Pan supervisory personnel. Smith neglected to obtain required information and revised drawings from a shoring engineer, which is not of the same nature as the "rogue conduct" of a malfeasant supervisor that *ComTran* characterized as idiosyncratic, isolated, unforeseeable, and implausible.

The Eleventh Circuit noted that Cobb "was focused intently on a specific task" and "there was nobody there to observe (and warn) him." *Id.* at n. 11. The concern of the court is the unfairness in attributing knowledge to the employer of a transitory violation that amounts to a snapshot in time to which the perpetrator, alone and unwatched, appeared to be oblivious. Here, Southern Pan had other "eyes and ears" on the site in addition to Smith who could have observed and warned him that he had failed to obtain information and revised drawings from the shoring engineer that the structure could support Pour 6A. Southern Pan was not, "figuratively speaking, blind and deaf," during the almost seven weeks the existing shoring and reshoring deviated from the drawings.

Smith claims he misunderstood his supervisor's instructions and permitted Southern Pan employees to remove reshoring without first verifying the expected revised drawings (based on information provided by a shoring engineer) were available on the site. Postma knew the reshoring should not have been removed. He was on the site on a weekly basis and he walked the site with Southern Pan general superintendent Charles Mathis and superintendents Smith and Marlow the first week of December (Tr. 558-559).

Southern Pan superintendent Marlow testified he directed his labor foreman Tommy Brown and his crew to remove the reshoring in order to help Smith in his struggle to stay on schedule. Marlow stated Smith was responsible for his crew when they were removing the shoring and reshoring. When asked if he remembered walking the garage with Mathis and Smith, Marlow replied, "Yes. We—we all walked it."(Deposition of Marlow, p. 6)

Marlow's testimony on this point leaves no doubt he and his fellow supervisors knew the removal of the shoring and reshoring diverged from the existing drawings.

Q. [Y]ou had said you recall walking the floors, the shoring and reshore floors. Does that mean at some point you accompanied other people where you were actually looking at shoring and reshoring, as well?

Marlow: You just asked that. Me and Charles and Jim, all three.

* * *

Q. So I want to clarify now. Was there a time when you, Smith and Mathis walked the garage to look at the shoring and reshoring prior to the last pour?

Marlow: Yes.

Q. Okay. And do you recall was that within days of the pour? Was it potentially a week or more before the pour?

Marlow: Normally you'd walk the pour the day before.

* * *

Q. And when you three did the walk to look at the shoring and reshoring, what—what were you—what was the purpose of that?

Marlow: It's just a—it's like a pour check. You pour—you check your pour before you—to make sure it's all in by the drawings.

(Deposition of Marlow, pp. 8-10)

Southern Pan argues it did not know of the violative condition because, again, "it was reasonable for it, as an exposing employer, to rely on written approvals by professional engineers." (Southern Pan's Brief on Remand, p. 27) As I noted in the previous section, I find it was *not* reasonable for Southern Pan to rely on approvals which it knew were flawed due to Southern Pan itself providing inaccurate drawings to the inspectors. When the inspectors gave their approval, they were confirming the shoring and reshoring met the specifications set out in the drawings. Since Smith, Postma, Marlow, and Mathis knew Southern Pan's employees had removed the shoring and reshoring on the first three levels and that the existing drawings required shoring to the ground, these supervisors had actual knowledge of the violative condition. Postma stated, "Always according to the drawings. The drawings that are on the site is the Bible of what you're going to go by." (Tr. 565) Marlow testified, "The only thing that was told to us was to make sure that we didn't move—we didn't go off—away from the stamped drawings. Everything goes in by a stamped drawing." (Deposition of Marlow, p. 14).

The Secretary has established at least four of Southern Pan's supervisors had actual knowledge their employees removed shoring and reshoring without first obtaining information from a shoring engineer that the structure could support the weight of Pour 6A. *ComTran* applies to situations when one supervisor alone knows of the violative condition; here, at least four supervisors knew of it. I find, therefore, Item 1 of Citation No. 1 does not fall with the scope of *ComTran.*

The actual knowledge of Southern Pan's supervisors is imputed to Southern Pan. The Secretary has established Southern Pan had actual knowledge of the violative condition. Item 1 of Citation No. 2 is affirmed.

