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SOL (MSHA) V. THE INDUSTRIAL COMPANY OF WYOMING (TIC)
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 89-108 A.C. No. 48-00732-03503 ZC7
v.	Belle Ayr Strip
THE INDUSTRIAL COMPANY OF WYOMING (TIC), RESPONDENT	

DECISION

Appearances: S. Lorrie Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Sharp & Casson, P.C., Steamboat Springs, Colorado, for Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor pursuant to Section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). The Secretary charges the Industrial Company of Wyoming (TIC) with a 104(d)(1) significant and substantial violation of 30 C.F.R. 77.204.

TIC filed a timely answer to the Secretary's proposal for penalty, denying the alleged violation. After notice to the parties, an evidentiary hearing on the merits was held before me at Steamboat Springs, Colorado. Oral and documentary evidence was introduced. Both parties have filed post-hearing briefs which I have considered, along with the entire record in making this decision.

STIPULATIONS

1. The decedent, Jeffrey Rosenau, sustained fatal injuries when he fell through a 6-foot, 6-inch square opening at the top of the Fluid Dryer Bin Chamber at Level 183 of the dryer building.

2. The decedent fell approximately 44 feet.

3. The decedent was wearing a safety belt with a lanyard, but the lanyard was not tied off at the time of the fall.

4. The printout of the history of respondent's violations (Ex. A) is accurate.

5. Although respondent denies that it committed any violation and denies that any penalty should be imposed, the proposed $2,000 penalty would not affect the respondent's ability to continue in business.

6. The Mine Safety and Health Administration has no written or published guidelines, standards, or policies regarding the structural steel construction or steel erection practices in the construction industry.

7. Respondent immediately abated the alleged violation in good faith.

I

STATEMENT OF FACTS

Respondent, The Industrial Co. of Wyoming (TIC), is a medium-size heavy industrial construction company. The majority of its activity and service involves structural steel erection. At the time of the Accident, the steel erection project at which respondent was working was located near Gillette, Wyoming, at the Belle Ayr Mine, owned by AMAX Coal Company. The prime contactor, McNally-Pittsburgh, Inc., had contracted with AMAX to design and erect certain structures and machinery in the modernization of the Belle Ayr Mine. McNally subcontracted to Respondent, TIC, the structural steel erection involved in the construction of the coal dryer building.

Mr. Jeffrey Rosenau was an experienced iron worker who had worked high in the air for several years before he was hired as an iron worker by TIC. At the Belle Ayr site, Mr. Rosenau first worked on the construction of various steel structure components and trusses. He worked on the ground and up to 30-40 feet in the air. Later, at his request, he was transferred to work as a connector on the erection of the coal dryer building. He worked under Kevin Kelly, the iron worker lead man for TIC.

On the day of the accident, Mr. Rosenau and Jessie Thomas were working as connectors installing steel beams on the coal dryer building, at level 183, which was 83 feet above the ground.

Iron workers operating as connectors usually work at the highest level of the structure being erected. The steel beams were hoisted up to them by a crane located on the ground next to the building. The connectors working high in the air positioning each beam while still attached to the crane into a pre-designated position, putting sufficient bolts in each end of the beam to secure it in place.

The accident occurred at approximately 5 o'clock on June 3. Just prior to the accident, Mr. Rosenau and Mr. Thomas were connecting and bolting up steel beams over the surge bin, a large, open, uncovered structure approximately 18 feet by 30 feet deep, which had been installed the previous day. This bolting-up procedure followed the reinstallation of a steel beam which had inadvertently been installed backwards. Mr. Rosenau apparently ran out of bolts, got up from where he was working directly over the surge bin, and walked in the direction of the bolt bag about 28 feet away. The bolt bag was located near the opening to the dryer bin on Level 183 of the coal dryer building. It is not known for certain precisely what route Mr. Rosenau took from the surge bin to the bolt bag or how the accident occurred. There were no eye witnesses to the accident. However, Mr. Rosenau did pass through the opening of the dryer, as he fell through space. The opening was surrounded by structural steel beams located just above the opening. These are the beams, which would eventually support the decking or floor at Level 183. These beams were not yet squared and the bolts holding them in place were not fully tightened and thus the beams were not in final place. Mr. Rosenau received fatal injuries after falling approximately 44 feet to the bottom of the dryer bin. Mr. Thomas did not see Mr. Rosenau fall, but did hear what sounded to him like tools bouncing off the steel structure.

