

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 91-2494

AMERICAN STERILIZER COMPANY,

Respondent.

DECISION

Before: WEISBERG, Chairman; GUTTMAN, Commissioner.

BY THE COMMISSION:

Dan Troy, an employee of American Sterilizer Company (“AMSCO”) died from breathing carbon monoxide gas while working at the University of Texas Health Science Center (“UTHSC”), a hospital and research facility in Tyler, Texas. At the time, Troy was using a blasting machine to clean medical sterilization equipment. For reasons that are unknown, Troy connected an air-supplied respirator to the gasoline-powered air compressor that was used to operate the blasting equipment rather than to a separate electrically-powered compressor that would not produce carbon monoxide gas.

Following an inspection, the Secretary issued citations containing 10 items alleging serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) (“the Act”), and one item alleging a nonserious violation. Administrative Law Judge Louis G. LaVecchia affirmed nine of the 10 alleged serious violations. He vacated item 8 of

that citation and also vacated the nonserious citation. Before us for review are five items of the serious citation. For the reasons that follow, we affirm the judge's decision with the exception of item 1, which we vacate.¹

I. FACTS

AMSCO sells and services sterilization chambers called autoclaves that hospitals and other medical facilities use to sterilize medical equipment. The chambers are approximately the size of a commercial clothes dryer, but unlike a clothes dryer the interior is rectangular, not cylindrical, about 20 inches square and 36 to 38 inches deep. Periodically, the interior surfaces must be cleaned. This procedure is performed by a type of blasting that uses glass beads rather than sand and produces large amounts of dust, requiring that the blaster operator be protected with a respirator. While cleaning, the technician stands outside of the open door to the chamber and reaches into it. Because of the dust that is generated by the blasting, a containment area is created by hanging a plastic curtain or "tent" around the working space. The blasting procedure normally takes 8 to 10 hours.

¹The Commission requested briefs on issues relating only to items 1,2,4,7,9, and 10. *See Pennsylvania Steel Foundry & Machine Co.*, 12 BNA OSHC 2017, 2019 n.3, 1986-87 CCH OSHD ¶ 27,671, p. 36,063 n.3 (No. 78-638, 1986), *aff'd*, 831 F.2d 1211 (3d Cir. 1987) (Commission has discretion to limit the scope of its review). AMSCO's arguments regarding items 3 through 6 are beyond the scope of the Commission's briefing order and we decline to address them.

On its own motion the Commission raised issues regarding whether items 4 and 7 should be grouped for purposes of penalty assessment. AMSCO does not acknowledge that these issues were raised and does not address them in its review briefs. Normally, the Commission will not consider issues which the party aggrieved by the judge's decision declines to address in its briefs. *Bay State Ref. Co.*, 15 BNA OSHC 1471, 1475, 1991-93 CCH OSHD ¶ 29,579, p. 40,025 (No. 88-1731, 1992); *S & S Diving Co.*, 8 BNA OSHC 2041, 2042, 1980 CCH OSHD ¶ 24,742, p. 30,464 (No. 77-4234, 1980). Accordingly, in the absence of argument by AMSCO, we express no opinion on the grouping of penalties. *See Marmon Group, Inc.*, 11 BNA OSHC 2090, 2090 n.1, 1984-85 CCH OSHD ¶ 26,975, p. 34,641 n.1 (No. 79-5363, 1992). Since that issue was the only issue we asked the parties to brief regarding item 4, we do not address that item.

AMSCO's service contracts are maintained by its service technicians who are assigned to discrete geographic areas and are responsible for service at all medical facilities that have contracts with AMSCO in each area. However, while service technicians perform routine preventive maintenance, they do not clean sterilization chambers. The cleaning procedure itself is the responsibility of AMSCO's utility technicians. The deceased, Troy, was a utility technician whom AMSCO had assigned to its southwest region, which consists of Texas, Mississippi, Louisiana, Arkansas, Oklahoma, Nebraska, and Kansas. Troy was the only utility technician in that region and was responsible for cleaning autoclaves at all service locations within the region.² Although Troy had an office at AMSCO's regional office near Dallas, he normally worked in the field at AMSCO's service locations and reported to AMSCO's office approximately one day a week.

