SECRETARY OF LABOR, Complainant, v. NEW YORK STATE ELECTRIC & GAS CORP., Respondent.	:	OSHRC Docket No. 91-2897

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

This matter is before the Commission pursuant to a remand order from the Court of Appeals for the Second Circuit. *New York State Elec. & Gas Corp. v. Secretary of Labor*, 88 F.3d 98 (2d Cir. 1996). In its first decision in this case, the Commission affirmed the decision of Administrative Law Judge Richard W. Gordon holding that Respondent, New York State Electric & Gas Corporation ("NYSEG") violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act") as alleged in the Secretary's citation because one of its employees was not wearing eye protection and safety-toe footwear although he was exposed to hazards requiring such protective equipment. *New York State Elec. & Gas Corp.*, 17 BNA OSHC 1129, 1993-95 CCH OSHD ¶ 30,745 (No. 91-2897, 1995). For reasons which we discuss more fully below, the Second Circuit set aside the Commission's decision and remanded for further consideration. Upon such reconsideration, we now vacate the

citation items.[1]

At the time in question, NYSEG's 2-man crew, consisting of Jim Webb, a gas fitter "first class," and Ray Price, an equipment operator and driver, were installing new gas service at a residence in Binghamton, New York. The Secretary's compliance officer, William Marzeski, who was passing by the worksite, observed Price operating a jackhammer without wearing eye protection. When he came onto the site, the inspector also determined that Price was not wearing protective footwear. Webb then told Price to get the necessary protective equipment from the company truck, where the equipment was kept. There is no dispute that NYSEG failed to comply with the Secretary's protective equipment standards at 29 C.F.R. §§ 1910.132(a), 1926.28(a), and 1926.102(a)(1).[2] The question before us is whether the Secretary proved that NYSEG had knowledge of the violative conditions.[3]

The relevant facts may be briefly stated. Webb and Price were assigned to this job by

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[1]Chairman Rogers notes that this is one of the oldest cases pending before the Commission. To take an unnecessarily expansive view of our mandate, as our colleague advocates in his separate opinion, would do little to serve the ends of justice and may well further prolong this 9-year-old case.

The disposition of the court's remand order is adequately resolved on a narrow issue related to the adequacy of the NYSEG safety program, specifically the monitoring of employees. Anything else would be dicta.

[2]Sections 1910.132(a) and 1926.28(a), respectively, require that appropriate protective equipment be used "wherever it is necessary by reason of hazards" and "where there is an exposure to hazardous conditions." Section 1926.102(a)(1) requires the use of eye and face protection where "operations present potential eye or face injury."

[3]A violation of section 5(a)(2) of the Act, which requires that the employer comply with occupational safety and health standards, exists when the employer fails to comply with an applicable standard, employees are exposed to the hazard the standard was intended to prevent, and the employer knew or reasonably could have known of the violation. *Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1939, 1999 CCH OSHD ¶ 31,932, p. 47,371 (No. 97-1676, 1999) As the judge below noted, with the exception of the issue of knowledge, NYSEG did not dispute the existence of the violative conditions.

their foreman, John Hrywnak. NYSEG required that its foremen visit each job site for which they were responsible at least once each day. Hrywnak testified that he would inspect each site for work progress and safety violations twice a day, once in the morning and once in the afternoon, and would spend between 30 and 45 minutes on each visit.[4] Jack Jones, NYSEG's supervisor for the Binghamton area, also conducted unannounced safety "audits" of each crew under his jurisdiction. Similar audits were also conducted several times each year by NYSEG's workmen's compensation carrier. Hrywnak, Price, and Webb had all previously been employed by Columbia Gas, a gas distribution company which NYSEG acquired on April 5, 1991, approximately four months before the incident here occurred. Like NYSEG, Columbia Gas had safety rules which required eye and foot protection to be worn by employees engaged in the kind of work Price was performing. Hrywnak, who had supervised Price and Webb at Columbia Gas, testified that neither Webb nor Price had ever been known to have acted in violation of any safety rule during their employment with Columbia Gas. On May 1, 1991, on one of his random inspections, Jones observed Webb at another worksite where the work crew was installing residential gas service. In his opinion, Webb did an "excellent" job. There is no evidence that either Price or Webb had ever previously been known to have committed any infraction of NYSEG's safety rules.