The Department of Labor, Mine Safety and Health Administration (MSHA) investigated the accident and, in its report received in evidence, summarized how the accident occurred as follows:

> Jeffery Rosenau, age 26, Iron Worker, fell from a beam he was traveling on through a 6-foot, 6-inch square opening at the top of the Fluid Dryer Bed Chamber. The victim fell about 44 feet, receiving fatal injuries. Rosenau was wearing a safety belt with lanyard, but the lanyard was not tied off because he was moving from one location to another.

MSHA stated in the body of its report:

> Work progressed normally until about 4 p.m. While installing steel beams, it was determined that a steel beam had been installed incorrectly. The steel beam was attached to a Bucyrus Erie Crane used for hositing and positioning steel, unbolted, turned around, repositioned in the correct direction, and secured in place. Bolts used to attach other beams to the installed beam were located approximately 28 feet from the beam to be installed in the immediate work area. About 5 p.m., Rosenau unlatched his safety lanyard and began walking a W 10 by 22-wide flange I-beam 10.17 inches deep with a flange width of 5.75 inches. He apparently gathered enough bolts from where the bolts were located, and started back to the work area. The beam he was traversing was located above the dryer chamber adjacent to where the top unit of the chamber was to be installed. A 6-foot, 6-inch square opening in the top of the chamber was located south of the I-beam he was traversing. Rosenau lost his footing and fell through the opening.

MSHA's Narrative Findings for a Special Assessment described the accident as follows:

> The injuries were caused when the victim slipped or stumbled as he was walking on an I-beam with a 5.75-inch flange; and he fell 43 feet, 8 inches. The victim was wearing a safety belt with lanyard, but because of his movements, he was not able to tie off to prevent a fall.

Based upon the record, I find that this fatal fall-of-person accident occurred when the 26-year old steel erection worker slipped or stumbled as he was walking on an I-beam on his way back to his immediate work area after obtaining additional bolts he needed to complete the steel beam connecting erection work he was performing at the 183 level of the dryer building. In accordance with the usual and customary practice of connectors in the steel erection industry, he was walking on the 5.75-inch wide flange of an I-beam when he slipped or stumbled and fell from the beam. As he fell into space, he fell through the 6 x 6þ 6" opening of the dryer bin and landed on the bottom of the bin. The victim was wearing a safety belt with lanyard, which he used, as is the custom and practice of connectors in steel erection to prevent fall-of-person injuries. Undoubtedly, he unlatched the end of the lanyard so he could travel across the steel gridwork

at Level 183 where the bolt bag was located, approximately 28 feet away. Thus decedent was not tied off at the time of the accident because he was traveling to an area beyond the length of the lanyard.

The parties stipulated that MSHA has no written or published guidelines, standards, or policies regarding the construction of structural steel or steel erection practices in the construction industry. Four witnesses - Kevin Kelly, Lee Dessnar, Steve Johnson, and Melvin Cox - all experienced in the steel-erection industry - testified regarding the construction methods utilized by Respondent in the construction of the coal dryer building and about the standards, customs, and practices used in the stuctural steel erection industry generally. Each of these four witnesses testified that the methods and practices utilized by TIC in the construction of the coal dryer building were consistent with those standards, customs, and practices.