Troy started doing chamber cleaning work for AMSCO in December 1988, about two years and three months before the fatal accident. He spent the first nine months as a trainee under the supervision of AMSCO employee David Heitzer. During his training and afterwards until his death Troy would wear one of two different types of respirators depending upon which of two blasting units he was using. According to both Heitzer and Keith Lindstrom, AMSCO's regional service manager, an operator using the smaller blasting unit only needed to wear a half-mask respirator because the unit had an effective vacuum recovery system that captured most of the dust generated during the cleaning. In contrast, the larger blasting unit generated much more dust. Heitzer therefore had instructed Troy that "AMSCO's policy was that [he] always" had to wear a supplied-air respirator if he used the large blaster.³

²AMSCO, which operates nationwide, has five regional offices. Because Troy worked throughout the entire southwest region, he reported directly to the manager for that region, Keith Lindstrom. The record does not indicate how many utility technicians AMSCO employed in its other regions.

³At UTHSC, Troy used a new unit that AMSCO had only recently purchased, a "Zero
(continued...)

All of AMSCO's blasting units were powered by compressed air produced by an air compressor. These compressors, which Troy would either rent locally for use on a particular project or would borrow from the medical facility being serviced, are powered by internal combustion engines that use either gasoline or diesel fuel. Carbon monoxide gas is a byproduct of this type of engine. The air Troy breathed when wearing his supplied-air respirator was also produced by an air compressor. However, under AMSCO's work rules, Troy was strictly prohibited from connecting his respirator to the same compressor that powered the blasting unit. Instead, he was required to use a separate breathing air compressor powered by an electric motor, which would not produce any carbon monoxide emissions.

On March 12, 1991, Gary Funk, AMSCO's service technician who handled the UTHSC account, and Gene Manus, a UTHSC maintenance employee, assisted Troy in setting up the gasoline compressor, which Manus had borrowed from UTHSC, in preparation for the chamber cleaning operation. After Troy expressed concern that carbon monoxide generated by the compressor would create a hazard because of a lack of air flow in the courtyard where it had been positioned, they moved the compressor into a vehicle parking space some distance away. Because of the distance of this location from the SPD (sterile processing department), the blaster was linked to the gasoline compressor by 250 feet of hose. After the compressor for the blaster was positioned, Troy asked Funk and Manus whether the hospital had an electric compressor he could use. Manus took Funk and Troy to the UTHSC's carpentry shop which had such a compressor and informed Troy that he could use that unit so long as he waited until the end of the carpenters' shift.

³(...continued)

Comet" blaster. Although AMSCO had expected this blaster to be even more effective than the small blaster in reducing dust levels, Troy found that the vacuum recovery on the blasting unit did not work as well as expected, and he encountered problems with escaping debris. It is presumably for this reason that Troy was wearing the supplied-air respirator at the time of his death.

Based on her investigation, Compliance Officer Kathryn Delaney determined that Troy began working sometime between 10 and 11 p.m. on the night of March 12, 1991, and died at approximately 2 a.m. on March 13. The autopsy revealed that Troy died of carbon monoxide poisoning, and Delaney's investigation established that the source of the carbon monoxide was the gasoline compressor. Acting contrary to AMSCO's work rules, Troy had used a "T-split" or "T-assembly," located within the containment curtain that surrounded his immediate work area, to connect both his supplied-air respirator and the blaster to the same 250-foot-long air hose that extended between the SPD room and the *gasoline* compressor. There is no indication that Troy obtained or used the electrically powered compressor, and the record contains no explanation of his failure to do so.⁴

II. TRAINING AND INSTRUCTIONS ON RESPIRATOR USE

⁴In support of her conclusion that "Troy was confused as to the purpose and necessity of an electric air compressor," the Secretary relies on a statement Troy assertedly made to Funk and Manus when the three were setting up the equipment. According to Funk, Troy stated that he wanted the "fitting" to the "oiler" changed on the gasoline compressor "because he used it for his breathing air, and he didn't want to breathe oil." We do not believe this testimony establishes that Troy intended to attach the supplied-air respirator to the gasoline compressor, or that Troy was confused over the need for a separate breathing air compressor. Funk conceded that Troy's remarks made no sense to him. Funk was not Troy's supervisor, and he had no prior experience with chamber cleaning nor any knowledge "of the appropriate assembly of respirators" so that he could "assist in any sort of inspection function." We conclude that it is more likely than not that Funk simply misunderstood Troy. By moving the gasoline compressor because of the carbon monoxide hazard he thought it created in the courtyard and by requesting a separate electrical compressor after setting up the gasoline compressor for the blasting unit Troy demonstrated an awareness of the hazards posed by not using a separate electrical compressor.

