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November 5, 1980

Note to: Norman Moseley, I&E
Terry Harpster, I&E
John Craig, I&E

TMI-2 CURRENT INVESTIGATION

Attached are two cases where the Court of Appeals overturned citations on grounds of due process and failure on the part of the agency to prove that employer's conduct fell below demonstrated practices in the industry.

I think these cases will be helpful in shaping the final report on your current investigation of information flow at TMI-2.

Richard Hoefling, Attorney
Rulemaking & Enforcement Division
OELD

Attachments:
As Stated

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Hoefling

DIEBOLD, INCORPORATED, Petitioner,

v.

F. Ray MARSHALL, Secretary of Labor, and Occupational Safety and Health Review Commission, Respondents.

No. 76-1278.

United States Court of Appeals, Sixth Circuit.

Argued Oct. 14, 1977.

Decided Nov. 3, 1978.

Employer sought review of decision of the Occupational Safety and Health Review Commission that the employer had violated a safety regulation. The Court of Appeals, Walinski, District Judge, for the Northern District of Ohio, sitting by designation, held that: (1) OSHA regulation relating to point of operation guarding on power presses was properly applied to press brakes; but (2) in view of inartful drafting of a related regulation, in view of past industry practice, and in view of past enforcement history, the regulation had not given sufficient warning to the employer, and (3) in view of subsequent intervening judicial interpretation of the regulation, the regulation could be constitutionally applied to press brakes in the future.

Vacated.

1. Labor Relations ⇐9.5

Occupational Safety and Health Act requires adoption of established federal and national concensus standards without substantive modification; Secretary of Labor may not enforceably construe such a standard to impose requirements which the standard's source did not impose; Secretary may extend the standard to cover employees whose employers were not governed by the source standards, as long as the extension does not operate to create a protection which had not been afforded to workers

§ 6(a), 29 U.S.C.A. § 655(a).

2. Labor Relations ⇐9.5

Occupational Safety and Health Commission is entitled to great deference in its reasonable interpretations of regulations promulgated under the Occupational Safety and Health Act; that deference is especially appropriate in a case where the Commission has expressly addressed historical and technical arguments. Occupational Safety and Health Act of 1970, § 12(a), 29 U.S.C.A. § 661(a).

See Part III p 1335

3. Labor Relations ⇐9.5

Evidence sustained Occupational Safety and Health Commission's determination that regulation relating to point of operation guarding on power presses, a standard which was taken from one previously promulgated by the Secretary of Labor under the Walsh-Healey Public Contracts Act, was applicable to press brakes. Occupational Safety and Health Act of 1970, § 6(a), 29 U.S.C.A. § 655(a); Walsh-Healey Act, §§ 1–12, 41 U.S.C.A. §§ 35–45.

4. Labor Relations ⇐9.5

Evidence sustained determination of Occupational Safety and Health Commission that a standard promulgated by the Secretary of Labor under the Walsh-Healey Act, and subsequently adopted by the Secretary as an OSHA standard, relating to point of operation guards on power presses had required press brake guarding, despite a contention that such guarding was impossible. Occupational Safety and Health Act of 1970, § 6(a), 29 U.S.C.A. § 655(a); Walsh-Healey Act, §§ 1–12, 41 U.S.C.A. §§ 35–45.

5. Labor Relations ⇐9.5

OSHA standard relating to point of operation guarding on power presses does not require guarding in cases where installation of such guards would in fact render the machine unfit for its intended use; standard applies only where there exists an identifiable and practical means for guarding the specific machine in the specific uses to which the particular employer puts it.

6. Labor Relations ⇐27

ance, Secretary of Labor has the burden of

establishing the existence of a specific and technologically feasible means of compliance as an element of his showing that a violation has occurred; where the regulation itself specifies the means for compliance, the burden rests on the employer to show the technological impossibility of the specified means. Occupational Safety and Health Act of 1970, § 5(a)(2), 29 U.S.C.A. § 654(a)(2).

7. Administrative Law and Procedure ⇐413

Court's deference to administrative constructions of regulations founded primarily on the special expertise of each agency in its particular field and only secondarily on matters of authorship.

8. Labor Relations ⇐9.5

Occupational Safety and Health Commission did not err in determining that OSHA standard relating to point of operation guarding on power presses was applicable to press brakes, even though another regulation setting out both a general rule that power press points of operation be guarded and a detailed specification of the acceptable means for achieving that end excluded press brakes "from the requirements of this section." Occupational Safety and Health Act of 1970, § 6(a), 29 U.S.C.A. § 655(a).