Kevin Kelly, who has been an iron worker for more than six year and who has worked on approximately 20 structural steel buildings similar to the coal dryer building during that time period, testified that the standard and customary sequence of construction of a building of this type is to set the vertical columns, set the steel beams in what will eventually be a horizontal floor, set any equipment or machinery that may come up through that floor, put bolts in the ends of the steel beams, tighten the bolts and square the structure, and then install the flooring and cover all holes which would not otherwise be covered by flooring or filled with machinery. Lee Desner, who has been and iron worker for eight to ten years, and who has worked on approximately 30 structural steel buildings during that time period, testified to the same standard and customary sequence of construction followed both in the structural steel erection industry generally and by Respondent in the construction of the coal dryer building. Steve Johnson, who has been involved in instructural steel construction for 20 years, and who was the construction manager for Respondent at the Belle Ayr Mine, also testified to the standard and customary fashion in which a structural steel building such as the coal dryer building is erected, and that the coal dryer building was constructed in the standard and customary fashion. Melvin Cox, who was the project superintendent at the Belle Ayr Mine for McNally-Pittsburgh, Inc., and who has 19 years of experience in the structural steel erection industry, participating directly in the construction of over 100 structural steel buildings, testified that the sequence of construction of a structural steel building always follows a standard sequence of standing the vertical steel columns, installing any equipment which will pass up through the building, installing

the steel beams which will eventually support a horizontal floor, one layer at a time, bolting the beams in place, "rattling" or squaring and tightening the beams, and then installing the flooring and covering all openings which will not be covered by flooring or immediately filled by equipment or machinery. He further testified that the standard sequence and methods of construction of structural steel buildings are always the same no matter what the design or ultimate function of that building, and that Respondent constructed the coal dryer building and Level 183, the site of the accident, in conformance with the standards and customs of the structural steel erection industry.

All of the witnesses who testified at the hearing stated that Level 183, the site of the accident, was an open gridwork of steel beams with numerous openings through which men or materials could fall and that the dryer bin opening was but one of many such similar openings. The photographs (Exhibits 5, B, D, E, F and G) received into evidence, also clearly depict the state of construction of Level 183 and the open gridwork of steel beams, containing approximately 46 openings through which men or materials could have fallen the same or a similar distance as through the dryer bin opening.

Jessie Thomas, Lee Dessner, Steve Johnson and Melvin Cox, all testified without exception that, given the stage of construction existing at Level 183 of the coal dryer building at the time of the accident, the dryer bin opening would not have been covered; they would not have covered it and they would not have expected it to be covered. Further, those witnesses testified that the dryer bin opening would have been covered in the standard and customary sequence of construction always followed in the structural steel erection industry and that there was no reason to deviate from that standard sequence.

MSHA inspector Caughman testified that the highest floor below Level 183 was a completed floor and, as such, it had no uncovered openings in it.

Jessie Thomas, Lee Dessner, Steve Johnson and Melvin Cox also testified without exception that, as experienced iron workers, they did not consider the dryer bin opening to be any different or more hazardous than any of the approximately forty-five other similar openings present a Level 183 at the time of the accident and that they did not recognize it as a hazard which needed protection.

Kevin Kelly and Steve Johnson both testified that, at the stage of construction existing at the time of the accident, the

dryer bin cover was not installed because to install it out of the standard and customary sequence would have created a construction problem; that since the cover was to be attached to both the bin top and to the surrounding steel beams, it could not be installed until the steel beams had been installed, squared and tightened, which had not yet occurred; and that, in fact, it had to be moved again in order to complete the construction of Level 183.

MSHA Inspectors Ferguson called by the Secretary admitted that, if Mr. Rosenau had fallen in any other direction through an opening of a similar nature for a similar distance, MSHA would not have cited Respondent for any violation of 30 C.F.R. 77.204. Mr. Cox testified that falls through the openings to the south and the north of the dryer bin opening, as well as through most of the openings at Level 183 would have involved a fall of the same distance as through the dryer bin opening.

MSHA Inspectors Ferguson and Caughman also testified that MSHA did not require the covering or protecting of any of the other forty-five similar openings at Level 183, that MSHA considered the area safe for resumption and completion of normal structural steel construction activities after the dryer bin opening had been covered, and that MSHA did not cite Respondent for any violations for the other forty-five openings in this incomplete structure with its steel gridwork of openings through which men or materials could have fallen.

