

BACKGROUND

On the morning of July 30, 1991, OSHA compliance officer William Marzeski (“the CO”) was driving near the intersection of two city streets in Binghamton, New York, when he saw someone at the intersection using a jackhammer to cut through asphalt pavement. That person, who was not wearing any type of protective eyewear, was Ray Price, an equipment driver and operator employed by NYSEG in its natural gas department. Price and Jim Webb, a gas fitter, first class, formed NYSEG’s two-member work crew at the site. No one else was present. The CO parked his vehicle, went over to Price, and identified himself. After presenting his credentials to Webb, whom both employees designated as the “crew leader,” the CO determined that Price had also not been wearing steel-toed safety boots or protective shoe covers while operating the jackhammer.

On this record, it is undisputed that the jackhammer operation Price was engaged in exposed him to eye and foot injury hazards that could and should have been substantially reduced through use of appropriate PPE. It is also undisputed that NYSEG provided such PPE for its employees and required them to wear it while operating a jackhammer. Indeed, at the time of the alleged violations, safety goggles and protective shoe covers were both stored in the back of the company truck that was “right adjacent to [Price’s] work area.”

Following this inspection, OSHA issued NYSEG a citation alleging a single serious violation of 29 C.F.R. § 1926.28(a), with a reference to 29 C.F.R. § 1926.102(a).² The

¹(...continued)

§ 1910.5 Applicability of standards.

...
 (c)(1) If a particular standard is *specifically applicable* to a condition, practice, means, method, operation, or process, it shall prevail over any different standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. . . .

(Emphasis added, example omitted).

² The originally-cited standard provides, as follows:

§ 1926.28 Personal protective equipment.

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to

(continued...)

factual basis of this charge was that employee Price had been “exposed to eye and toe injuries while operating . . . [a jackhammer] without using protective eye equipment and safety-toe footwear.” In his complaint, however, the Secretary separated this allegation into its two component parts and also changed his legal theory. As amended, item 1a alleges a violation of 29 C.F.R. § 1910.132(a)³ based on Price’s failure to wear “protective safety-toe

²(...continued)

hazardous conditions [and] where this part indicates the need for using such equipment to reduce the hazards to the employees.

See L.E. Myers Co., High Voltage Sys. Div., 12 BNA OSHC 1609, 1614, 1986-87 CCH OSHD ¶ 27,476, p. 35,604 (No. 82-1137, 1986), *rev’d on other grounds*, 818 F.2d 1270 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987) (restoration of standard’s original language, as adopted under the Construction Safety Act).

The referenced standard provides, in pertinent part, as follows:

§ 1926.102 Eye and face protection.

(a) *General.* (1) Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

³ The cited standard provides, as follows:

§ 1910.132(a) General requirements.

(a) *Application.* Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact.

footwear,” while item 1b alleges a violation of the general duty clause⁴ based on his failure to wear “protective eye equipment.”

PREEMPTION

At issue on review is whether it is appropriate to cite NYSEG under the general duty clause, and if not what is the appropriate standard. From the earliest days of the Act’s enforcement, the Commission has held that a citation for violation of the general duty clause “is not appropriate where there exists a specific occupational safety and health standard covering the conduct at issue.” *Sun Shipbuilding & Drydock Co.*, 1 BNA OSHC 1381, 1381-82, 1973-74 CCH OSHD ¶ 16,725, p. 21,474 (No. 161, 1973). More recently, the Commission refined this rule, as follows:

Under the Act, a citation alleging a violation of section 5(a)(1) is inappropriate when a specific standard applies to the facts. . . . A citation under section 5(a)(1) will not be vacated, however, where the hazards presented are interrelated and not entirely covered by any single standard . . . or where a specific standard does not address the particular hazard for which the employer has been cited. . . .

Ted Wilkerson, Inc., 9 BNA OSHC 2012, 2015, 1981 CCH OSHD ¶ 25,551, p. 31,855 (No. 13390, 1981) (case citations omitted).

Here, we conclude that, at the time of the alleged violation, there were at least three standards that required use of protective eyewear during the operation in question⁵:

⁴ The employer’s “general duty” is set forth in section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), which provides, as follows:

(a) Each employer--

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The more specific duty of “[e]ach employer” to “comply with occupational safety and health standards promulgated under this Act” is set forth in section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2).

⁵ It is undisputed that there is now such a standard and that that standard would preempt the general duty clause if circumstances similar to those cited here arose in the future. As the Secretary points out in his review brief, he recodified section 1910.132(a), *see supra* note 3, approximately two years *after* the incident at issue here, expressly making it applicable to construction work. *See* 29 C.F.R. § 1926.95, as adopted, 58 Fed. Reg. 35,075, 35,152 (1993).

sections 1926.28(a), 1910.132(a)⁶ and 1910.133(a)(1).⁷ It is also arguable that 29 C.F.R. § 1926.102(a)(1) was applicable, as the direction for review (“DFR”) in this case suggested (“Did the judge err in ruling that the Secretary could invoke section 5(a)(1) . . . even though 29 C.F.R. § 1926.102(a) was specifically applicable to these facts?”). Of these standards, we conclude that section 1926.28(a) is the standard that is most “specifically applicable” to the cited violative conditions. *See supra* note 1.

Section 1926.28(a), which OSHA originally cited here, makes employers “responsible for requiring the wearing of appropriate personal protective equipment” under specified circumstances, including those at issue in this case. It can only be cited if there is some other standard in Part 1926 that “indicates the need for using” the particular form of PPE that is at issue. Here, however, that test was met because section 1926.102(a)(1) “indicates the need for using” protective eyewear “when machines or operations present potential eye or face injury from physical, chemical, or radiation agents,” *see supra* note 2, in the same

⁶ As indicated, *see supra* note 5, the Secretary in 1993 made the requirements of section 1910.132(a) expressly applicable to construction work. However, as item 1a of the citation now on review illustrates, the Secretary took the position even prior to this recodification that 1910.132(a) could be applied to construction work. Thus, the Secretary argues in his review brief here that it was appropriate to cite Price’s failure to wear protective *footwear* under a general industry standard such as section 1910.132(a) “because no such requirement for foot protection was then present in the construction standards.” Yet, the Secretary also argues in that same brief that, at the time of the alleged violations, there was no requirement for the use of protective *eyewear* “then present in the construction standards.” It would seem to follow that, in the absence of a Part 1926 standard that he deemed applicable, the Secretary should have cited the protective eyewear violation under an applicable general industry standard, as he did with respect to protective footwear and as NYSEG has persistently argued he should have done in this context as well.