Was the Violation Willful?

The Secretary classified Southern Pan's violation of § 1926.701(a) as willful.

> "The hallmark of a willful violation is the employer's state of mind at the time of the violation—an 'intentional, knowing, or voluntary disregard for the requirements of the Act or ... plain indifference to employee safety."' *Kaspar Wire Works, Inc.,* 18 BNA OSHC at 2181, 2000 CCH OSHD at p. 48,406 (citation omitted). [I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation .... A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference.... *Hern Iron Works, Inc.,* 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256 57 (No. 89-433, 1993). This state of mind is evident where "the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care." *AJP Constr. Inc. v. Sec'y of Labor,* 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citation omitted).

Thomas Indus. Coatings, Inc., 23 BNA OSHC 2082, 2091 (No. 06-1542, 2012).

James Borders, area director for OSHA's Jacksonville office, summed up the Secretary's case for finding Southern Pan's violation of § 1926.701(a) is willful.

> Southern Pan and Jim Smith w[ere] aware by the OSHA standards and just by construction standards and building standards, as he called them, that a determination had to be made as to whether or not that structure could support the loads that were about to be placed on it. He knew that additional concrete was going to be added to this structure. He was told that by a general contractor representative. He also knew that the reshoring no longer went all the way to the ground as it was when it was initially approved. He also knew that the not making this determination could result in the collapse of the structure, and he also knew that he would have employees in the vicinity of this work.

(Tr. 874)

When asked if he was aware OSHA "requires that somebody make the determination that the structure will withstand weight that's being placed on it prior to the weight being placed," Smith replied, "I would hope so. My life kind of depends on that part." (Tr. 200) Smith also acknowledged the engineer of record "relies on the shoring engineer to determine whether . . . the structure can withstand the weight of wet concrete being placed." (Tr. 201) Postma testified he was aware a person qualified in structural design is required to determine whether a structure can support the weight of additional concrete before the pour. On the Berkman Plaza II project, that person, Postma stated, was Doug Rose of Patent (Tr. 550). Postma also stated if Southern Pan wanted the shoring configuration changed so the structure was not shored to the ground, he was the person responsible for requesting the revised drawings. "It would be me. I review the drawings and I request that, yes." (Tr. 507)

The Secretary highlighted the dissonance created by Southern Pan's position that it was not contractually obligated to determine whether the structure could withstand additional weight imposed on it during concrete pours:

> SP suggests that other contractors should have had plans created or made the determination. Is SP referring to shoring plans that SP had the sole responsibility to obtain? Only shoring plans would make the required determination. SP also argues that no one asked SP to make the determination that the structure could hold the weight imposed during the pour. No one had to ask SP to do so because no weight was ever supposed to go to the structure until SP removed shores without revised plans and without having someone determine that the structure could withstand the weight with less shoring. No other contractor needed to concern itself with new shoring plans or a determination if SP had done what it was supposed to do and shore to the ground. . . . Unfortunately, SP thought nothing of deviating from the plans and putting dozens of employees at risk without even notifying other contractors that it had done so.

(Secretary's Reply Brief on Remand, pp. 7-8)

I agree with the Secretary's argument. The shoring and reshoring plans were in Southern Pan's possession and it was contractually responsible for obtaining revised plans should it desire to change the configuration of the shoring and reshoring. Southern Pan's employees removed the shoring and reshoring despite failing to obtain revised plans. This violative conduct, which triggered the need for a new determination as required by § 1926.701(a), was performed by Southern Pan under the direction and with the knowledge of at least three supervisors. Had

Southern Pan left the structure shored to the ground, no new determination would have been needed. Southern Pan created the circumstances that gave rise to the need for a new determination.

Although Smith's excuse for deviating from the plans is he mistakenly thought Postma wanted him to remove the shoring and reshoring, and had ordered revised drawings to that effect,[6] the record establishes Smith had a different motivation for ordering Southern Pan's employees to remove the shoring and reshoring. He stated he "had never had any intention of" removing the shoring in the high bay area, but Paul Dionne of Choate "tried to have me run off the job because I wouldn't do it and remove them." (Deposition of Smith, pp. 32-33).