II

MSHA, after investigating the fatal accident, issued a citation alleging TIC violated the provisions of 30 C.F.R. 77.204 which read as follows:

> 77.204 Openings in surface installations; safeguards.
>
> Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices.

The Secretary's position appears simple and straightforward. The decedent obviously fell through an opening through which men or material could fall. Nevertheless, the application of this regulation to the facts of this case strikes me as being an inappropriate wooden application of this regulation.

TIC asserts that 30 C.F.R. 77.204 is unenforceably vague as applied to the facts of this case because it does not give fair warning to TIC, or any other structural steel erection contractor, that the conduct complained of--lack of a cover or barrier over the dryer bin opening--is prohibited by the terms of that regulation. TIC asserts that to pass constitutional muster, the regulation must provide adequate notice to TIC of the precise parameters of its responsibility and that 30 C.F.R. 77.204 of 30 C.F.R. especially in light of the introduction to Part 77 contained in 77.200, does not provide such adequate notice and fair warning.

TIC contends that whether the regulation provides constitutionally adequate warning and notice is measured by the standards, practices and customs of the industry at issue, i.e., the structural steel erection industry. Measured by the standards of conduct followed in that industry, 77.204 fails to provide the adequate notice and fair warning, because those customs, practices and standards, as adhered to by TIC in this construction project, do not expect or require the covering of this one opening among approximately forty-six similar openings at the stage of construction existing at the time of the accident. Further, when measured against the reasonable man in the industry standard used by the courts to determine if a person engaged in the structural steel erection industry would have recognized this one opening among forty-six similar openings as a hazard and protected against it, the evidence is clear and undisputed that such an opening in the incomplete, open and unexisting at Level 183 on the day of the accident would not have been covered or otherwise protected.

TIC asserts an employer cannot be cited and penalized where his conduct is not specifically addressed by a regulation, as has been admitted by MSHA in this case, and where that conduct complained of, conforms to the common practice and customs of those engaged in the structural steel erection industry.

By its express terms, 30 C.F.R. 77.204 does not specifically apply to ongoing, incomplete construction of structural steel buildings at the stage of construction existing at the time of the accident. TIC asserts a building, especially one level in that building under construction and incomplete, cannot be "maintained" and "repaired" pursuant to 77.200, and the obvious inintent of 77.204 is to require the covering or other protection of an opening in an otherwise completed building or completed floor of a building.

TIC argued that given the stage of construction existing at Level 183 of the building being erected, the condition complained of by MSHA was not foreseeable, and therefore, cannot form the basis of a citation and a penalty. TIC correctly points out that the testimony is clear and uncontroverted that it was not foreseeable that this one opening among forty-six similar openings posed any problem or hazard different from the others existing at Level 183 at the time of the accident and for which MSHA has admitted it did not and would not cite Respondent.

At the hearing, I heard evidence regarding important facts from witnesses experienced in the matters at issue. I also heard opinion testimony from MSHA inspectors who admitted they have no experience in the steel erection industry. Thus many of the facts, as established by Respondent's witnesses were uncontroverted. The matters established by Respondent--and left uncontroverted by Petitioner--relate to the customs, standards and practices of the structural steel erection industry and the fact that at the stage of construction that existed at the time of the accident, one opening among forty-six similar openings did not create a different or more hazardous condition than the other openings, and would not have been covered at that stage of the construction.

Elaborating on the constitutional argument TIC contends that 30 C.F.R. 77.204 is unenforceably vague as applied on due process grounds because in the factual circumstances presented by this case. It does not give fair warning to TIC, in light of the common understanding and commercial practices applicable to the structural steel erection industry, that the conduct complained of is proscribed by its terms.