⁷ This is the standard that NYSEG has relied upon throughout this proceeding as the basis of its preemption claim. It provides, in pertinent part, as follows:

§ 1910.133 Eye and face protection.

(a) *General.* (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. . . . Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects

sense that 29 C.F.R. § 1926.105(a) “indicates the need for using” safety belts “when workplaces are more than 25 feet above the ground or water surface.” *See Pace Constr. Corp.*, 14 BNA OSHC 2216, 2217, 1991-93 CCH OSHD ¶ 29,333, p. 39,427 (No. 86-758, 1991); *L.E. Myers*, *supra* note 2, 12 BNA OSHC at 1614, 1986-87 CCH OSHD at pp. 35,604-05. Section 1926.28(a) applied to the conditions cited in item 1b and, as applied, it required NYSEG to ensure that Price wore protective eye equipment while operating a jackhammer. In sum, the Secretary’s original citation was correct when it cited this alleged violation under section 1926.28(a) with a reference to section 1926.102(a)(1). The Secretary’s amended charge under the general duty clause cannot stand because the cited conditions were covered under a section 5(a)(2) occupational safety and health standard.

In reaching these conclusions, we reject the Secretary’s arguments urging us to decide only the limited issue stated in the DFR, as quoted *supra*, and to resolve that issue by affirming the judge. While we “ordinarily” decide only those issues that are set forth in the DFR, “[t]he issues to be decided on review are within the discretion of the Commission” since “a direction for review establishes jurisdiction in the Commission to review the entire case.” 29 C.F.R. § 2200.92(a). *See generally Hamilton Die Cast, Inc.*, 12 BNA OSHC 1797, 1986-87 CCH OSHD ¶ 27,576 (No. 83-308, 1986). Here, we find ample justification for expanding our consideration beyond the narrow issue stated in the DFR.

The Secretary’s theory endorsing the judge’s approach to the preemption issue is untenable. There is no support in the case law for the proposition that section 1926.102(a)(1) was “sufficiently” applicable to “preempt the applicability of the congruent general industry standard,” *i.e.*, section 1910.133(a)(1), but not sufficiently applicable to preempt citation under section 5(a)(1). This argument also runs counter to the Congressional preference for reliance on section 5(a)(2) standards, when such standards have been promulgated, rather than on section 5(a)(1). *See Sun Shipbuilding*, 1 BNA OSHC at 1382, 1973-74 CCH OSHD at pp. 21,474-75. It also is in conflict with the Secretary’s own regulations, *compare* 29 C.F.R. § 1910.5(c)(1) & (2) *with* 29 C.F.R. § 1910.5(f), and it is internally inconsistent with the position that he has taken on item 1a, *see supra* note 6.

Although we base our holding on section 1926.28(a) rather than the standard relied on by NYSEG, *see supra* note 7, the DFR placed the parties on notice that the judge’s

determination that there was no applicable construction industry standard was open to question. We therefore feel no obligation to consider only the two options presented to us by the parties, *i.e.*, 1910.133(a)(1) or the general duty clause. Nor do we feel limited to the option suggested by the DFR, particularly since neither party has argued that 1926.102(a)(1) applied to the cited conditions. We have not considered any standard on review that was not first introduced into this proceeding by one of the parties. Moreover, our ultimate conclusion is merely that the Secretary cited the protective eyewear violation correctly in his original citation.

Having determined that section 1926.28(a) applied to the violative conditions at issue in item 1b, we amend the citation *sua sponte* to restore the eye protection charge to its original form. “Amendments to a complaint,” including *sua sponte* amendments, “are routinely permissible where they merely add an alternative legal theory but do not alter the essential factual allegations contained in the citation. . . .” *A.L. Baumgartner Constr., Inc.*, 16 BNA OSHC 1995, 1997, 1994 CCH OSHD ¶ 30,554, p. 42,272 (No. 92-1022, 1994) (case citations omitted). Here, the conflict between the parties is clearly a dispute over legal theory only. The central factual allegation of the citation, *i.e.*, that NYSEG failed to meet its obligation to ensure that employee Price wore protective eye equipment while operating a jackhammer, remains unchanged by this amendment, as it did when the Secretary amended the citation in his complaint. This issue was tried by the parties, and the same evidence relied upon by the judge as establishing a violation of the general duty clause also establishes NYSEG’s noncompliance with 1926.28(a). Since the amendment merely changes the legal theory, restoring the citation to its original form, it does not result in any prejudice to NYSEG, and it does not require a remand.⁸

⁸ Chairman Weisberg notes that the simple and undisputed fact is that the Respondent’s employee, Price, was observed using a jackhammer without wearing any protective eyewear. Given the employer knowledge found below, the Respondent violated the Act. Clearly this conduct was covered either by a specific standard or, if not, by the general duty clause. Under these circumstances, however, Chairman Weisberg questions the wisdom of expending Commission resources to resolve a dispute over legal theory that has minimal precedential value by parsing which standard might have been specifically applicable to these facts, particularly where at least one of the standards under consideration (§ 1910.132(a)) has subsequently been expressly made applicable to construction work. *See supra* note 5. The
(continued...)