We note that the Secretary has standards governing compressors that are lubricated by oil, *see infra* note 7, but it is not clear that Troy was referring to these requirements.

Item 1 alleged that AMSCO violated 29 C.F.R. § 1910.94(a)(5)(iv) by failing to establish a respiratory protection program that met the performance criteria set forth at 29 C.F.R. § 1910.134(a) & (b). Although section 1910.134(a) & (b) contains a number of requirements for respirator use, the parties agree that the gravamen of this item is the adequacy of Troy's training.⁵ In affirming this item, Judge LaVecchia found that Troy was inadequately trained with respect to the type of compressor that must be used with an air-supplied respirator. On review of the record, we conclude that the judge's finding is contrary to the preponderance of the evidence.

It is undisputed that AMSCO provided instructions and training to Troy on the proper assembly and use of the supplied-air respirator. AMSCO employee Heitzer, who was doing chamber cleaning at the time, was assigned to provide on-the-job training to Troy. Heitzer testified that in December 1988, when Troy started working for AMSCO, he showed Troy how to obtain and set up a breathing air (electrical) compressor in the same room where he was to perform the chamber cleaning and to connect the supplied-air respirator to that compressor with a single, 25-foot-long air hose. Heitzer further testified that he made it clear to Troy that he was *always* supposed to obtain a separate breathing air compressor for use with the supplied-air respirator, that "Dan understood that there was no exception" to this requirement, and that he (Heitzer) "also went over the dangers of using gasoline or a diesel compressor" as the air source because of the carbon monoxide hazard it would create. Heitzer, who had been with AMSCO since 1985, was described by Lindstrom as "very conscientious, very detail-oriented . . . and [a] safety-oriented type person." Lindstrom

⁵The cited standard, section 1910.94(a)(5)(iv), requires employers who engage in abrasive blasting to establish "[a] respiratory protection program as defined and described in § 1910.134(a) and (b) . . . wherever it is necessary to use respiratory protective equipment." Section 1910.134(a) prescribes some general requirements for respirator use while section 1910.134(b) sets forth ten elements that are required "for a minimal acceptable" respiratory protection program. The third element, section 1910.134(b)(3), is that "[t]he user shall be instructed and trained in the proper use of respirators and their limitations."

regarded Heitzer as AMSCO's "best trainer" to conduct on-the-job training. Other than the initial instance in which Troy was first shown how to use the supplied-air respirator and the incident which resulted in his death, there is no evidence to show how often, if at all, he used a supplied-air respirator as opposed to the half mask.

Lindstrom also told Troy that, if he was ever unable to obtain a separate breathing air compressor, he was required to wear the half-mask dust respirator (and to perform his cleaning with the small blaster) rather than wear a supplied-air respirator that was improperly connected to a gasoline or diesel fuel compressor. Lindstrom was stationed at AMSCO's regional office, where Troy would report approximately one day each week. Lindstrom testified that at those times, he and Troy "talked extensively about procedures and about work practices and about hazards involved," including "the potential hazard of carbon monoxide poisoning if [Troy] did not use a separate breathing air compressor." Lindstrom testified that he had no doubt that Troy was aware of this hazard. On May 14, 1990, Troy and Lindstrom attended a sales meeting with a representative of a company that manufactures air-supplied respirators. The hazard of carbon monoxide poisoning from failure to use a breathing compressor was among the subjects addressed at this meeting.