> And I just pointed out, told 'em, "Look, I just don't have time to do it, just to get him off, put him off, and I went back to work. He didn't like that answer. He calls Tim Postma, "Hey, I need this stuff removed. I've got elevator equipment coming in. This is where it's going. You got to get this out." Postma calls Tim Marlow. "Hey, if you're caught up, send your guys over. *But the directions to take that out came from Paul Dionne for Choate Construction.* . . . I came down that day and saw that they had most of it taken down, and I asked [Marlow], "Why did y'all do it?" He said, Tim Postma told him to come over and do it, send his laborers.

(*Id.*at 32) (emphasis added)

Marlow corroborated Smith's testimony, stating, "I remember Choate, wanting to store—I think it was—elevator equipment under the first floor. They were pushing to get the shoring out." (Deposition of Marlow, p. 12) Contrary to the testimony of Smith and other Southern Pan supervisors that Smith mistakenly assumed Postma had ordered revised drawings showing the shoring and reshoring removed on the first three levels, the deposition testimony of Smith and Marlow indicates Southern Pan, at the direction of Postma, removed the shoring and reshoring in response to Choate's urgings. This shows a heightened awareness of the illegality of the conditions and conscious disregard or plain indifference to employee safety.

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[6] The Commission stated,

> Smith admitted at the hearing that it became apparent later that the switch to the one-over-two method was based on a misunderstanding between him and Postma. Postma had told Smith to rotate the "material," and Smith assumed that meant he should switch to what "we always did at one over two, one shoring over reshoring ...." Smith later learned that Postma had intended for him "to rotate his aluminum and plywood," but not to remove any reshoring. Postma testified that he had always intended the garage to be shored to the ground.

Southern Pan, 25 BNA OSHC at n. 4.

The violation of § 1926.701(a) was properly classified as willful.

II. Item 2: Alleged Willful Violation of § 1926.703(a)(2)

Item 2 of Citation No. 2 alleges Southern Pan "did not obtain a reshoring drawing, including all revisions, for the reshoring design method of using two levels of reshores, exposing employees to a structural collapse hazard." Section 1926.703(a)(2) provides: "Drawings or plans, including all revisions, for the jack layout, formwork (including shoring equipment), working decks, and scaffolds, shall be available at the jobsite." Judge Welsch affirmed Item 2.

Did Southern Pan Have Either Actual or Constructive Knowledge of the Violative Condition?

The Commission agreed the Secretary established the first three elements of his burden of proof with respect to this item. Regarding the fourth element, the Commission directed the judge on remand to "consider whether the knowledge issue as presented by this citation item is affected by *ComTran*." *Southern Pan*, 25 BNA at 1090. By order dated January 29, 2015, I directed the parties to submit briefs addressing what impact, if any, the Eleventh Circuit's decision in *ComTran* had on Judge Welsch's conclusion in the underlying Decision that the Secretary established the knowledge element of the Secretary's *prima facie* case for Item 2.

The Secretary argued *ComTran* does not apply to the situation at issue because it "only applies when a supervisor working alone engages in misconduct[.]" (Secretary's Brief, p. 5) Southern Pan contended *ComTran* does apply because it "prohibits the Secretary from imputing knowledge to an employer when the only source of that knowledge is the supervisor's knowledge of his own malfeasance. Accordingly, because the Secretary relied, solely, on such improper imputation in the case below, he failed to show the required *prima facie* element of knowledge and the citation should be vacated." (Southern Pan's Brief, pp. 1-2)[7]

[7] Southern Pan contends the Secretary (and consequently this court) is bound by Judge Welsch's conclusion that Smith's knowledge was imputed to Southern Pan as the sole basis for finding knowledge. I disagree. Under the applicable law at the time Judge Welsch issued his decision, he properly concluded Southern Pan knew of the violative condition based on the undisputed evidence that Smith knew of the violation. Having found knowledge established, Judge Welsch did not otherwise discuss evidence of the actual knowledge of other supervisors or of constructive knowledge. On remand, however, I am not limited by Judge Welsch's finding that the Secretary established actual knowledge only by imputing Smith's knowledge to Southern Pan. The Commission specifically instructed the judge on remand to consider whether the record supports a finding that Southern Pan knew of the violation of § 1926.703(a)(2), without limiting the consideration to the imputed actual knowledge of Smith: "[W]e direct the judge on remand to reconsider whether the Secretary has established knowledge." *Southern Pan,* 25 BNA OSHC at 1090. Thus, my finding that at least four Southern Pan supervisors had actual knowledge the violation is within the ambit of the Commission's directive.