In his decision affirming the citation, Judge Gordon concluded that NYSEG could not be charged with actual knowledge of the violations. There was no evidence that, prior to the arrival of compliance officer Marzeski, Webb was aware that Price was not wearing the necessary protective equipment. However, the judge found that if Webb had been reasonably diligent he could have observed Price's misconduct because he was in close proximity to Price at the site. The judge further found that because Webb was responsible for ensuring that the job was performed in a safe manner and for communicating with NYSEG's management, Webb was a supervisory employee whose knowledge should be imputed to NYSEG. Having

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[4]Judge Gordon found that twice-daily visits were conducted.

concluded that the Secretary thereby established a prima facie case of knowledge, the judge then held that the burden of proof shifted to NYSEG to demonstrate that it had taken all reasonable measures to prevent the violations by showing that it: (1) had an adequate safety program consisting of safety rules directed to the hazard in question, (2) had communicated those rules to employees, (3) had taken measures to discover any noncompliance with the safety rules, and (4) had effectively enforced the rules when infractions occurred. The judge observed that "reasonable and continual supervision" is the primary means of detecting violations of safety rules. He concluded that the worksite visits by NYSEG's supervisors and its insurance company "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." *New York State Electric & Gas Corp.*, No. 91-2897, slip op. at 10-11 (ALJ, July 7, 1993).

The Commission affirmed the judge's decision and agreed with the judge's findings regarding the adequacy of NYSEG's supervision. The Commission noted that where a supervisory employee is in close proximity to a readily apparent safety violation, the supervisor may be charged with constructive knowledge of that violation. *Hamilton Fixture*, 16 BNA OSHC 1073, 1993-95 CCH OSHD ¶ 30,034, p. 41,184 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994). Such knowledge is imputable to the employer and is sufficient to make a prima facie showing of employer knowledge. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, pp. 40,583-84 (No. 87-692, 1992). Unlike the judge, however, the Commission declined to decide whether or not Webb in fact was a supervisory employee whose constructive knowledge could be imputed to NYSEG.

The Commission concluded that if Webb was simply Price's co-worker, as NYSEG contended, then NYSEG's safety program was inadequate. NYSEG's monitoring of worksites, which the Commission characterized as "brief, daily visits" by Webb's foreman, was inadequate to detect infractions of the safety rules at issue here. On the other hand, if

Webb were considered a supervisor as the Secretary argued, then the Commission concluded that NYSEG did not rebut the Secretary's prima facie showing of employer knowledge because NYSEG had failed to show that Webb himself was adequately supervised. Although the judge found in his decision that there were "questions" as to the adequacy of NYSEG's communication of its safety rules, the Commission expressly held that all elements of an acceptable safety program were present with the exception of monitoring to detect infractions:

> 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.

17 BNA OSHC at 1133, 1993-95 CCH OSHD at p. 42,711.[5]

The appellate court set aside the Commission's decision. The court agreed with the Commission's finding that if Webb were a supervisor, he had constructive knowledge of Price's misconduct which was properly imputable to NYSEG. According to the court, Webb was in a position from which he could have observed Price's lack of protective equipment, and Webb knew that the type of work Price was doing—operation of a jackhammer—required protective equipment. However, the court rejected the Commission's conclusion that

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[5]In suggesting an inconsistency between our current decision and the Commission's prior decision, our dissenting colleague quotes out of context the Commission's reference to an argument in NYSEG's brief. Our dissenting colleague ignores the sentence which immediately follows this reference, in which the Commission emphasized that it was "affirming the judge's finding that NYSEG did not take adequate steps to monitor compliance with its work rules." 17 BNA OSHC at 1133-34, 1993-95 CCH OSHD at pp. 42,710-11. The remaining discussion addresses enforcement of safety rules in the context of monitoring to detect infractions of those rules. Moreover, the portion of the decision which includes this discussion commences with the following subheading: "*The finding that compliance monitoring was inadequate.*" (Emphasis in original). Although the Commission's decision, in which our dissenting colleague participated, is not absolutely explicit, it is susceptible of only one reasonable interpretation, *i.e.*, that the Commission expressly found no deficiencies in NYSEG's safety program other than the adequacy of monitoring.

NYSEG's safety program was inadequate because it conducted insufficient monitoring. The court held that because the Commission predicated a finding of a violation on a single infraction of NYSEG's safety rules, the Commission in effect imposed on NYSEG the obligation to provide continuous supervision of the worksite throughout the entirety of the workday, a requirement which the court expressly found unreasonable. *See Ragnar Benson, Inc.*, 18 BNA OSHC 1937, 1940, 1999 CCH OSHD ¶ 31,932, p. 47,373 (No. 97-1676, 1999) (employer not required to provide constant surveillance by supervisors).