KNOWLEDGE

Judge Gordon found that NYSEG employee Webb was a supervisor and that NYSEG, through Webb, had constructive knowledge of the alleged violations because Webb could have known, with the exercise of reasonable diligence, that Price was operating the jackhammer without wearing the safety goggles and protective shoe covers that NYSEG had provided. In rejecting NYSEG's unpreventable employee misconduct defense, the judge further found that NYSEG had failed to take adequate measures to monitor compliance with its work rules requiring use of the PPE in question. The judge's ultimate conclusion that the Secretary sustained his burden of proof on the knowledge issue, as well as each of the related findings set forth above, are before us on review.

The finding that Webb had constructive knowledge

We agree with the judge that "[t]here is no available evidence" in this case to support a finding of *actual* employer knowledge of the violative conditions at issue in items 1a and 1b. There is no evidence that Webb, or any NYSEG employee other than Price himself, knew that Price was working without PPE before the CO discussed this fact with Webb.

We also agree with the judge that the "lead man" on the work crew, gas fitter Webb, had constructive knowledge of the violations due to his "proximity" to Price at the time of their occurrence and "the feasibility of detection" of the violative conditions. The record fully supports the judge's findings. Testimony from the CO that Webb had joined him and Price "within seconds" of the CO's initial contact with Price establishes the proximity of the two crew members to each other at the time of the alleged violations. The CO's testimony

⁸(...continued)

Respondent had sought review arguing that § 1910.133(a)(1) was the applicable standard requiring that employee Price wear protective eyewear while operating the jackhammer. This case was directed for review on the issue of whether the judge erred in ruling that the Secretary could invoke the general duty clause "even though 29 C.F.R. § 1926.102(a) was specifically applicable to these facts." Neither the Respondent nor the Secretary had challenged the judge's determination that § 1926.102(a) did not apply. The confusion is further compounded by holding that the cited condition is covered by yet a different provision, § 1926.28(a), one which no party, not the Secretary nor the Respondent, contends is applicable. Nevertheless, the Chairman agrees with his colleagues that the legal and factual issues relative to Price's failure to wear protective eye equipment were fully tried by the parties and that the Respondent was not prejudiced by any amendments to the original citation and subsequent changes made in this regard by the Commission.

that he had been able to determine within five seconds of seeing Price from his vehicle that Price was working without protective eyewear and that, while talking to the two employees, he had been able to see the unworn protective shoe covers stored in the back of NYSEG's truck establishes that the violative conditions were in open view and easily detectible. Notwithstanding our inability to determine how long the violative conditions lasted⁹ or what Webb was doing at the time, we conclude that the record is adequate to support the judge's finding that Webb had constructive knowledge of the violative conditions. *See, e.g., Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1993 CCH OSHD ¶ 30,034, p. 41,184 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994) (constructive knowledge found where supervisory employee was in close proximity to readily apparent violation, even though he had just come into the area).

The finding that Webb was a supervisor

We decline to resolve NYSEG's challenge to the judge's finding that "Mr. Webb's on-site [responsibility] for safety measures and reporting is sufficient nexus for him to be deemed 'supervisory' for purposes of imputing constructive knowledge to NYSEG through him." We conclude that NYSEG had constructive knowledge of the violative conditions regardless of whether Webb is characterized as a supervisory employee or merely Price's co-worker. If Webb was a supervisor, as the Secretary contends, then the judge was correct in imputing his constructive knowledge of the violations, *see supra*, to NYSEG. If, however, Webb was merely a co-worker, as NYSEG contends, then NYSEG could have known of the violative conditions if it had exercised reasonable diligence by providing adequate supervision.¹⁰ *Cf. Gary Concrete Products, Inc.*, 15 BNA OSHC 1051, 1055, 1991-93 CCH

⁹ NYSEG introduced no evidence at the hearing to support its claim that Price operated the jackhammer without wearing PPE for "a brief five seconds." (The testimony that NYSEG cites in support of its claim relates instead to the time it took the CO to realize, after first seeing Price, that the employee was not wearing protective eyewear). The record is equally silent as to whether Price's use of the jackhammer was "spontaneous," as NYSEG claims, or planned.

¹⁰ NYSEG's position is that gas supervisor Hrywnak was the supervisor of the work crew in question at the time of the alleged violations. At that time, Hrywnak had four or five work crews under his supervision, located at different sites throughout the Binghamton area.
(continued...)

OSHD ¶ 29,344, p. 39,452 (No. 86-1087, 1991) (foreman “failed to ensure the adequate supervision” of the employee who created the violation “and thereby failed to exercise the reasonable diligence which would have led to discovery of the violation”).

The finding that compliance monitoring was inadequate

“To rebut prima facie proof that the knowledge of a supervisor should be imputed to it, the cited employer must offer evidence that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated.” *Pride Oil Well Service*, 15 BNA OSHC 1809, 1815, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992).¹¹ The Third and Tenth Circuit cases relied on by NYSEG in support of a different allocation of the parties’ respective burdens of proof do not control here. This case arises in the Second Circuit so it is the Commission’s precedent that governs.

Here, we have little difficulty in finding that NYSEG met its burden of proving three of the four elements of its rebuttal case. However, we agree with Judge Gordon that

¹⁰(...continued)

He testified that he “[u]sually” visited each worksite under his supervision twice a day, once in the morning and once in the afternoon, for thirty to forty-five minutes on each occasion, “[t]o see how the job was progressing, see if there [were] any problems and check the crews for safety violations.” Judge Gordon found that the supervision exercised by gas supervisors like Hrywnak was inadequate to monitor compliance with the safety rules at issue because NYSEG “could not be expected to discover non-complying behavior except in the minute portion of the workday where employees were observed by the salaried personnel.” We agree.