Upon consideration of the parties' briefs, I issued an order dated March 24, 2015, in which I agreed with Judge Welsch's finding that the Secretary established the element of employer knowledge, but based this determination on constructive knowledge, not imputed actual knowledge.[8] Upon further consideration of the underlying record, the depositions taken pursuant to these remand proceedings, and the briefs and reply briefs on remand, I now find, in addition to constructive knowledge, the Secretary established actual knowledge on the part of four of its supervisors, which is imputed to Southern Pan.

Southern Pan began removing reshoring on October 22, 2007, and the garage collapsed on December 6, 2007 (Tr. 247). Southern Pan did not have the required revisions on site because no revision actually had been intended. Thus, the violative conduct continued unabated for 46 days, from the time Southern Pan first removed reshoring until the garage collapsed. Moreover, it was not Smith alone who was aware of the violative condition. The removal of the reshoring was done by a number of Southern Pan employees, including a crew sent over by Southern Pan superintendent Tim Marlow. Smith testified,

> Tim Marlow brought his men over to do it because he knew I did not have time to do it and he knew that Choate was pushing me to have it done. So, he took it upon himself since he had the man hours to do it, the man time to do it, to go ahead and take some of the relief off of me, some of the pressure off of me by starting it.

(Tr. 251)

Postma testified he visited the Berkman Plaza site "at least once a week" and was sometimes on site for two days at a time (Tr. 599). The first week in December, Postma toured the project site with general superintendent Charles Mathis (Tr. 558-559, 599). Postma knew Southern Pan was not supposed to remove the reshoring from the first three levels of the garage.

The fact pattern of *ComTran* varies significantly from the facts established by the record in this case. The situation presented here, where the violation was ongoing and other supervisory personnel knew of the violative condition, is not the situation contemplated in *ComTran*.

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[8] Southern Pan contends my finding of constructive knowledge "is incorrect, and is not supported by the record" because Smith mistakenly assumed the revised drawings had been ordered and there is no evidence "Smith was aware at the time of the absence of any required drawing." (Brief on Remand, p. 34) At the hearing, Smith identified Exhibit J-11, which counsel for Southern Pan characterized as having "a worn look," as "my shoring drawings sent to me from Patent." When asked why the papers were so worn, Smith responded, "These are my working drawings that I had on site." (Tr. 307) Smith was aware he was using the original drawings and he had not received revised drawings, even though he was aware Southern Pan employees were removing shoring and reshoring in deviation from Patent's drawings.

Marlow and his crew removed the shoring and reshoring contrary to the existing drawings. Labor foreman Brown was also aware the shoring and reshoring had been removed, contrary to the Patent drawings.[9] Smith's failure to secure revised drawings before removing shoring and reshoring continued for 46 days and existed during Postma's weekly visits and Postma's walkaround inspection with Mathis in early December. Smith, Marlow, and Mathis inspected the shoring and reshoring the day before Pour 6A. *ComTran* does not apply to the instant item.

The actual knowledge of Southern Pan's supervisors is imputed to Southern Pan. The Secretary has established Southern Pan had actual knowledge of the violative condition. Item 2 of Citation No. 2 is affirmed.

Was the Violation Willful?

Judge Welsch determined the Secretary properly classified Southern Pan's violation of § 1926.703(a)(2) as willful, finding Southern Pan evinced an intentional, knowing, or voluntary disregard for the requirements of the Act.