TIC in its post-hearing brief states the following:

> A. Where the imposition of penal sanctions is at issue in a proceeding brought by an enforcing administrative agency, the due process clause of the United States Constitution requires that the regulation sought to be enforced give "fair warning" of the conduct it prohibits or requires, and if it does not, it is unenforceable. United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921). The United States Supreme Court and the Circuit Courts of appeal have consistently held that regulations sought to be enforced must clearly describe what conduct

is required or prohibited, and if the regulation is too broad or general and does not provide that specificity, it is unconstitutionally vague and unenforceable. "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972), quoted in Diebold v. Marshall, 585 F.2d 1327, 1335 (6th Cir. 1978). The principle to be applied is the due process requirement of fundamental fairness and, "[e]ven a regulation which governs purely economic or commercial activities, if its violation can engender penalties, must be so framed as to provide a constitutionally adequate warning to those whose activities are governed." Diebold, Inc. v. Marshall, supra at 1335-36. See also, e.g., Phelps Dodge Corporation v. FMSHRC, 681 F.2d 1189, 1193 99th Cir. 1982); Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119, 122-24 (7th Cir. 1981); B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1367-71 (5th Cir. 1978). "Regulations must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'." Phelps Dodge Corporation v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982); Kropp Forge Co. v. Secretary of Labor, 657 F.2d 119, 122-24 (7th Cir. 1981); B & B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1367-71 (5th Cir. 1978). "Regulations must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'." Phelps Dodge Corporation v. Federal Mine Safety, supra at 1194, quoting Lloyd C. Lockrem, Inc. v. United States, 609 F.2d 940, 943 (9th Cir. 1979). This "reasonable opportuity" requires that a regulation give those to whom it purportedly applies "adequate notice . . . of the exact contours of his responsibility." Dravo Corporation v. OSHRC, 614 F.2d 1227, 1234 (3rd Cir. 1980), quoted in Kropp Forge Co. v. Secretary of Labor, supra at 122. Obviously, an alleged violation of 30 C.F.R. 77.204 exposes Respondent to penalties, and these principles of law apply in this case.

B. The question whether a regulation provides such "adequate notice" is to be answered "in the light of the conduct to which [the regulation] is applied." United States v. National Dairy Products Corp., 372 U.S. 29, 36, 83 Sup. Ct. 594, 600, 9 L.Ed.2d 561 (1963), quoted in Diebold, Inc. v. Marshall, supra at 1336. "[T]he constitutional adequacy of the warning given must be measured by common understanding and commercial practice'." Diebold, Inc. v. Marshall, supra at 1336, quoting United States ex rel. Shott v. Tehan, 365 F.2d 191, 198 (6th Cir. 1966). In other words, the "common understanding and commercial practice" to which these standards of analysis apply is that of the practices, customs and procedures that establish the standards of conduct in the industry in which the employer participates. See Diebold, Inc. v. Marshall, supra at 1336-37, and Cape and Vineyard Division v. OSHRC, 512 F.2d 1148, 1152-53 (1st Cir. 1975). Such standards of conduct are those of "a reasonable prudent employer" in that industry. See B & B Insulation, Inc., supra at 1370. "[A]n appropriate test is whether a reasonably prudent man familiar with the circumstances of the indus-try would have protected against the hazard." Cape and Vineyard Division, supra at 1152. This "reasonable man standard" is used by the courts to determine if a reasonable person engaged in the industry in question would have recognized the hazard and protected against it. B & B Insulation, Inc., supra at 1369-70. This Court must look to persons whose conduct would be subject to judgment by that reasonable man standard, i.e., employers engaged in the steel erection industry.

The conduct of the reasonably prudent employer is established by reference to industry custom and practice. Cape and Vineyard Division, supra at 1152.

The standards, customs and practice of the steel erection industry were established through the undisputed testimony of Kevin

Kelly, Lee Dessner, Steve Johnson and Melvin Cox, persons experienced in the structural steel erection industry, and those witnesses testified without contradiction that the dryer bin opening was not a recognizable hazard, given the stage of construction existing on June 3, 1988, and would not have been covered or otherwise protected by a reasonable employer in the industry.

Diebold, Inc., supra at 1336, sets forth certain factors which in combination deprived the employer in that case of constitutionally adequate warning as to what conduct was prohibited by the regulation at issue. Examination of similar factors in this case leads to the same result. 30 C.F.R. 77.200, the introductory and definitional section to Subpart C of 77, states as follows:

> All mine structures, enclosures, or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees.