¹¹ The Secretary argues on review that the opportunity to make this rebuttal showing is limited to situations where a supervisor has violated company safety rules and does not include situations, like the circumstances of this case, where “the [only] failure of the supervisory employee to follow proper procedures” is a failure to adequately enforce compliance with the safety rules by others. Commission precedent, however, gives employers the opportunity to make this same rebuttal showing in either context. *Compare Consolidated Freightways*, 15 BNA OSHC 1317, 1320-22, 1991-93 CCH OSHD ¶ 29,500, pp. 39,809-11 (No. 86-351, 1991) (foreman’s failure to “make sure that the employees wore personal protective equipment when [cleaning up a shipping container] spill”) *with Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537-39, 1991-93 CCH OSHD ¶ 29,617, pp. 40,100-01 (No. 86-360, 1992) (consolidated cases) (claim that leadermen “committed misconduct that was contrary to [company] safety policy and was unpreventable”).

NYSEG failed to prove the fourth element, *i.e.*, that it had taken adequate measures to monitor compliance with the work rules in question. Again, we consider this issue in light of the unresolved factual dispute over Webb's role at the workplace, and again we reach the same conclusion regardless of whether we characterize Webb as a supervisory employee or a mere co-worker. If Webb was merely Price's co-worker, as NYSEG alleges, then we would adopt the judge's reasoning as discussed above and hold that the supervision NYSEG did provide, primarily in the form of brief, daily worksite visits by the gas supervisor, was inadequate to detect employee noncompliance with the two safety rules that are at issue, except during "the minute portion of the workday" when the gas supervisor or some other workplace inspector (*e.g.*, Binghamton area supervisor Jones or an inspector from NYSEG's workers compensation carrier) was present in the field. *See supra* note 10 and accompanying text.

If Webb was a supervisor, as the Secretary contends, we would still conclude that NYSEG has not rebutted the Secretary's *prima facie* showing of constructive knowledge. Ultimately, the employer's burden in this situation is to "establish[] that the failure of the supervisory employee to follow proper procedures was unpreventable." *Consolidated Freightways, supra* note 11, 15 BNA OSHC at 1321, 1991-93 CCH OSHD at p. 39,810. Here, however, NYSEG has not shown that Webb's failure to enforce the company work rules "was unpreventable" because it has not shown that "it took all necessary precautions to prevent the violations, including adequate instruction and supervision of its supervisor." *Id.* Indeed, consistent with its view that Webb was *not* a supervisor, NYSEG has asserted in its review brief that Webb was unaware at the time of the alleged violations that he had any responsibility for enforcing NYSEG's work rules. It therefore could not have adequately instructed and trained Webb in how to carry out his responsibilities.

In affirming the judge's finding that NYSEG did not take adequate steps to monitor compliance with its work rules, we acknowledge the vast amount of evidence NYSEG introduced into the record concerning enforcement of its safety rules. The Commission has held, however, that it is not enough for an employer to establish that its "safety rules *in general* have been communicated and enforced." The employer must show that it has "effectively communicated and enforced [the] *specific* rule" or rules that are at issue.

Hamilton Fixture, 16 BNA OSHC at 1090, 1993 CCH OSHD at p. 41,185 (emphasis in the original).

Here, the documentary evidence introduced by NYSEG relates overwhelmingly to the enforcement of safety rules in its *electrical utility operations*. References to natural gas operations are rare, and references to operating a jackhammer or to protective equipment for the eyes or feet are even more rare. We would expect to find some disparity in NYSEG's record since approximately three-fourths of NYSEG's customers are consumers of electricity rather than natural gas. Nevertheless, the disparity in the documentary evidence is so grossly disproportionate as to create an inference that the relative sizes of the two operations is not the only reason for this imbalance. When we combine this evidence of uneven enforcement of company safety rules with the evidence showing that NYSEG provided different types of field work supervision for its electrical utility crews (full-time, on-site working supervisors) and its natural gas crews (sporadic visits by a supervisor simultaneously responsible for several work sites),¹² we can only conclude that NYSEG had a more stringent and vigorous safety program in its electrical utility operations than it had in its natural gas operations. On this record, NYSEG has not established that the particular work rules at issue in this proceeding were effectively enforced.

For the reasons set forth above, we conclude that NYSEG has not rebutted the Secretary's prima facie showing of constructive knowledge. We therefore affirm the judge's finding that NYSEG had constructive knowledge of the violative conditions.

ORDER

As we stated previously, the same evidence that the judge relied on as establishing NYSEG's violation of section 5(a)(1) of the Act also establishes its noncompliance with 29

¹² NYSEG's Job Specification Manual describes two different positions at the lowest level of management: "foremen," who are full-time salaried supervisors, and "chiefs," who are working supervisors. Other documentary evidence suggests that field crews in NYSEG's *electrical utility operations* were customarily headed by "chiefs," who apparently accompanied their crews into the field. However, the documentary evidence supports testimony that field crews in NYSEG's *natural gas operations* were customarily headed by "foremen," like gas supervisor Hrywnak, who were responsible for several work crews on any given day and therefore present at any particular work site under their supervision only during brief, daily visits.

C.F.R. § 1926.28(a). We therefore affirm item 1a of the citation as a serious violation of 29 C.F.R. § 1910.132(a) and amended item 1b as a serious violation of 29 C.F.R. § 1926.28(a) in conjunction with 29 C.F.R. § 1926.102(a)(1). In the absence of any challenge to the penalty assessed by the judge, we affirm his assessment of a \$1500 consolidated penalty.

Stuart E. Weisberg

Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.

Edwin G. Foulke, Jr.
Commissioner

Velma Montoya

Velma Montoya
Commissioner

Dated: March 24, 1995

Docket No. 91-2897

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhause, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick St., Room 707
New York, NY 10014

James S. Gleason
Leslie Precht Guy
Hinman, Howard & Kattell
700 Security Mutual Bldg.
Binghamton, N.Y. 13901

Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 420
McCormack Post Office and Courthouse
Boston, MA 02109-4501



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,

v.

NEW YORK STATE ELECTRIC & GAS CORP.
Respondent.