> Smith admitted he knew he was not permitted to continue work if he did not have the revised plans on site. Smith admitted he never saw any revised plans, yet he ordered the reshoring removed anyway (Tr. 247). . . . He knew he did not possess revised plans on site, he knew he was not supposed to deviate from the existing plans, and yet he did so. Smith knowingly disregarded the requirements of the standard. Smith's claim he mistakenly assumed the revised plans were in the mail from Dansco, along with the replacement drawings for the tower is, rejected. Even if the plans were in the mail, Smith should not have removed the reshoring until the revised plans were on site. No one specifically told Smith that revised reshoring plans had been ordered or were in the mail. . . . SP's contract with Universal Engineering Service to inspect the shoring/reshoring does not show good faith. . . . SP cannot contract away its responsibility under the standard. Universal was never given the Patent plans and was only shown the shoring plans SP asked it to inspect. Greg Holtz was the project engineer for Universal (Tr. 398). He inspected the garage on December 4, 2007, in preparation for Pour 6A. Holtz testified he never saw reshoring plans, only the shoring plans (Tr. 408). Smith would verbally tell Holtz what he wanted Holtz to look at. Smith carried what were purported to be shoring plans. Holtz states, "[T]here was no need to

[9] The Eleventh Circuit recently clarified that a supervisor's knowledge of a subordinate employee's violative conduct is imputable to the employer when the supervisor was simultaneously involved in violative conduct. "We see little or no difference between the classic situation in which the supervisor sees the violation by the subordinate and disregards the safety rule, for example to expedite the job; and the instant situation in which the supervisor sees the violation and pitches in and works beside the subordinate to expedite the job." *Quinlan v. Sec'y, U.S. Dep't of Labor*, No. 14-12347, 2016 WL 97602 at *7 (11th Cir. Jan. 8, 2016).

> bring out the plans. He had them rolled up and said, 'These are the plans' and he quickly rolled them back up" (Tr. 409). The inspections by Universal were not in accordance with the plans on site.

Southern Pan Services Co., slip op. at 22-23 (ALJ).

I agree with Judge Welsch's determination regarding Smith and, additionally, find the state of mind of each of the other supervisors who knew of the violative condition rose to the level of willfulness. *Branham Sign Co*., 18 BNA OSHC 2132, 2134 (No. 98-752, 2000) ("The state of mind of a supervisory employee ... may be imputed to the employer for purposes of finding that the violation was willful.").

Mathis, Marlow, Smith, and Postma uniformly and consistently testified the formwork they were contracted to install should never deviate from the drawings. Mathis stated, "[N]obody is supposed to deviate from plans, period, without—like you said—going to an engineer. That's just kind of always been company policy." (Deposition of Mathis, p. 20)

Marlow testified, "Everything goes in by a stamped drawing." When asked how he knew this, he responded, "Well, that was—that's just the policy in a company. Your owner will tell you that—Dickey, when we had meetings and stuff in the superintendent meetings, you know, it would be brought up. You don't deviate from your stamped drawings, your approval drawings." (Deposition of Marlow, pp. 14-15) When pressed whether, at the request of the general contractor, Southern Pan could make "what might be seen as a small change or deviation from the plans[,]" Marlow held firm: "No. The superintendent shouldn't deviate from the stamped drawings." (*Id.* at 15)

Smith was even more adamant that Patent's drawings were not to be ignored.

> Q. So, if deviating from the Patent plans, you knew you needed to go back to the engineer to have that reviewed?
>
> Smith: Right. . . . [Y]ou don't deviate from the drawing sets that you have unless another engineer provides adequate, I guess, paperwork or plans to change things. You never deviate from the plans, the original things you got, until something else, a revision comes in.
>
> Q. And, why do you need to follow that practice?
>
> Smith: Why would I do it? Just from my experience in construction. I mean, I would never do that. I've never done that without approval. You just don't do that. I would lose my job if I did.

Q. Are there any safety concerns if you deviate from—

Smith: Yes, I would end up taking responsibility for it if I deviated from the drawings that the engineers approved and I wouldn't do that.