The judge found that Troy's training was "inadequate" because he had been "trained in supplied-air respirator use only once, over two years before the accident." In our view, this finding is not supported by the record inasmuch as the evidence demonstrates that Troy's training had been reinforced during the interim period. However, even assuming that the judge correctly found that Troy was given training on only one occasion, that fact alone would not necessarily establish that the training was inadequate. *See Trinity Indus., Inc.*, 15 BNA OSHC 1788, 1789, 1991-93 CCH OSHD ¶ 29,773, p. 40,493 (No. 89-1791, 1992) (broadly-worded standard does not specify how often training must be conducted).

When, as here, the Secretary alleges a violation of a broadly-worded training standard and the employer defends by showing that it has provided the type of training at issue, the burden shifts to the Secretary to show some deficiency in the training provided. For instance,

in *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2176-77, 1993-95 CCH OSHD ¶ 30,636, p. 42,493 (No. 90-1747, 1994), the Commission vacated a citation alleging a violation of section 1910.1200(h), relating to training on particular hazardous chemicals, where the employer presented evidence that employees had been warned about the relevant hazards and the Secretary's industrial hygienist was unable to specify the basis on which she concluded that the requisite training had not been given. In this case, the Secretary made no effort at the hearing either to rebut the testimony given by Heitzer and Lindstrom or to challenge the adequacy of the training that they described. Indeed, the Secretary presented no evidence to show that Troy lacked the knowledge and expertise necessary for the job.⁶ Funk's account of Troy's actions setting up the gasoline compressor shows that Troy understood the prohibition against use of the gasoline compressor as a source of breathing air for his supplied-air respirator. We therefore set aside the judge's finding and vacate item 1 on the ground that the Secretary has failed to prove the alleged violation.

⁶Compliance Officer Delaney testified that her opinion that Troy's training was inadequate was based on a description in AMSCO's written respiratory protection plan of one instance in which Troy received on-the-job training on or about October 9, 1989. This training differs from the training Heitzer gave Troy when AMSCO first hired Troy in December 1988, at which time Heitzer instructed Troy in the proper use of an air-supplied respirator to protect against the hazard of carbon monoxide poisoning. The training to which Delaney referred dealt only with use of the half mask dust respirator as protection against silica dust. This training—even if inadequate—has no relevance to the sufficiency of Troy's training with respect to the carbon monoxide hazard presented by improper use of a supplied-air respirator. Moreover, Delaney conceded that she made no attempt to determine what training Troy actually received but rather relied entirely on AMSCO's written program. Accordingly, she was unable to give an opinion as to whether Troy's training regarding the supplied-air respirator was adequate, and, in particular, she did not know whether AMSCO had instructed Troy not to connect the supplied-air respirator to a gasoline compressor.

II. ITEM TWO

Item 2 alleges that the air supplied by the gasoline compressor to the supplied-air respirator that Troy was wearing when he was killed was not tested for carbon monoxide levels as required by 29 C.F.R. § 1910.134(d)(2)(ii) and did not meet the specifications for air purity required by section 1910.134(d)(1)(I) or in the alternative section 1910.94(a)(6).⁷ AMSCO's noncompliance with the cited standards is undisputed. The record shows that the air contained excessive levels of carbon monoxide, and that AMSCO had not taken either of the required alternative precautions against overexposure to carbon monoxide (frequent testing of the air supply or use of a carbon monoxide monitor with an audio or visual alarm). AMSCO's defense to this item is that the violations were the result of Troy's misconduct. It claims that if Troy had followed the company work rule and attached his supplied-air respirator to a separate electrical breathing air compressor, there would have been no possibility of *any* carbon monoxide contaminating his air supply and no need to take the prescribed precautions against overexposure. Judge LaVecchia rejected the defense based on his finding that Troy's training was inadequate. We agree with the judge that AMSCO failed to establish the elements of the defense but for reasons other than those assigned by the judge.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove: (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules

⁷Section 1910.134(d)(2)(ii) requires that if an oil-lubricated compressor is used for breathing air, the air must be "frequently" tested for carbon monoxide unless the compressor is equipped with a carbon monoxide alarm. Section 1910.134(d)(1) provides that breathing air must meet the standard for Grade D breathing air "as described in Compressed Gas Association Commodity Specification G-7.1-1966." Section 1910.94(a)(6), which deals with abrasive blasting operations, requires that abrasive blasting respirators must meet the specifications "for air purity set forth in ANSI Z9.2-1960."

when violations are discovered. *E.g.*, *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455, 1995 CCH OSHD ¶ 30,910, p. 43,034 (No.93-2971,1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). For the reasons that follow, we reject AMSCO's unpreventable employee misconduct defense on the ground that it has failed to prove the third element of its defense, *i.e.*, that it took steps to discover violations of the work rule at issue.⁸ We therefore need not reach any other elements of the defense, including the element of adequate communication of work rules to employees, *i.e.*, training, on which Judge LaVecchia relied.