OSHRC DOCKET
NO. 91-2897

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on July 15, 1993. The decision of the Judge will become a final order of the Commission on August 16, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before August 4, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: July 15, 1993

DOCKET NO. 91-2897

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

James S. Gleason, Esq.
Hinman, Howard & Kattell
700 Security Mutual Bldg.
80 Exchange Street
Binghamton, NY 13901 3490

Richard W. Gordon
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

00102913613:02



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
ROOM 420
BOSTON, MASSACHUSETTS 02109-4501
(617) 223-9746

SECRETARY OF LABOR,

Complainant,

v.

NEW YORK STATE ELECTRIC
& GAS CORP.,

Respondent.

:
:
:
:
: OSHRC Docket No. 91-2897
:
:
:
:
:
:
:

Appearances:

William G. Staton, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

James S. Gleason, Esq.
Hinman, Howard & Kattell
Binghamton, New York
For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This proceeding arises under § 10(c) of the Occupational Safety and Health Act of 1970, 20 U.S.C., *et seq.*, (“Act”), to review a citation issued by the Secretary pursuant to § 9(a) of the Act and a proposed assessment of penalty thereon issued pursuant to §10(c) of the Act.

BACKGROUND

On September 12, 1991, the Occupational Safety and Health Administration (“OSHA”), issued to Respondent, New York State Electric & Gas Corporation (“NYSEG”) a serious citation containing one item with a proposed penalty of \$1,500. By filing a timely

notice of contest, NYSEG brought this proceeding before the Occupational Safety and Health Review Commission ("Commission").

Pursuant to Rule 35(f) of the then existing Rules of Procedure of the Commission, the Secretary amended the citation to vacate the alleged violation of 29 C.F.R. § 1926.28(a) and to substitute therefor one (1) alleged violation of 29 C.F.R. § 1910.132(a) as item 1a and one (1) alleged violation of Section 5(a)(1) of the Act as item 1b. This amendment was made to reference the statutory section and standard applicable to the alleged violations. Prior to the hearing, NYSEG moved for partial summary judgment on that portion of the Secretary's complaint alleging a violation of Section 5(a)(1) of the Act, the general duty clause ("GDC").

A hearing was held in Binghamton, New York on July 14, 1992. The parties have submitted their briefs and this matter is now ready for decision.

DISCUSSION

While driving on Front Street in Binghamton, New York on July 30, 1991, William Marzeski, a compliance officer ("CO") with the Occupational Safety and Health Administration ("OSHA"), observed a pneumatic jackhammer operator cutting asphalt pavement on the road shoulder without wearing protective eyewear. CO Marzeski stopped his car and approached the individual who identified himself as Ray Price, a NYSEG employee. Marzeski identified himself to Price as an OSHA inspector and asked to see Price's supervisor. Immediately thereafter, the crew leader, Mr. Jim Webb, who was on-site, joined the two men.

CO Marzeski then explained to Webb that Price was in violation of OSHA regulations in not wearing safety glasses while jackhammering, a suggestion that caused Webb to instruct Price to obtain a pair of safety goggles from the nearby company truck. At about this time, CO Marzeski also learned that Price was not wearing steel-toed safety boots. Webb then told Price to retrieve safety "covers" (overshoes) from the truck. Both articles of personal protective equipment ("PPE") were available to the workers from the company vehicle and were recovered and worn by Price as he resumed his job. Based upon his observations at the work site, CO Marzeski recommended the issuance of a citation.

NYSEG, employer of both Price and Webb, is a public utility company supplying natural gas and electric service to a million across New York State. Work crews usually consist of 2-3 employees for gas line maintenance and operations, including one first-class gas fitter (Webb), who normally acts as the foreman, though he is a member of the collective bargaining unit. Salaried crew supervisors handle a number of separate crews and usually visit each job site twice per day, although they do not remain on site unless problems arise. The crew supervisor assigns work and assures that employees comply with company policies. The supervisor of Webb's crew was John Hrywnak, who dispatched the crew to the Front Street site in order to tie in a new gas main. NYSEG does not oppose the Secretary's version of the factual conditions prevalent at the time of the alleged occurrence of the citation.

DISPOSITION OF PARTIAL SUMMARY JUDGMENT MOTION

NYSEG timely filed a motion for partial summary judgment accompanied by affidavit and memorandum of law. NYSEG asserts that item 1b of the citation is invalid since a general duty clause violation will not lie where a duly-promulgated OSHA standard is applicable.

Summary judgment, though generally disfavored by the Commission¹, is considered appropriate when there is no genuine issue of material fact. The Commission follows the Federal Rules of Civil Procedure in allowing summary judgment when "the pleadings..., together with the affidavits if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."² There is no issue of fact in controversy here, so my inquiry is directed to whether the applicable law requires dismissal under the facts admitted.

In order to establish a violation of the general duty clause, the Secretary must prove, by a preponderance of the evidence, that the "cited employer failed to free the workplace of a hazard that was recognized by the cited employer or its industry, that was causing or

¹ Rothstein, *Occupational Safety and Health Law*, § 384 (2d. Ed., 1983).

² Fed. R. Civ. P. 56(c).

likely to cause death or serious physical harm, and that could have been materially reduced by a feasible and useful means of abatement.” *Pelron Corporation*, 12 BNA OSHC 1833, 1835 (R.C. 1986).

Citation under the general duty clause is only proper if no specific standard applies to the hazardous situation. See *Ted Wilkerson, Inc.*, 1981 CCH OSHD ¶25,551, p. 31,855 (1981). NYSEG cites § 1910.5(c)(1) to the effect:

If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

Respondent notes three cases to further its contention, using *Brisk Waterproofing Company, Inc.*, 1 BNA OSHC 1263, 1973-1974 CCH OSHD ¶16,345 (No. 1046, 1973), as the benchmark. However, the applicability of § 1910.5(c)(1) alone is cause for concern. That section, by its own terms, applies to a situation where two standards are in issue (e.g.: where a general industry standard “overlaps” with a maritime standard), and not where a standard confronts a general duty clause violation. Indeed, *Brisk* itself comments upon the distinction (“While this regulation applies only within the standards themselves”) but then goes on to compare the two types of violations and, by analogy, equate the GDC with general industry standards (in effect, the GDC becoming the “most general” of standards). In *Brisk*, the Secretary allowed that a specific standard was applicable to the condition or practice that constituted the violation, and an argument favoring application of the GDC was short-circuited by amending the complaint to conform to a Section 5(a)(2) violation of a specific standard. In the present situation, the Secretary contests the effective application of any standard to the hazard at issue.