(Tr. 742-743)

Of course, Smith did deviate from the drawings (and did not take responsibility for it or lose his job), as Postma conceded. "Jim Smith should have looked at the drawings and, yes, if Jim Smith made a mistake and took something out he shouldn't have taken out, that was a mistake." (Tr. 552) Postma went on, however, to place ultimate blame on Universal. "And, that's the reason why the other layer of Universal is there is to catch these mistakes, and at that point, if the mistake was caught, the shoring would have been put back in place and we would have been back in accordance with the drawings that were on the site." (*Id.*)

At the hearing, in the depositions, and in its briefs, Southern Pan repeatedly returns to Universal as the party primarily responsible for failing to detect the shoring and reshoring was not configured in accordance with Patent's drawings. Southern Pan stubbornly refuses to acknowledge it was due to Smith and Marlow the Universal inspector was allowed only fleeting glimpses of the plans and was not allowed to see the complete plans. Smith and Marlow played the inspectors from Universal and Synergy off against each other, limited the scope of the inspections, and told them their inspections were unnecessary. Smith and Marlow did not approach the formwork inspections as crucial safeguards to ensure structural stability but rather as hoops through which they had to jump before they could continue with their work. The fact revised drawings were not on site was known specifically by Southern Pan—it had the contractual responsibility for obtaining the shoring and reshoring drawings from Patent. Southern Pan cannot pass off its responsibility for the flawed inspections to Universal and Synergy when it knowingly deviated from the drawings and steered the inspectors into making perfunctory inspections.

The violation of § 1926.703(a)(2) was properly classified as willful.

Penalty Determination

Under § 17(j) of the Act, the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous

violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries." *Siemens Energy and Automation, Inc*., 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Southern Pan employed approximately 1,000 employees at the time of the collapse (Tr. 1132). The company had received citations within the three years prior to the instant citation items (Exh. C-11; Tr. 854). I do not credit Southern Pan for good faith based on the awareness of the senior project manager, the general superintendent, and two superintendents of the violations. *Gen. Motors Corp., CPCG Okla. City Plant,* 22 BNA OSHC 1019, 1048 (No. 91-2834E7 91-2950, 2007) (consolidated) (giving no credit for good faith when management tolerated and encouraged hazardous work practices).

The gravity of both violations is high. With regard to Item 1 of Citation No. 2, the Commission determined two employees were exposed to the structural collapse hazard. *Southern Pan,* 25 BNA OSHC at 1085. One employee was killed and another seriously injured close to the beginning of their shift on December 6, 2007. I determine a penalty of $55,000.00 is appropriate.

With regard to Item 2 of Citation No. 2, numerous employees were exposed to the hazard of structural collapse over a period of 46 days. Southern Pan characterizes the violation of § 1926.703(a)(2) as "a paperwork error," (Reply Brief on Remand, P. 12) but, as the Commission notes, "OSHA has recognized that this provision is intended to prevent accident that could result from improperly erected formwork, and written plans enable this protective purpose to be met." *Southern Pan*, 25 BNA OSHC at 1089. The Commission quotes with approval Judge Welsch's analysis of § 1926.703(a)(2). "The requirement that all plans, including revisions, be present on site is not a mere technicality. Formwork is designed to transfer weight from the structure. Prematurely removing formwork without an engineer's revisions exposes employees to structural collapse. Without the correct plans on site, crucial information is missing." *Id.* at 1089. Although the parties stipulated Southern Pan's removal of the shoring and reshoring in deviation from Patent's drawings did not cause the structural collapse, Southern Pan's expert witness testified adherence to the drawings would have prevented it.

> Q. Do you have any belief that the shoring that was in the garage was not strong enough to withstand the weight that was placed on it?

Dr. Lindsey: Quite the contrary. It's my belief that the shoring that was furnished by Patent Construction Company was adequate for its intended use.

* * *

Q. And, using that Patent system, shoring equipment, had there been further plans to the ground, the building would not have collapsed?

Dr. Lindsey: That's my opinion. Let me clarify. It would not have collapsed as long as the shoring were in place.

(Tr. 1404-1405)

I determine a penalty of $70,000.00 is appropriate.

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, it is hereby ORDERED:

1. Item 1 of Citation No. 2, alleging a willful violation of § 1926.701(a), is AFFIRMED and a penalty of $55,000.00 is assessed; and
2. Item 2 of Citation No. 2, alleging a willful violation of § 1926.703(a)(2), is AFIRMED and a penalty of $70,000.00 is assessed.

SO ORDERED.

/s/
HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia

Date: April 1, 2016