Establishing adequate procedures for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards. It is not enough that an employer has developed an exemplary safety program on paper. Rather, "the proper focus in employee misconduct cases is on the effectiveness of the employer's *implementation* of its safety program" *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987) (emphasis added). Effective program implementation requires "a diligent effort to discover and discourage violations of safety rules by employees." *Paul Betty d/b/a Betty Bros.*, 9 BNA OSHC 1379, 1383, 1981 CCH OSHD ¶ 25,219, pp. 31,151-52 (No. 76-4271, 1981). Therefore, in the absence of evidence that the employer has "attempted to discover violations" of its work rules, we must conclude

⁸Although the defense of unpreventable employee misconduct is available to an employer, the Secretary has an initial burden to show that the employer knew or reasonably could have known of the existence of conditions that fail to comply with the standard. *Precast Services*, 17 BNA OSHC at 1456-57, 1995 CCH OSHD at p. 43,035. In this case, however, AMSCO argued only the defense before the judge and did not contest the knowledge element of the Secretary's case. Review was directed only on issues relating to the defense, and AMSCO did not address the element of employer knowledge in its briefs on review. Accordingly, that element is not before us. *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1862 n.4, 1996 CCH OSHD ¶ 31,197, p. 43,686 n.4 (No. 93-1122, 1996), *petition for review filed*, No. 97-3096 (6th Cir. Jan. 31, 1997). *Cf. D.A. Collins Constr. Co. v. Secretary of Labor*, 117 F.2d 691, 694-95 (2d Cir. 1997) (appellate court considers issue of knowledge to be waived where employer fails to raise the issue in its petition for discretionary review before the Commission).

that the employer “could not have enforced its work rules effectively.” *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539, 1991-93 CCH OSHD ¶ 29,617, p. 40,101 (No. 86-360, 1992) (consolidated).

We find that AMSCO has failed to prove that it made sufficient efforts to discover violations of its work rules. AMSCO has not demonstrated that Lindstrom used his ongoing discussions with Troy to determine whether Troy was complying with the work rule that is at issue here. While Lindstrom testified that he and Troy had discussed the hazard of carbon monoxide poisoning, there is no evidence that Lindstrom ever questioned Troy to determine how frequently, if at all, Troy used the supplied-air respirator or whether Troy was following proper procedures in setting up the supplied-air respirator on any occasion when he used that respirator in his work.

Lindstrom admitted to Compliance Officer Delaney that he had never accompanied Troy to a worksite, “had never seen or evaluated the respiratory protection program set up by Mr. Troy or used by Mr. Troy,” and did not even know whether Troy was using the half-mask dust respirator or the supplied-air respirator in his work. Lindstrom was also unaware “of what type of equipment the employee was using while work was performed” and “of the connections that the employee was or was not making in using a supply of air to the respirator.” Lindstrom further told Delaney that he had only observed the setup of the supplied-air respirator once and that observation had been for the purpose of evaluating the system itself rather than Troy’s use of the system. In essence, Lindstrom delegated to Troy the authority to decide for himself whether to use the supplied-air respirator or the half-mask dust respirator and, generally speaking, did not even know which respirator Troy had chosen on any particular project.

Because the record does not show any effort by AMSCO to determine whether Troy was complying with its work rule on the proper assembly of the supplied-air respirator, we cannot agree with its contention that the violation was the result of unpreventable employee misconduct. Like the employer in *Austin Bldg. Co. v. OSHRC*, 647 F.2d 1063 (10th Cir.