While the term “specifically applicable” is not defined in the regulations, one may look to § 1910.5(f) for further elucidation regarding the prerequisites for preemption. This section reads:

An employer who is in compliance with any standard in this part shall be deemed to be in compliance with the requirement of § 5(a)(1) of the Act, but only to the extent of the condition,

practice, means, method, operation or process covered by the standard.

The words “conditions, practice...” have generally been construed by the courts to be equated with the term “hazardous condition”, rather than the more narrow interpretation apparently envisioned by respondent of relating to a particular type of work process or activity.³ By the stated terms of Section 5(f), compliance with Section 5(a)(2) will not avoid a GDC violation if that standard is circumscribed in its protection of the health or safety of the employee. Thus, a standard must be specifically applicable to the hazard in question to the extent that hazard is covered under the standard. It is at the point of circumscription where the GDC becomes operative in a situation where a hazard is ineffectively covered by a particular standard, and, over and above its obligation to comply with particular standards, the employer “must furnish employment...free from recognized hazards that are likely to cause death or serious physical harm.” By very definition, a serious violation requires “significant risk of harm”, meaning that there exists a hazardous condition in the workplace.”

The condition at issue here is the use of a pneumatic hammer to tear up asphalt. It seems entirely obvious that an accident could occur while using such a powerful and unwieldy piece of equipment. Flying debris could cause serious harm to an operator’s eyes if they were improperly or inadequately protected from such a happenstance. My inquiry must now focus on the adequacy of the standard cited by the respondent as being applicable to the hazardous condition.

The use of a jackhammer is covered under a general construction standard at § 1926.102(a) which states:

Employees shall be *provided* with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The Secretary did not issue the citation under the that section because it contends that mere provision of PPE would not adequately abate the hazard to the eyes of flying debris. Respondent, however, would urge me to implicate the general industry standard at §

³ For a thorough discussion of this point, see *Donovan v. Daniel Marr*, 763 F.2d 477, 481 n.6 (1st Cir. 1985). Also, *L.R. Wilson & Sons, Inc. v. Donovan*, 685 F.2d 664, 672 (D.C. Cir. 1982).

1910.133(a), whose wording is, for our purposes, consistent with the construction standard but with the added condition that use of PPE be required. Basically, NYSEG proposes that a tactical error on the Secretary's part in failing to cite under the general industry standard is fatal to the Secretary's case.

Respondent misconstrues the statutory scheme, along with its purpose. The scheme is much more flexible in practice than respondent would acknowledge. Both the Commission and the courts have generally construed standards broadly, in keeping with the Act's purpose of assuring worker safety and health.⁴ In this instance, that avowed purpose would be poorly served by highlighting one of many inconsistencies prevalent in the regulations while ignoring the overall goal of workplace safety. Although citation under the general industry standard would have had the effect of more adequately addressing the hazard than citation under the construction standard, it would fail to resolve the impending procedural impasse which would occur when a respondent sequentially raises the point of the existence of a paramount construction standard, a standard more "specific" in applicability. The sole end result would be to handcuff the Secretary in his attempted enforcement of the Act and Regulations, a result certainly not visualized by the Act's original Congressional proponents. To allow flexibility in scenarios analogous to this situation, the GDC was formulated to augment, rather than supplant standards⁵ where a specific standard would, but does not, apply due to its impotence in fully-abating the hazard in question. The general standard at § 1910.133(a) should not displace the normally-applicable construction standard at § 1926.102(a). However, as the Secretary fully realized, application of that more specific standard would fail to alleviate the hazard at the work site, but application of the argumentative GDC would alleviate the hazard. His alternative was to apply the GDC, which he did, and I concur with its application here.

Recent caselaw⁶ has looked to the adequacy of standards in abating particular hazards. The construction standard in question only requires an employer to provide or

⁴ See *Rothstein*, supra §§ 124-5 for an expanded discussion on this point.

⁵ *Rothstein*, supra § 141, citing S. Rep. No. 91-1282, 91st Cong., 2d. Sess. at 9,10 (1970).

⁶ *International Union, U.A.W. v. General Dynamics Land Systems*, 815 F.2d 1570 (D.C. Cir. 1987); cert. denied.

furnish PPE, and clearly, only use of PPE would effectively alleviate the hazard of flying debris from jackhammering operations. One such case, from the D.C. Circuit, has held that “if an employer knows that a particular safety standard is inadequate to protect his workers against a particular safety hazard it is intended to address, he has a duty under § 5(a)(1) to take whatever measures that may be required by the Act, over and above those mandated by the safety standard, to safeguard his workers. Scierter is the key.”⁷ I feel this interpretation of Section 5(a)(1) is more in tune with the accepted purpose of the Act as being preventative in nature. In the instant case, NYSEG previously adopted a work place rule requiring the use of safety glasses while its workers are operating jackhammers. Usage of such equipment would afford employees the necessary eye protection against flying debris, while the mere presence of PPE at the site would not. So long as the employer has specific knowledge of the existence of such a hazard, then, for purposes of Section 5(a)(1), the hazard is “recognized”, and the general duty clause may be invoked in order to adequately abate the hazard. The motion for summary judgment is denied.