9. Labor Relations ⇐9.5

Fact that Occupational Safety and Health Commission's resolution of ambiguity in one regulation which set forth a general rule that power press points of operation be guarded and also set forth a detailed specification of the acceptable means for achieving that end created something of an inconsistency in the structure of guarding requirements because the temporary exclusion of some existing power presses from the guarding requirements of the power press standard did not operate to subject those presses to the immediately effective requirements of another regulation dealing with point of operation guards on power presses did not preclude the Commission from applying the latter regulation to press brakes. Occupational Safety and Health Act of 1970, §§ 5(a)(2), 6(a), 29 U.S.C.A. §§ 654(a)(2), 655(a).

10. Constitutional Law ⇐251.4

Among the myriad applications of the due process clause is the fundamental principle that statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid. U.S.C.A.Const. Amend. 5.

11. Administrative Law and Procedure ⇐390

Even 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. U.S.C.A.Const. Amend. 5.

12. Constitutional Law ⇐275(2)

In view of inartful drafting of OSHA power press guarding standard in such a way which might lead an employer reasonably to believe that press brakes had been specifically exempted from the generally applicable point of operation guarding requirements, in view of the common understanding and commercial practice relative to brake guarding which indicated that press brake point of operation guarding had been rarely used, and in view of the confirmation of the industry practice by the pattern of administrative enforcement, it was a denial of due process to charge an employer with a violation of the Occupational Safety and Health Act because of its failure to use point of operation guards on its press brakes; in view of subsequent intervening judicial interpretation of the standard, the standard could be so applied in the future. U.S.C.A.Const. Amend. 5; Occupational Safety and Health Act of 1970, § 5(a)(2), 29 U.S.C.A. § 654(a)(2).

13. Administrative Law and Procedure ⇐390

The fairness of a regulatory warning is governed by a less stringent standard in the absence of criminal penalties or First Amendment implications. U.S.C.A.Const. Amends. 1, 5.

14. Administrative Law and Procedure ⇐391

Duty of inquiry may properly be imposed on one engaged in a business enter-

prise who claims that an administrative regulation fails to give fair warning of what is required of the business enterprise, as business enterprises should be alert to the probability that their conduct is of interest to one or more administrative agencies.

15. Constitutional Law ⇐275(2)

If employer had been aware of point of operation guarding requirement for its press brakes, it would have received constitutionally sufficient warning and could not complain that the OSHA standard did not give the notice required by due process. U.S.C.A.Const. Amend. 5; Occupational Safety and Health Act of 1970, § 5(a)(2), 29 U.S.C.A. § 654(a)(2).

16. Administrative Law and Procedure ⇐412, 413

Defects in the constitutional sufficiency of a regulatory warning may be cured by authoritative judicial or administrative interpretations which clarify obscurities or resolve ambiguities.

17. Labor Relations ⇐27

Because of a lack of constitutionally sufficient warning as to what was required by OSHA regulation relating to point of operation guarding on press brakes, order of the Occupational Safety and Health Commission which imposed fines for past violations could not stand; where the Commission's order that the employer provide press brake guarding in the future rested on the Commission's rejection of a claim that guarding was impossible, where that claim was rejected because of the failure of the employer to seek a variance, and where the failure of the employer to seek a variance was attributable to the insufficiency of warning given by the regulation, the order directed to future compliance also could not stand. U.S.C.A.Const. Amend. 5; Occupational Safety and Health Act of 1970, § 5(a)(2), 29 U.S.C.A. § 654(a)(2).

Hulse Hays, Jr., Roger A. Weber, Cincinnati, Ohio, for petitioner.

General Counsel, Occupational Safety & Health Review Com'n, Washington, D. C., William J. Kilberg, Stephen A. Bokat, Baruch A. Fellner, Allen H. Feldman, Jeffrey Lewis Berger, Michael H. Levin, U. S. Dept. of Labor, Washington, D. C., William S. Kloepfer, Assoc. Regional Sol., U. S. Dept. of Labor, Cleveland, Ohio, for respondents.

Before WEICK and LIVELY, Circuit Judges, and WALINSKI,* District Judge.

WALINSKI, District Judge.

Petitioner Diebold, Inc. seeks judicial review of a decision by the Occupational Safety and Health Review Commission (hereinafter "the Commission") that Diebold has violated a safety regulation promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (hereinafter "the Act"). Diebold contends that the Commission erred in its interpretation of the applicable regulations and that, even if the Commission's interpretation is correct, the regulations are so vague as to be unenforceable under the due process clause of the Fifth Amendment. For the reasons which follow, we accept the Commission's interpretation of the regulations in question but hold that on the facts of this case their application to Diebold would be a denial of due process. We therefore set aside that portion of the Commission's order which is challenged on appeal.

I.