1981), AMSCO would have us infer that it “justifiably relied” on its employee to comply with the applicable safety rules and that violations of these safety policies were therefore not preventable. However, we may draw such an inference only when the evidence demonstrates “that the employer effectively communicated *and enforced* safety policies to protect against the hazard” *Id.*, 647 F.2d at 1068 (emphasis added). The fact that Troy was considered to be an expert in chamber cleaning operations with a known record of safe work performance does not relieve AMSCO of responsibility for affirmatively enforcing its safety rules. *Borton, Inc.*, 10 BNA OSHC 1462, 1466, 1982 CCH OSHD ¶ 25,983, p. 32,599 (No. 77-2115, 1982), *rev’d on other grounds*, 734 F.2d 508 (10th Cir. 1984). As the Commission observed in *Stuttgart Mach. Works*, 9 BNA OSHC 1366, 1369, 1981 CCH OSHD ¶ 25,216, p. 31,142, a favorable safety record “can be [merely] a matter of good fortune rather than an indication of an effectively enforced safety program.”

We therefore find that AMSCO failed to prove that it had taken reasonable measures to determine whether Troy was complying with its work rule and thus failed to establish that his noncompliance with the standards was the result of unpreventable employee misconduct.⁹

III. ITEM SEVEN

Item 7 alleges that AMSCO failed to comply with 29 C.F.R. § 1910.134(b)(11) because at the time of the accident Troy was using a respirator that was not “approved” within the meaning of the standard.¹⁰ Compliance Officer Delaney testified that the entire

⁹AMSCO presented evidence regarding the suitability of Troy’s work operations for random spot inspections by Lindstrom or other supervisors. On review, it argues that such inspections of Troy’s workplaces would have been neither feasible nor useful as a means of ensuring Troy’s compliance with the work rule in question. We express no opinion on this question. Our decision requires that AMSCO undertake measures to more accurately and more comprehensively inform itself of the manner in which its utility technicians perform their work. It may do so by whatever means it considers reasonable and appropriate in the circumstances.

¹⁰Under section 1910.134(b)(11), one of the requirements for an acceptable respirator
(continued...)

“respirator assembly,” that is, the respirator together with its air supply and connecting hose, did not meet the specified standards for approval because the air hose was 50 feet longer than the maximum permissible length of 200 feet.¹¹ AMSCO does not dispute that it failed to comply with the standard but argues that the violation is the result of Troy’s unpreventable misconduct in failing to adhere to the work rule previously discussed. In AMSCO’s view, had Troy acted properly, he would have connected the supplied air respirator he was wearing to an electrical compressor set up in the same room where the chamber blasting took place rather than to a gasoline compressor set up outside the building far from that room. The hose carrying the pressurized air from the compressor to the respirator would therefore have been only 50 feet long, well within the 200-foot maximum. Under those conditions, the respirator assembly would have been “approved” within the meaning of the cited standard and AMSCO would have been in compliance.

For the same reasons we rejected AMSCO’s affirmative defense of unpreventable employee misconduct with regard to item 2, we reject it here. Since AMSCO has failed to establish its claims that the violations alleged in items 2 and 7 were unpreventable and because it has raised no other issues concerning these two items, we affirm the judge’s decision to the extent it affirms items 2 and 7 and assesses the penalties proposed for those items.

¹⁰(...continued)

program, respirators must be “selected from among those jointly approved by the Mine Safety and Health Administration and the National Institute for Occupational Safety and Health”

¹¹The compliance officer further testified that the respirator assembly also could not be considered approved because it had a defective air pressure gauge on the air line filter. However, in her review brief, the Secretary distinguishes between items 4 and 7 on the ground that item 7 deals with the improper *selection* of respirator components, while item 4 deals with AMSCO’s failure to maintain *properly-selected* respirator components in their original condition. The brief implicitly acknowledges that the defective pressure gauge was incorrectly cited as a basis for item 7.

IV. ITEMS NINE AND TEN

These two items allege violations of the hazard communication standard (“HCS”) for AMSCO’s failure to require respectively (a) maintenance of a list of hazardous chemicals as part of the employer’s written safety program and (b) the providing of hazard information and training to employees who are exposed to such chemicals.¹² Judge LaVecchia found that gasoline and diesel fuel were hazardous materials required to be listed and that Troy was not properly trained in the hazards presented by them.¹³ AMSCO defends against both charges on the ground that the gasoline and diesel fuel used by Troy were excluded from coverage under the HCS pursuant to the terms of the HCS “consumer product exemption.”¹⁴ It claims that, while Troy “occasionally purchased and used small quantities of gasoline and diesel fuel for the compressor to run the blaster,” his exposure was no greater than that of “a homeowner who purchases five gallons of gasoline to run his lawnmower.”