First, an employer could conclude from from this general language that buildings un-under construction, which by their very nature cannot be "maintained" or "repaired" until they are completed, were exempted from the broad, general requirements of that section, as well as of 77.204.

Second, the undisputed "common understanding in commercial practice" relating to the erection of structural steel buildings as testified by Kevin Kelly, Lee Dessner, Steve Johnson and Melvin Cox, do not require the covering of an opening such as that for which Respondent was cited in this case at the stage of construction which existed at the time of the accident. Those witnesses testified that structural steel erection always follows a standard and customary sequence, which is the only way such buildings can be constructed, and that that sequence was followed with respect to the construction of the dryer building in which the dryer bin opening was located.

From that, this Court must conclude that TIC, as an average employer in the structural steel erection industry, was unaware that 77.204 required the covering of one opening at the stage of construction existing on June 3, 1988, while approximately 45 other openings of similar or identical nature were not required to be covered. Therefore, whether TIC or any other employer in the structural steel erection industry looked to 77.200 and 77.204 or to industry customs and practices, it would have been led to the conclusion that the dryer bin opening at issue in this case was exempted from the requirement of a covering or other protective measures at the stage at which the construction existed on June 3, 1988.

Petitioner has also recognized that Respondent's conduct in this case must be measured by "the stage of construction that an opening existed" and the particular "nature of the construction" involved, i.e., open structural steel erection. (Section 4.b of Petitioner's Response to Pre-Hearing Order). Petitioner has thus recognized and admitted that the standards, customs and practices of the steel erection industry provide the benchmark by which Respondent's conduct is to be measured. The testimony presented by Respondent at the hearing in this matter clearly established--without refutation by Petitioner--the standard and customary sequence of construction in the structural steel erection industry and the methods and procedures used to accomplish that construction.

The constitutional adequacy of the conduct mandated or prohibited by 77.204 must be measured by those standards and customs, as presented by witnesses Kevin Kelly, Lee Dessner, Steve Johnson and Melvin Cox. Diebold, Inc. v. Marshall, supra at 1336-37. Respondent complied with the standards and customs of conduct of "a reasonable prudent employer" in the steel erection industry, B & B Insulation, Inc., supra, and measured by those standards and customs, 77.204 clearly fails to provide constitutionally adequate warning.

Where an employer's conduct is not addressed by a detailed and precise regulation and that conduct conforms to the common practice and customs of those similarly situated in the industry, the employer cannot be cited and penalized. B & B Insulation, Inc., supra at 1371.

C. The testimony was clear and uncontroverted that if Mr. Rosenau had fallen to either side of the dryer bin opening or in almost any other of the numerous openings exisexisting in Level 183 on June 3, 1988, he would have fallen almost as far as he fell through the dryer bin opening (T. 300-04). MSHA Inspectors Ferguson (T. 103, lines 14-19) and Caughman (T. 190, lines 4-B, p. 210, lines 4-8) both stated unequivocally that had Mr. Rosenau fallen in any other direction for the same distance, MSHA would not have cited the Respondent for a violation of 30 C.F.R. 77.204. Witnesses Kelly, Dessner, Johnson and Cox all clearly testified that the dryer bin opening was no different from nor more hazardous a condition than any of the other forty-five openings existing on Level 183 at the time of the accident. (See pages 6-7 of this Brief for relevant citations to the record).

Section 77.204 does not require the covering or protecting of bin openings while providing that all other openings of a similar nature through which men or materials may fall a similar distance with a similar result need not be covered or protected. However, this is now the arbitrary interpretation which MSHA wishes to have this Court give to 77.204. The law is clear, however, that MSHA and the Secretary of Labor cannot construe 77.204 to mean what it does not adequately and clearly express, even if the foregoing was intended by that agency. Phelps-Dodge Corp., supra at 1193, and Gates & Fox Co., Inc., supra at 156. To allow otherwise would result in arbitrary, subjective and inconsistent interpretations of the unclear regulation. The rule-making procedures of the Administrative Procedures Act may not be supplemented by ad

