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SECRETARY OF LABOR, :

Complainant, :

v. :

NEW YORK STATE ELECTRIC & GAS CORPORATION, :

Respondent. :

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OSHRC Docket No. 91-2897

*DECISION*

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

On review are two citation subitems (1a and 1b) arising out of an employee's failure to wear appropriate personal protective equipment ("PPE") while operating a jackhammer. Former Commission Administrative Law Judge Richard W. Gordon affirmed both subitems and assessed the Secretary's consolidated proposed penalty of \$1500. At issue before us are the judge's determination that the employee's failure to wear protective eye equipment (item 1b) was properly cited under the Act's "general duty clause," section 5(a)(1), rather than a section 5(a)(2) occupational safety and health standard, and his finding that New York State Electric & Gas Corporation ("NYSEG") had constructive knowledge of the violative conditions. We reverse the judge on the preemption issue, but sustain his finding on knowledge. We therefore amend item 1b of the citation to allege a serious violation of the most "specifically applicable" safety standard and affirm the citation as thus amended.<sup>1</sup>

**BACKGROUND**

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<sup>1</sup> We conclude herein that more than one standard was applicable by its terms to the violation alleged in item 1b. We therefore follow the guidelines set forth in 29 C.F.R. § 1910.5(c), as follows:

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<sup>1</sup>(...continued)

**§ 1910.5 Applicability of standards.**

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(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).

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).<sup>2</sup> The 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)<sup>3</sup> based on Price's failure to wear

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<sup>2</sup> 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 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.

<sup>3</sup> 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

(continued...)

“protective safety-toe footwear,” while item 1b alleges a violation of the general duty clause<sup>4</sup> 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 question<sup>5</sup>: sections 1926.28(a), 1910.132(a)<sup>6</sup> and 1910.133(a)(1).<sup>7</sup> It is also

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absorption, inhalation, or physical contact.

<sup>4</sup> 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).

<sup>5</sup> 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).

<sup>6</sup> 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.

<sup>7</sup> This is the standard that NYSEG has relied upon throughout this proceeding as the basis of its preemption claim. It provides,  
(continued...)

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 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-

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<sup>7</sup>(...continued)  
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 . . . .

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 995, 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.<sup>8</sup>

### 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

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<sup>8</sup> 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 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.

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 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 lasted<sup>9</sup> 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.<sup>10</sup> *Cf. Gary Concrete Products*,

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<sup>9</sup> 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.

<sup>10</sup> NYSEG's position is that gas supervisor Hrywnak was the supervisor of the work crew in question at the time of the alleged (continued...)

*Inc.*, 15 BNA OSHC 1051, 1055, 1991-93 CCH 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).<sup>11</sup> 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 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.

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<sup>10</sup>(...continued)

violations. At that time, Hrywnak had four or five work crews under his supervision, located at different sites throughout the Binghamton area. 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.

<sup>11</sup> 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").

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),<sup>12</sup> 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

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<sup>12</sup> 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.

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 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.

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/s/ \_\_\_\_\_

Stuart E. Weisberg  
Chairman

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/s/ \_\_\_\_\_

Edwin G. Foulke, Jr.  
Commissioner

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/s/ \_\_\_\_\_

Velma Montoya  
Commissioner

Dated: March 24, 1995 \_\_\_\_\_