Furthermore, because the Commission adopted the judge's finding that NYSEG had failed to establish that it had implemented an adequate means of detecting violations of its safety rules, the court concluded that the Commission had impermissibly placed on the employer the burden of proof of knowledge of the violative conditions. The court acknowledged that the majority of the circuit courts of appeal recognize that the employer has the burden to plead and prove as an affirmative defense that a violation was the result of unpreventable employee misconduct. However, the court acknowledged that the Secretary has the obligation to first establish knowledge as part of her prima facie case. 88 F.3d at 108 (citing, e,g,, *Brock v. L.E. Myers Co.*, 818 F.2d 1270, 1277 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987)). *See Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067, 2000 CCH OSHD ¶ 32,053, p. 48,003 (No. 96-1719, 2000) (Secretary bears burden of proof on actual or constructive knowledge).

The court concluded that in placing the burden of proof on the employer the Commission had disregarded its own precedent which holds that the Secretary must make a prima facie showing of knowledge. While the court suggested that the Commission "could . . . accept the Secretary's position as a permissible one," the court did not remand this matter with instructions that the Commission address generally the relative evidentiary burdens of the Secretary and the employer with respect to employer knowledge and employee misconduct. The court's decision does nothing more than admonish the Commission that *if* the Commission seeks to place the burden of proof of knowledge on the employer or

otherwise change its precedent, it must "articulate its reasons for making the change." 88 F.3d at 107-08:

> Without deciding whether a given rule would be permissible under the OSH Act, we simply hold that—absent a clear and reasoned explanation for changing its prior rule—the burden of proof regarding the issue of knowledge may not be shifted to the employer even when knowledge charged to an employer is predicated on its alleged inadequate safety policy.

Id. at 108.[6] The court stated that the Commission was free to adopt its own principles for deciding these issues so long as the Commission formulated a "workable" rule and applied that rule "in a consistent fashion." *Id.* Thus, contrary to the suggestion in the dissenting opinion, the court did not direct that we devise a rule "to address the evidentiary burdens of the Secretary and the employer with respect to the interplay between employer knowledge and the affirmative defense of unpreventable employee misconduct," nor is there any language in the court's opinion to indicate that it viewed the formulation of such a rule as essential to the disposition of this case.

The court identified three factual issues which in its view warranted further consideration by the Commission: whether NYSEG's safety program was adequate,[7] whether

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[6]Subsequent to its decision in this case, the Second Circuit stated that it agreed with those other circuits which have held that the employer has the burden to prove an affirmative defense of unpreventable employee misconduct after the Secretary establishes a prima facie case. *D.A. Collins Constr. Co. v. Secretary of Labor*, 117 F.3d 691, 695 (2d Cir. 1997). In *Collins*, however, the employer waived the issue of knowledge before the court and therefor the court had no occasion to decide what showing the Secretary must make in order to establish her prima facie case.

[7]The court explained this basis for its remand order as follows:

> Whether, given the evidence adduced at the hearing, the Commission would have been entitled to find that NYSEG's monitoring for purposes of ensuring its workers' safety was insufficient, is a matter we need not decide. On appeal, both parties advanced reasons for reaching opposite conclusions regarding the adequacy of NYSEG's safety program. . . . We therefore must remand this

(continued...)

Webb was a supervisor, and whether Price's misconduct was preventable. Upon reconsideration as directed by the court, we conclude that we do not need to decide whether Webb was a supervisor because his status does not affect our disposition of this case.[8] In light of the court's admonition that we cannot impose a requirement for continuous, full-time monitoring, we find on the record here that NYSEG met the requirements for an adequate safety program based on its level of monitoring. Accordingly, and since we are not departing from our existing precedent, we conclude that it is also not necessary to address the formulation of a rule regarding the burden of proof on knowledge.

Subsequent to the Commission's previous decision in this case, the Commission in *Kerns Bros.* found a company's safety program adequate where either the company's co-owner or its safety director inspected between 75 percent and 95 percent of the company's work sites each day to monitor employee compliance with safety rules. The facts in *Kerns Bros.* are analogous to those here in that the employees who were not wearing the required personal protective equipment at the worksite in question had never previously been known

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[7](...continued)
issue to the Commission for its reconsideration.