DISPOSITION OF VIOLATION 1a

NYSEG was cited for a serious violation of § 1910.132(a) for failure of an employee to wear protective footwear while engaging in a hazardous activity. A violation is considered serious if the violative practice or condition gives rise to a substantial probability of death or serious bodily harm, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. Item 1a is a violation of a general industry standard requiring the use of personal protective equipment for the feet when an employee is exposed to a hazardous condition (for example, physical contact with flying debris from, or actual contact with, an operating jackhammer). Here, the use of the hand-held jackhammer within inches of an employee’s unprotected lower extremities clearly creates a hazardous condition. If the hammer were to slip from the operator’s hands for whatever cause, serious injury is certainly a strong possibility. The feet of the operator are probably the most likely area of the body to be exposed in such a scenario. The alleged violation of § 1910.132(a) was properly characterized as serious.

⁷ Id., p. 1577.

Respondent was cited under Section 5(a)(2) of the Act, referring to violation of a standard. To establish a *prima facie* case under that section, the Secretary must prove, by a preponderance of the evidence, that:

1. The cited standard applies,
2. The employer failed to comply with that standard,
3. The employee access to the violative condition,
4. The employer knew, or could have known of the violative condition with the exercise of reasonable diligence.

I must consider all the evidence in determining whether the Secretary has met his burden. Respondent acquiesces in the Commission's jurisdiction, and is a company engaged in business affecting commerce. NYSEG also fails to contest the first three elements of the Secretary's case. It does, however, dispute the knowledge (fourth) element. If knowledge is found, NYSEG alternately claims that it cannot be held responsible for the unpreventable misconduct of its employee, Mr. Price, in his circumvention of the OSHA regulation. NYSEG asks that the citation be vacated in its entirety under either scenario. At issue is the employer knowledge requisite.

At a minimum, a violation must be reasonably foreseeable for it to be deemed a serious violation. Employer knowledge may be actual or constructive. Where constructive knowledge is averred, the Secretary must prove that the employer did not show reasonable diligence in avoiding the hazardous condition. Either actual or constructive knowledge may be imputed through the employer's supervisory personnel. The focus of the inquiry is not the employee's supervisory status, but rather, whether the employer's implementation of its safety program has been effective.⁸ The employee need only be shown to bear some responsibility for on-site employee safety. *See Mercer Well Service, Inc.*, 5 BNA OSHC 1893, 1977-78 CCH OSHD ¶ 22,210 (no. 76-2337, 1977). Foreseeability may be shown by any instance of employer awareness of the potentially hazardous condition.

⁸ For a broader discussion of this point see *Floyd S. Pike, Electrical Contractor, Inc. v. OSHRC*, 576 F.2d 72,77 (5th Cir. 1978). Also, *Brock v. L.E. Myers*, 818 F.2d 1270 (6th Cir. 1987).

Respondent's Accident Prevention Manual demands the wearing of proper safety equipment, including "safety covers" during the use of pneumatic jackhammers. This evidence satisfies the foreseeability test of employer awareness.

To prove actual knowledge, the Secretary must show that the employer had adequate warning of the violative condition (subjective knowledge of the hazard's existence). Here, the Secretary must show that the lead man Webb, whose safety responsibilities are imputed to NYSEG, was aware of the violation at the time of its occurrence. There is no available evidence to support the proposition that Webb was ever aware that Price had failed to don protective footwear before the arrival of CO Marzeski. Since Webb had no prior warning of Price's violation, the employer cannot be held to the actual knowledge standard.

Proof of constructive knowledge, however, is more readily apparent from the record. Webb admits being in close proximity to price at the time the violation occurred. (Tr. 55, 65). This proximity, in addition to the feasibility of detection of the hazardous condition by the lead man, strongly infers that the lead man should have been aware of the violation with the exercise of reasonable diligence. Admittedly, he was not. (Tr. 24). There was no evidence of extraordinary or unusual conditions being prevalent at the site which might mitigate the "diligence" standard. There was no reason given why Webb was not alert to the equipment operator's misconduct. Thus, Webb's lack of diligence in safety supervision is attributable to NYSEG, and the Secretary has presented his *prima facie* case for a §1910.132(a) violation. Mr. Webb's on-site reasonability for safety measures and reporting is sufficient nexus for him to be deemed "supervisory" for purposes of imputing constructive knowledge to NYSEG through him.

It should be noted that a possible exception to employer's imputed knowledge occurs when a supervisor's actions are in willful violation of an employer directive, and the employer shows that the supervisor himself had adequate supervision as to safety matters. In this case, the supervisor's inaction is at issue, and while the inaction was violative of a company policy, it did not constitute a violation of the Act, as the employee's behavior did. Respondent cites the Third Circuit case of *Pennsylvania Power and Light v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984), for the proposition that the burden of proving foreseeability (here, the word is used conterminously for employer knowledge) requires a greater showing

than mere supervisory misconduct or participation before the burden of ultimate risk of non-persuasion is shifted to the employer. While I am not bound to follow such precedent, (and only a minority of courts who have reached the question have agreed with the Third Circuit's pronouncements.⁹) the *Pennsylvania* rule operates under a disparate factual framework, as it pertains to supervisory misconduct directly resulting in an OSHA violation, rather than the simple scenario of lax supervision (a violation of a company policy, but not OSHA rules) by supervisory personnel that I find in the instant case. Supervisory inadequacy alone is sufficient to discharge the Secretary's burden of proof in showing employer knowledge where employee misconduct results in a violation of the Act.

After the Secretary has shown his *prima facie* case, NYSEG may submit evidence that the employee conduct resulting in non-compliance with the Act was unpreventable, and that therefore, the citation should be vacated. The burden of proof is placed on the employer to prove the affirmative defense of unpreventable employee misconduct. The employer must prove:

1. The existence of established work rules designed to prevent the hazard from occurring, and a departure from those rules.
2. Adequate communication of work rules between employer and employees.
3. Steps taken by employer to discover non-compliance .
4. Effective enforcement in instances where non-compliance is found.