¹²29 C.F.R. § 1910.1200(e)(1) requires an employer to “develop, implement, and maintain” a written hazard communication program including a “list of the hazardous chemicals known to be present.” Section 1910.1200(h) requires that employees be given “effective information and training on hazardous chemicals in their work area.”

¹³The Secretary also alleged that AMSCO violated the HCS with respect to the blasting beads and to a metal primer allegedly used by Troy. In her review brief, the Secretary states that she no longer relies on these substances as a basis for the alleged violations of the HCS.

¹⁴At the time this case arose, 29 C.F.R. § 1910.1200(b)(6)(vii) provided that the HCS does not apply to the following:

Any consumer product or hazardous substance . . . where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers[.]

Subsequent to the inspection and citation at issue, the Secretary amended this exception, and it is now codified at 29 C.F.R. § 1910.1200(b)(6)(ix). 59 Fed. Reg. 6153, 6170 (1994). Although the parties refer to the amended provision in their briefs, our analysis and conclusion would be the same under either version of the exception.

An employer makes out the consumer product exemption to the HCS by showing that the product is used in the same manner in the workplace as it is used in normal consumer use and that the exposure to the hazard is comparable to that of a typical consumer. *See Safeway Store No. 914*, 16 BNA OSHC 1504, 1510-11, 1991-93 CCH OSHD ¶ 30,300 (No. 91-373, 1993). It may well be that Troy's exposure to the carbon monoxide hazard created by those products would have been no greater than the exposure of a homeowner operating a gasoline-powered lawnmower *if* Troy had complied with AMSCO's work rule and used the gasoline compressor only to supply air to the blasting unit and not to the supplied-air respirator. However, the consequences of noncompliance with that work rule could be and were fatal. These circumstances are far removed from those of a homeowner using a lawnmower. We therefore do not accept AMSCO's analogy. The fact that AMSCO adopted a work rule designed to prevent overexposure to carbon monoxide during the chamber cleaning operations and then warned its utility technician of the possible consequences of noncompliance with that work rule establishes that AMSCO realized that the hazard posed by such operations was not comparable to a homeowner's use of a gasoline-powered mower.

We therefore conclude that the judge properly affirmed item 9 since it is undisputed that AMSCO's master list of hazardous chemicals did not include gasoline and diesel fuel. We conclude that the merits of item 10 are not before us, and we affirm that item, because the only issue AMSCO argues with respect to item 10 is the consumer product exception.¹⁵

¹⁵AMSCO has not argued in its briefs to us that it provided the requisite training and instruction even though it raised that issue in its petition for review and we accordingly included the merits of item 10 in our briefing order. Under Commission precedent, an issue raised in a petition for review or direction for review but not addressed in the party's brief is treated as abandoned. *StanBest, Inc.*, 11 BNA OSHC 1222, 1224 n.4, 1983-84 CCH OSHD ¶ 26,455, p. 33,618 n.4 (No. 76-4355, 1983); *See Bay State Ref. Co.*, 15 BNA OSHC 1471, 1475, 1991-93 CCH OSHD ¶ 29,579, p. 40,025 (No. 88-1731, 1992) (issue raised before judge and included in briefing notice but not addressed in the party's brief is (continued...))

As in the case of items 2 and 7, neither party on review addresses the penalties assessed by the judge in his decision. We therefore do not disturb those assessments.

ORDER¹⁶

Accordingly, item 1 of citation no. 1 is vacated. In all other respects the judge's decision is affirmed. A total penalty of \$28,800 is assessed.

/s/

Stuart E. Weisberg
Chairman

/s/

Daniel Guttman
Commissioner

Dated: November 5, 1997

¹⁵(...continued)
considered abandoned).

¹⁶AMSCO has moved for oral argument. The written record, however, adequately disposes of the issues raised. We therefore deny the motion.