88 F.3d at 109.

[8]Commissioner Visscher notes that, in concluding that Webb was a supervisor, the dissenting opinion relies principally on the contents of NYSEG's exhibit H102. That document was among hundreds of "Specific Appraisal Reports" offered into evidence by NYSEG for the purpose of showing that the company enforces its safety rules. The Secretary has not cited the exhibit at any stage of these proceedings as evidence that Webb was a supervisor, and NYSEG therefore has never had reason to respond or explain the exhibit with regard to the issue for which our colleague cites it. Our colleague erroneously compares his reliance on an exhibit which was not submitted or examined for the purpose for which he uses it with my dissenting opinion in *Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2169, 2177-78, 2000 CCH OSHD ¶ 32,217, pp. 48,450-51 (No. 97-257, 2000), where I found that there was no evidence on which to conclude that the space involved was enclosed. The exhibit here is evidence, but it is susceptible to various interpretations and therefore should be given little weight under the circumstances.

to have violated any safety rule. On these facts, the Commission held that there was "no basis . . . to believe that Kerns should have recognized that more intensive supervision was necessary to prevent hard hat violations." 18 BNA OSHC at 2070, 2000 CCH OSHD at p. 48,006.[9] Similarly, we conclude that there are no circumstances which can reasonably be said to have put NYSEG on notice of a need for further or more intensive monitoring of Price or Webb. *See Ragnar Benson*, 18 BNA OSHC at 1940, 1999 CCH OSHD at p. 47,373 (citing *Texas A.C.A., Inc.*, 17 BNA OSHC 1048, 1050, 1993-95 CCH OSHD ¶ 30,652, p. 42,527 (No. 91-3467, 1995) (employer's duty is to take *reasonably diligent* measures to detect hazardous conditions through inspection of worksites; it is not obligated to detect or become aware of every instance of existence of a hazard)); *Southwestern Bell Telephone Co.*, No. 98-1748 (Sept. 27, 2000) (worksite visits conducted occasionally and at no specific frequency by supervisors held inadequate where no evidence produced that the inspections pertained to the specific work practices at issue).

In addition to the regularity and duration of NYSEG's worksite inspections, the record contains documents reflecting numerous reprimands and more severe disciplinary action taken against NYSEG employees for infractions of safety rules. Although the overwhelming majority of these instances in the record involve workers in NYSEG's electrical as opposed to its gas operations, there is nevertheless evidence of a number of occasions in which employees were disciplined for infractions of safety rules, including failure to wear personal

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[9]Because both the worksite and the employer's business office were located within the jurisdiction of the Third Circuit, the Commission in *Kerns* applied the Third Circuit's precedent, which holds that the Secretary retains the ultimate burden of proof on knowledge even where a supervisor is aware of the violative conduct or participates in it. *Pennsylvania Pwr. & Light Co. v. OSHRC*, 737 F.2d 350 (3d Cir. 1984). Because we find on the facts that NYSEG's level of monitoring was adequate, and NYSEG satisfied the requirements for an effective safety program under Commission precedent, the fact that *Kerns* arose in the Third Circuit is immaterial to our disposition here.

protective equipment, while working in gas activities. This evidence supports the conclusion that NYSEG's degree of monitoring of its worksites was, as a general matter, adequate to detect unsafe work practices.[10] We therefore vacate the citation items.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Dated: October 16, 2000

[10]In the Commission's earlier decision in this case, the Commission acknowledged that most of NYSEG's customers—approximately 75 percent—are consumers of electricity rather than gas. Nevertheless the Commission found the relatively small number of instances of disciplinary action with respect to employees in natural gas operations as opposed to those doing electrical work to be "grossly disproportionate." 17 BNA OSHC at 1134, 1993-95 CCH OSHD at p. 42,711. The appellate court did not directly address this finding but noted that NYSEG "presented voluminous evidence of its safety practices" and declared that the Commission "did not seriously analyze the reasonableness of this program." 88 F.3d at 109.