hoc adjudicatory proceedings based on an MSHA inspector's subjective interpretation. NLRB v. Wyman-Gordon Co., 394 U.S. 759, 564, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969). Further, MSHA and the Secretary of Labor would apparently assert the authority to decide what a reasonable prudent employer would do under the circumstances and state of construction existing in this case on June 3, 1988, even though the uncontroverted testimony clearly established that none of the experienced witnesses would have followed the course of action which MSHA and the Secretary of Labor would now attempt to dictate. MSHA and the Secretary of Labor may not disregard this demonstrated and uncontroverted industry custom and practice which was followed by Respondent in this case. B & B Insulation, Inc., supra at 1370-71. As stated above, only by reference to industry customs, practices and standards can the conduct of the "reasonable prudent employer" be established, and Respondent's conduct in this case must be measured by those industry customs, practices and standards. Id.; Cape and Vineyard Division, supra at 1152. Petitioner has wholly failed to prove that a reasonable prudent employer familiar with the customs, practices and standards in the structural steel erection industry would have recognized the dryer bin opening as a hazard and, therefore, covered or otherwise protected this one opening among forty-six similar openings.

D. Specific standards of conduct are desirable so that the goal of reducing industrial accidents can be reached by employer compliance through elimination of specifically identified safety and health hazards by specifically prescribed remedial measures. "Preventive goals are obviously not advanced where broad standards are extended to encompass every situation which gives rise to an unlikely accident." B & B Insulation, Inc., v. OSHRC, supra at 1371. Thus, in the case at hand, the Secretary of Labor bears the burden of clearly demonstrating that a reasonable structural steel erection employer at the stage of construction existing on June 3,

1988, would have recognized the dryer bin opening to be a hazard and, therefore, required the use of "railings, barriers, devices" to protect open gridwork that is necessarily created as steel beams are lowered in place by a crane and bolted to pre-existing framework in a building under construction at a level not yet prepared for installation of covers, machinery and flooring. See B & B Insulation, Inc. v. OSHRC, supra at 1372. Petitioner's own witnesses stated that such openings need not be covered and, as a result, Petitioner has not met his burden of proof.

II. 30 C.F.R. 77.204 does not apply to ongoing, incomplete construction of structural steel buildings.

30 C.F.R. 77.204 appears in Subpart C of Part 77, 20 C.F.R., Chapter 1. Subpart C is entitled "Surface Installations." The general requirement of Subpart C appears in 77.200 which states: "All mine structures, enclosures or other facilities (including custom coal preparation) shall be maintained in good repair to prevent accidents and injuries to employees." Section 77.204 states: "Openings in surface installations through which men or material may fall shall be protected by railings, barriers, covers or other protective devices." Neither of these provisions gives specific fair warning that they apply to the erection of structural steel framework and the procedures and processes necessary thereto, as presented by the facts and circumstances specific to this case.
First, 77.200 refers to "structures, enclosures, or other facilities" which "shall be maintained in good repair", thereby strongly implying that 77.200 is to apply to completely constructed "structures, enclosures, or other facilities" which can be "maintained in good repair." Buildings under construction cannot be "maintained" and "repaired". (T. 272, lines 7-21). Second, 77.204 refers to "openings" in such "structures, enclosures, or

other facilities," requiring them to "be protected by railings, barriers, covers or other protective devices." The basic purpose of these provisions, fairly fairly read, is to require protection by "railings, barriers, covers, or other protective devices" of "openings" in completed structures, such as floor openings in completed floors or roof openings in completed roofs, and neither 77.200 nor 77.204 can, in fundamental fairness, be applied to ongoing, incomplete construction of structural steel beam frameworks in which open spaces between beams are necessarily created and existing as construction progresses.

The only case involving 30 C.F.R. 77.204 of which Respondent is aware is Secretary of Labor v. Pittsburg & Midway Coal Mining Co., 3 MSHC 1637 (Central Dist. 1984). That case involved the issuance of several citations to the operator, one of which was a 77.204 citation for failing to provide a railing at the opening of a loading dock in a warehouse. That case involved a completed building, and the Court held that the definition of a surface installation in 77.200 was broad enough to include a loading dock, an opening in and being used in a completed structure. Common sense and fairness do not allow a reading of 77.204 to require "maintenance" and "repair" of an ongoing, incompletely constructed structural steel building.