Diebold is a manufacturer of security files, safes, and other record handling and retrieval systems. At the times which are relevant here, Diebold operated plants at Hamilton, Wooster, and Malvern, Ohio, where its employees used various kinds of presses, including press brakes, to shape a variety of metals for use in the assembly of Diebold's products.

The press brake, which is the kind of machine at issue on this appeal, is a species

* The Honorable Nicholas J. Walinski, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

of large mechanical power press used primarily for bending sheet metal. The "stock," or metal to be formed, is placed on a bottom die attached to the bed of the machine, and the operator then causes the metal to be struck with a matching top die which is attached to a movable ram mounted on rails. The area between the dies, i. e., the area where the stock is placed, is called the "point of operation." When the press brake is in use, the descending ram strikes the point of operation with a pressure of several hundred tons per square inch.

Based on inspections of Diebold's plants in January, March, and July, 1974, the Secretary issued a citation as to each plant charging Diebold with having violated § 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2),[1] by failing to provide point of operation guards on its press brakes as require by 29 C.F.R. § 1910.212. The Secretary proposed penalties totalling $190. Diebold contested the citations and proposed penalties, and the charges as to all three plants were consolidated for administrative review.[2]

In his decision, the Administrative Law Judge vacated the citations and proposed penalties, having concluded that a regulation specifically applicable to mechanical power presses, 29 C.F.R. § 1910.217, relieved press brakes from any point of operation guarding requirement. The Commission thereupon called the case for review, 29 U.S.C. § 661(i), and a Commission majority of 2–1 reversed the Administrative Law Judge, reinstating the citations and proposed penalties. The Commission majority determined that, although press brakes are excluded from the guarding requirements applicable to power presses (§ 1910.217), they remain subject to the requirements which the regulations set out for machines generally (§ 1910.212). In addition, the Commission rejected Diebold's contention that the regulations were improperly promulgated, impossible to comply with, and impermissibly vague. *Diebold, Inc.* (OSHRC Docket Nos. 6767, 7721, 9496), ——— OSAHRC ——, 3 BNA–OSHC 1897, 1975–76 CCH–OSHD ¶ 20,333 (1976), *rev'g*, 1974–75 CCH–OSHD ¶ 19,214 (Ad.L.Judge, 1975).

Diebold then filed the instant petition for judicial review of the Commission's decision pursuant to 29 U.S.C. § 660(a), advancing the same claim that it made before the Commission.

II.

The Act's central purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b). As the principal method for achieving this ambitious end, the Act authorizes the Secretary of Labor to promulgate national standards of occupational safety and health, 29 U.S.C. § 655, and places upon each covered employer[3] a duty to comply with the promulgated standards. 29 U.S.C. § 654(a)(2).

In general, the Secretary's standard-setting authority is to be exercised as the product of substantial prior research, advisory committee review, and notice-and-comment rule-making. 29 U.S.C. § 655(b). Congress recognized, however, that these procedures would be highly time-consuming and in the first years of the Act would run counter to the congressional interest in "immediately providing a nationwide minimum level of health and safety." *S.Rep.No. 1282*, 91st Cong. 2d Sess., 1970 *U.S.Code Cong. & Admin.News*, pp. 5177, 5182. For that reason the Act provided that, "as soon as practicable" and without regard to the

1. Each employer—

* * * * * *

(2) shall comply with occupational safety and health standards promulgated under this Act.

29 U.S.C. § 654(a).

2. Diebold was also charged in the same citations with having failed to provide point of operation guarding on several punch presses. The Administrative Law Judge's decision vacating the citation as to these machines was affirmed by the Commission, and the Secretary has not raised any challenge to that determination in the instant proceeding.

3. The term "employer" means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State.

29 U.S.C. § 652(5).

usual rule-making procedures, the Secretary was to adopt as his own any existing health and safety standards already promulgated under federal law ("established Federal standards") or issued by a nationally-recognized standards-setting organization based on full public discussion and on the substantial agreement of those affected ("national consensus standards"). 29 U.S.C. § 655(a). Notice-and-comment requirements could be dispensed with, thereby permitting establishment of the "nationwide minimum level" of safety with the desired rapidity, because these § 655(a) "interim standards"[4] would have already been subjected to close public scrutiny through the use of equivalent procedures in their original issuance.

Shortly after the Act's passage, the Secretary exercised his § 655(a) authority and promulgated a voluminous collection of standards drawn from existing federal and consensus sources. 36 Fed.Reg. 10466 (May 29, 1971), *codified at* 29 C.F.R. Part 1910. Among these was the general machine guarding requirement which Diebold is charged with having violated in the instant case. The standard, 29 C.F.R. § 1910.212, embodies an "established Federal standard" previously promulgated by the Secretary of Labor under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35–45. It provides in pertinent part:

> (a) *Machine guarding.*—(1) *Types of guarding.* One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation * *.
>
> * * * * * *
>
> (3) *Point of operation guarding.*
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> * * * * * *
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> (ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.
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> * * * * * *
>
> (iv) The following are some of the machines which usually require point of operation guarding:
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> * * * * * *
>
> (*d*) Power presses.