WEISBERG, Commissioner concurring in part and dissenting in part:

On July 3, 1996, more than four years ago, the U.S. Court of Appeals for the Second Circuit set aside the Commission's decision and remanded this case to the Commission: (1) to determine whether Webb was a supervisor; (2) to formulate a workable rule, based on the Commission's experience and expertise in the occupational safety field, to address the evidence the Secretary must show in order to establish her prima facie case, particularly employer knowledge, and the extent to which inadequacies in the employer's safety program may be an element of such a showing, and to resolve the evidentiary burdens of the Secretary and the employer with regard to the interplay between employer knowledge and the affirmative defense of unpreventable employee misconduct, with the ultimate burden of showing employer knowledge remaining with the Secretary; (3) to reconsider the adequacy of NYSEG's safety program without applying a per se rule that a safety policy is inadequate unless employees are being constantly monitored for safety violations; and (4) to provide some clarity "in a field of the law that may already be described as a patchwork of confusion." *New York State Elec. & Gas Corp. v. Secretary of Labor,* 88 F.3d 98 (2nd Cir. 1996). In my view, the majority opinion substantially ignores the nature and substance of the Court's remand and sidesteps the opportunity to resolve and provide clarity and guidance to a confusing area of the law.[1]

I agree with my colleagues, for the reasons stated in the majority opinion, that based on the record NYSEG's level of monitoring was sufficient to meet the requirements for an adequate safety program. However, unlike my colleagues I believe that it is necessary for the Commission to determine whether Webb was a supervisor for purposes of imputation of his knowledge. The Circuit Court's decision suggested that whether or not Webb was a

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[1]Chairman Rogers appears to suggest that the age of this case -- one of the oldest pending before the Commission -- somehow provides justification for not fully dealing with the Court's mandate. It is the breadth and import of the Court's mandate, however, that is the very reason this case has been before the Commission for so long. To then cite the age of the case as a means for circumventing the Court's mandate would be unfortunate. The "ends of justice," referred to by my colleague, do not justify the means in this case.

supervisor was significant. The court affirmed the Commission's finding that Webb, if he was a supervisor, had constructive knowledge of Price's violative conduct because he was working nearby and the violations were easy to see. The court also suggested that "If Webb was a supervisor, then his knowledge must be imputed and NYSEG therefore had knowledge."

Although the question of whether Webb's position was "supervisory" is a close one, I would affirm the administrative law judge's finding that Webb was a supervisor ("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"). An employee who has been delegated authority over other employees, even if temporarily, is considered to be a supervisor for the purposes of imputing knowledge to an employer. *Tampa Shipyards, Inc.* 15 BNA OSHC 1533, 1537, 1991-93 CCH OSHD ¶ 29,617, p. 40,100-101 (No. 86-360, 1992) (consolidated). The compliance officer testified that both Price and Webb himself referred to Webb as the "crew leader" and that during the OSHA inspection Webb functioned as a supervisor and instructed Price to get the necessary protective equipment from the company truck which Price immediately did. Webb also had some safety and reporting responsibilities at the worksite. Most notably, Exhibit R-H 102, a "Specific Appraisal Report," relates to a verbal reprimand given to a first class gas fitter (the same position held by Webb) based on a field crew's violation of an OSHA standard and company work rule. The gas fitter objected to the reprimand on the ground that he didn't feel as though he was in charge of the crew. The company responded that he was responsible for the crew as the senior gas fitter at the job site and warned him that a future incident of failure to follow or enforce proper company work procedures would result in more severe disciplinary action.[2]

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[2]Notwithstanding that Commissioner Visscher has chosen not to deal with the question of whether or not Webb is a supervisor, he objects to my relying in part on the contents of

(continued...)

Assuming, as I would find, that Webb is a supervisor for purposes of imputation of his knowledge, then the case does not end with the finding that NYSEG's level of employee monitoring was sufficient to meet the requirements for an adequate safety program. The issue remains whether there were other deficiencies in NYSEG's safety program and whether the company took all necessary precautions to prevent the violations, including adequate instruction and supervision of its supervisor. As the Commission noted in its first decision in this case:

> 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.

New York State Elec. & Gas Corp., 17 BNA OSHA 1129, 1134, 1993-95 CCH OSHD ¶ 30,745, p. 42,711 (No. 91-2897, 1995).[3] Accordingly, contrary to the assertion of my

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[2](...continued)
Exhibit R-H 102. This exhibit was introduced into evidence by NYSEG, although for a different purpose, and was properly admitted as evidence in the record by the judge. Commissioner Visscher argues that since the Secretary did not cite this exhibit as evidence that Webb was a supervisor, NYSEG never had reason to respond. *Compare Offshore Shipbuilding, Inc.*, 18 BNA OSHC 2169, 2177-2178, 2000 CCH OSHD ¶ 32,137, p. 48,450 (No. 97-257, 2000) where Commissioner Visscher, relying on evidence in the record, *i.e.,* citing and drawing inferences from the compliance officer's testimony, advanced a position in his dissent, that the ballast tank did not become an enclosed space until after the employee had completed the process of "enclosing himself in," which was neither raised nor argued by the company and therefore the Secretary never had reason to address.