In other words, the employer must have taken all feasible steps to prevent the occurrence of the hazard. As with the "due diligence" standard for constructive knowledge, adequate safety supervision constitutes the underlying foundation for steps 2 and 3. Certainly, to discover instances of non-compliance, reasonable and continual supervision is the foremost remedy. Lead man Webb's lax oversight has already been demonstrated, and this nonfeasance inhibits the employer's effective discovery of acts of non-compliance. While NYSEG has shown that certain methods of discovering violations were in place, including

⁹ The 4th, 5th and 10th Circuits concur. *See Id.*, p. 358 n.9.

twice-daily checks by a salaried supervisor, checks by the safety manager, and also by the insurer (Tr. 124-128), those instances were spotty and could not be expected to discover non-complying behavior except in the minute portion of the workday where employees were observed by the salaried personnel. While the Act does not impose on employers a duty of constant safety supervision, supervision must still be “adequate”, and that concept is dependent on a variety of factors, including amount of job-training received by supervisors, employee competence and experience, safety records, practicality of supervision, and degree of dangerous and hazardous work. Here, the two employees involved were shown to have been working for NYSEG for less than four months at the time of the violations, and though they had previously been employed in similar job spots by their prior employer, no record of the prior firm’s safety functions are before me. There is evidence, however, that NYSEG’s safety program was ineffective in communicating the relevant work rules to employees.

During the four-month period that Webb and Price had been employed by NYSEG, the company had issued its Employee Safety Manual to the new employees, and held two employee safety meetings related to the training of new employees. (Tr. 129-140). Several sections of the Manual are devoted to eye and foot protection and their necessity when operating heavy pneumatic equipment. Respondent does not dispute that the wearing of such PPE could have prevented the hazard in question. However, Mr. Webb did not attend both sessions (Tr. 167-176), and there was little mention of proper foot safety precautions during those meetings. (Tr. 152, 157). Moreover, the simultaneous occurrence of another PPE-type violation (lack of protective eyewear) is indicative of a deficient safety communications program. Webb admitted that he did not issue PPE to Price before the latter crewmember started the hazardous job. (Tr. 44). Although all safety manuals were distributed to the new employees, including Webb and Price, at the March 27 meeting, apparently there was no oral directive given to command the employees to read the manual (they were told they could be tested on the material). (Tr. 103, 154-155). While there are questions as to the adequacy of communication, there is little doubt that steps taken to discover non-compliance were ineffective. The placement of the main burden of safety supervision on the salaried supervisor’s visits disposes me to agree with the Secretary that

lack of a designated, on-site safety supervisor was the crux of the problem. Either Webb was responsible for safety at the site (which NYSEG denies), and was derelict in his duties, or the salaried personnel were responsible and the infrequency of their visits contributed to lax enforcement of safety rules. The added fact that the violation occurred during normal operations, rather than under exceptional conditions, is further evidence that negligence was the norm at NYSEG. Accordingly, I reject NYSEG's affirmative defense of unpreventable employee misconduct on the basis that inadequate means were utilized to discover non-compliance, and as "the [non-complying] behavior was not truly idiosyncratic, implausible, or unforeseeable."¹⁰ Serious Citation No.1, item no. 1a is affirmed.

DISPOSITION OF VIOLATION 1b

The Secretary also cited NYSEG for violating Section 5(a)(1) of the Act (the General Duty Clause). To prove such a violation, the Secretary must show that:

1. The cited employer failed to free the workplace of a recognized hazard.
2. That the hazard was causing or likely to cause death or serious physical harm.
3. That the hazard could have been materially reduced by a feasible and useful means of abatement.

The specific violation dealt with the failure to use protective eye equipment to safeguard the employee from a hazard of being struck by flying particles while operating a pneumatic jackhammer. NYSEG's lead man, Mr. Webb, who did not testify, was quoted in the testimony of CO Marzeski as concurring with Marzeski's assessment of the hazard and possible consequences of it. The NYSEG Safety Manual specifically calls for the usage of safety goggles while jackhammering. That the hazard could cause serious physical harm to an employee or operator is uncontested. I have already dealt with the question of applicability of the general duty clause to the hazard in question. I have also noted that the employer's knowledge is imputed through the presence of Mr. Webb at the jobsite (the foreseeability requirement pertains to Section 5(a)(1) violations, as well as to those of

¹⁰ *Horne Plumbing and Heating Co. v. OSHRC*, 528 F.2d 564, 571 (5th Cir. 1976).

Section 5(a)(2)). Enforcing the use of safety goggles or other personal protective equipment in this instance would have feasibly abated the hazard. For much the same reasons detailed above, supervisory laxity prevented this abatement. Under the general duty clause, the Secretary bears the burden of proving that the employer failed to render the workplace free of the recognized hazard, and the employer may rebut this contention by submitting evidence that it took all necessary precautions to prevent the occurrence of the violations. The crucial question that must be answered in each case is whether the employer could have taken steps to prevent the hazard.

For the same reasons denoted in the previous section, namely the inability of respondent NYSEG to enforce its work rule regarding the wearing of protective eyewear through inadequate supervision of its employees, I find that the employer failed to render his workplace free from a recognized hazard. Inclusion of the work rule relating to the wearing of PPE while jackhammering in the company manual is sufficient to give NYSEG notice of the hazard. I similarly reject NYSEG's affirmative defense of unpreventable employee misconduct. The Secretary has shown that inadequate steps were taken by NYSEG to discover the non-complying behavior. Accordingly, Serious Citation No.1, item no. 1b is affirmed.

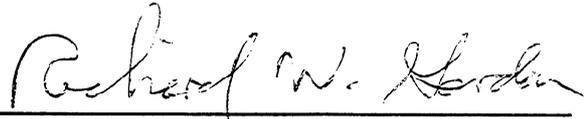
Section 17(j) of the Act requires the Commission to find and give "due Consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. Upon consideration of these factors, I have determined that a total penalty of \$1,500 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

1. Serious Citation No. 1, item nos. 1a and 1b are **AFFIRMED** and a penalty of \$1,500 is **ASSESSED**.



RICHARD W. GORDON
Judge, OSHRC

Dated: July 7, 1993
Boston, Massachusetts