III. The condition complained of by MSHA was not foreseeable, and, therefore, cannot form the basis of a citation and penalty.

The testimony presented at the hearing clearly established that there were approximately forty-six similar gridwork openings at Level 183 and that such openings are inherent in the construction of structural steel buildings at the stage of construction present at Level 183 on June 3, 1988. The construction was still in progress, and ironworkers continued to move across all of the open grids to perform their work in the construction of the

dryer building before the accident on June 3, 1988, during the investigation and abatement process, and after the investigation during the completion of the dryer building project. (T. 49, lines 10-21; p. 108, lines 10-25; p. 109, lines 1-25; p. 110, line 1; p. 197, lines 11-14; p. 230, lines 11-25; p. 231, lines 1-9).

Respondent's witnesses testified that it was not foreseeable that this one open area in relation to the other forty-five open areas would or could be a problem at that stage of construction. (T. 272, lines 22-25; p. 273, lines 1-8; see pages 6-7 of this Brief for further relevant citations to the record). They further testified that they did not deem that opening any different a condition or hazard than any of the other openings necessarily present and inherent in the construction of structural steel buildings. (See pages 6-7). In the case of Pyro Mining Company v. FMSHRC, 3 MSHC 2057 (6th Cir. 1986), the Court found that where a condition claimed by MSHA to be properly the subject of a citation was not foreseeable to the operator, that conditon could not be the basis for a finding of negligence and issuance of a citation. In the case at hand, only with the benefit of hindsight and by ignoring the clear and uncontroverted testimony of Respondent's witnesses can a finding be made that the open area complained of and the rsulting accident involving that open area were foreseeable to the Respondent. The condition of Level 183 was standard and customary for the stage of construction existing on the date of the accident, and given the unforeseeability of this condition, it cannot be the basis for a valid citation.

III

The purpose of the safety standard 77.204 is to protect against fall-of-person injuries. The section states several specific ways this can be done and concludes with the phrase "or other protective devices." It can be argued that the decedent was wearing and using whenever practical a "device" (safety belt and lanyard) to prevent a fall-off-person accident even

though at the time of his fall he was not able to "tie off." He was not able to "tie off" because he was moving to a location beyond the length of his lanyard. It is also noted that there is no evidence that anyone worked at Level 183 other than the two steel erection workers (connectors) positioning and bolting beams hoisted up to them by a crane. There is no evidence these connectors did not use their safety belts and lanyards to prevent fall-of-persons accident whenever it was practical to do so. The decedent and his fellow connectors were working together to bolt in place the steel beam that would support the decking or flooring at the level. It should be noted that there was undisputed evidence from the inspector and others that the highest completed floor below the 183 Level had no uncovered or unprotected openings.

It can also be noted that what caused the accident in this case was not the opening in the bin but the fact that this ironworker slipped or stumbled and fell while traversing on a beam in the customary manner of steel erection work while connecting. It was only after falling into space that he fortuitously passed through the opening in the top of the dryer bin rather than falling in another direction which would have resulted in the same tragic result but no citation.

The crucial question, as I see it, is the applicability of 30 C.F.R. 77.204 to the facts of this case given the nature of steel erection which involves positioning and bolting together steel beams hoisted into the air by a crane to create a steel gridwork of many openings.

The opening involved in this case was not an opening in a floor, a walkway, or an work platform which in my opinion would clearly come within the perview of the cited safety standard even in an unfinisted building under construction. Under the circumstances and facts of this case I find and conclude that at the stage of construction that existed at the time of the accident that there was no violation of 30 C.F.R. 77.204.

ORDER

1. Citation No. 3226562 is VACATED and its related proposed civil penalty SET ASIDE.

2. Docket No. WEST 89-108 is DISMISSED.

August F. Cetti
Administrative Law Judge