[3]My colleagues contend that this quote is taken out of context in that it appears in the portion of the Commission's decision pertaining to the adequacy of NYSEG's efforts to monitor compliance with its safety rules. It should be noted initially that this is the only portion of the decision where the Commission discusses the elements necessary to rebut a *prima facie* case of employer knowledge. Moreover, NYSEG's assertion in its review brief here that "until [Webb] was designated a supervisor by the Compliance Officer, neither Mr. Webb (and his paycheck) nor NYSEG was aware that he had any responsibility [for enforcing NYSEG's
(continued...)

colleague, disposition of this issue would not be dictum and would not *unnecessarily* prolong this "9-year old case."

I would decide this question and, as requested by the Circuit Court in its remand order, would also attempt to formulate a workable rule to address the evidentiary burdens of the

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[3](...continued)
work rules]," though intended to address the issue of Webb's supervisory status, is equally applicable to the question whether, if Webb was a supervisor, the company adequately trained him.

My colleagues also maintain that the Commission in its earlier decision *expressly* held that all elements of an acceptable safety program were present with the exception of monitoring to detect infractions. That assertion is based entirely on but a single misleading sentence in the opinion which reads: "Here, we have little difficulty in finding that NYSEG met its burden of proving three of the four elements of its rebuttal case." There is no discussion in the opinion as to what specific evidence, if any, the Commission relied on and a reviewing court would be hard pressed under such circumstances to find substantial evidence to support this purported finding that the company adequately communicated its work rules to its employees (including supervisors). Moreover, the Commission also explicitly stated that, assuming Webb was a supervisor, NYSEG had "not shown that it took all necessary precautions to prevent the violations, including adequate instruction *and* supervision of its supervisors." (Emphasis added, citation omitted.) *Id.* Instruction and supervision are two separate elements of an employer's rebuttal burden, and the Commission expressly found that NYSEG established neither.

Nor can one refer to the judge's decision and simply express agreement with him on this issue. The judge expressed concern about the adequacy of NYSEG's communications and pointed to evidence that NYSEG's safety program was ineffective in communicating the relevant work rules to Webb but he did not resolve this issue. Instead, the judge based his rejection of NYSEG's rebuttal on the company's failure to take reasonable steps to discover violations of the work rules. While my colleagues acknowledge in footnote 5 that the Commission's decision is not absolutely explicit, they contend that it is susceptible of only one reasonable interpretation. Unlike my colleagues, having participated in the earlier decision, I can state unequivocally that their interpretation is not the correct one and that the Commission never intended to resolve this issue. *See Northwest Conduit Corp.*, 18 BNA OSHC 2072, 2073, 2000 CCH OSHD ¶ 32,027, p. 47,853 (No. 97-851, 2000) (in decision on appeal following remand, participating commissioners clarified intent of prior decision).

Secretary and the employer with respect to the interplay between employer knowledge and the affirmative defense of unpreventable employee misconduct.

Date: October 16, 2000

/s/
Stuart E. Weisberg
Commissioner

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-2897
NEW YORK STATE ELECTRIC & GAS CORP.,	:	
Respondent.	:	

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 la and one (1) alleged violation of Section 5(a)(1) of the Act as item lb. 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 S(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 lb of the citation is invalid since a general duty clause violation wil1 not lie where a duly-promulgated OSHA standard is applicable.

Summary judgment, though generally disfavored by the Commission[1], 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 1125,551, 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 fl6,345 (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 shortcircuited 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 (lst Cir, 1985). *Also, L.R. Wilson & Sons, Ine. 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 that 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 caselaw[6] 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. Scienter 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 la

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 la 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 if 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 11 ¶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. la is affirmed.

DISPOSITION OF VIOLATION lb

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. lb 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. la and lb are AFFIRMED and a penalty of $1,500 is ASSESSED.

/s/

RICHARD W. GORDON
Judge, OSHRC

Dated: July 7, 1993
Boston, Massachusetts