It is conceded that Diebold's press brakes are a form of mechanical power press, that their operators are exposed to point of operation injuries, and that no guarding devices are used to protect them from this hazard. In the Secretary's view, those facts establish a violation of § 1910.212 beyond any possibility of dispute. Diebold advances several reasons for its position that the regulation cannot properly be construed as applying to press brakes.

The company argues first that, despite the facial breadth of § 1910.212, the regulation's Walsh-Healey predecessor was never understood to require point of operation guarding on press brakes; indeed, it claims, such guarding was impossible in 1971,[5] the year in which the Secretary promulgated the Walsh-Healey regulation as an "established Federal standard" under the Act. Thus, in Diebold's view, the standard could not have been intended to cover press brakes, and the Secretary's application of it to such machines necessarily modifies the substantive content of the Walsh-Healey original without adherence to the rule-making procedures which the Act prescribes for such modifications.

4. The "interim" label was affixed to the § 655(a) standards by the Conference Committee report on the final version of the Act. *Conf.Rep.No. 1765*, 91st Cong. 2d Sess., 1970 *U.S.Code Cong. & Admin.News*, pp. 5228, 5229. In point of fact, the vast majority of standards in force have been, and continue to be, "interim standards" adopted pursuant to the Secretary's § 655(a) authority.

5. Diebold raises as a separate issue its claim that press brake guarding remains impossible today. Because of our disposition of the due process claim, part III, *infra*, we do not reach this question. *But see* text and notes following n. 16, *infra*.

[1] We agree with Diebold's premise that 29 U.S.C. § 655(a) required adoption of "established Federal" and "national consensus" standards without substantive modification, and that the Secretary may not enforceably construe a § 655(a) standard to impose requirements which the standard's source did not impose.[6] *See Dunlop v. Ashworth*, 538 F.2d 562, 563 (4th Cir. 1976); *Diamond Roofing Co., Inc. v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976). Thus, we also agree that the question whether § 1910.212 applies to press brakes is determined by whether its Walsh-Healey source applied to press brakes.

[2] As Diebold's arguments make clear, however, resolution of that issue depends in large part upon essentially historical or factual determinations relating to industrial and technological conditions at the time the standard was promulgated. Those are precisely the kinds of determinations which the Commission is peculiarly fitted to make by virtue of its members' "education, training, or experience." 29 U.S.C. § 661(a). As a general matter, the Commission is entitled to great deference in its reasonable interpretations of regulations promulgated under the Act. *Dunlop v. Ashworth, supra*, 538 F.2d at 563; *Brennan v. OSHRC (Ron M. Fiegen, Inc.)*, 513 F.2d 713, 715–16 (8th Cir. 1975). *Cf. Dunlop v. Rockwell International*, 540 F.2d 1283, 1289 (6th Cir. 1976) (deference to Commission constructions of the Act itself). That deference is especially appropriate in a case like the present one where the Commission has expressly addressed historical and technological arguments and resolved them adversely to the petitioner.

[3] Thus, we find no reason to second-guess the Commission's rejection of the claim that industrial practice and belief contradicted the applicability to press brakes of § 1910.212's Walsh-Healey source. To be sure, the Secretary has noted on appeal that press brake guarding is rarely used in practice, a fact which certainly indicates a widespread belief that guarding was not required. However, assuming that no one in industry was aware of any guarding requirement applicable to press brakes, we do not consider that fact to be dispositive of the guarding standard's meaning. It is true that the Act's authorization of expedited rule-making was based on a congressional belief that industry would already be thoroughly familiar with the "interim standards." *S.Rep.No. 1282, supra*, 1970 *U.S. Code Cong. & Admin.News* at 5182. As has become obvious in the years since the Act's passage, however, Congress was mistaken: Neither the "established Federal" nor the "national consensus" standards were widely known to or understood by industry at the time of their promulgation by the Secretary. *See* Gov't Res. Corp., *Occupational Safety and Health: A Policy Analysis*, pp. i, 21–22 (1973); N. Ashford, *Crisis in the Workplace: Occupational Disease and Injury*, pp. 248, 295 (Ford Foundation Rep. 1976). *See, e. g., Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843, 845 (9th Cir. 1976).[7] Thus, we can hardly conclude that wide-

6. The Secretary concedes that his § 655(a) authority extended only to the adoption of source standards without substantive modification and that any modification would require use of the full rule-making procedures set out in 29 U.S.C. § 655(b). Thus, he also agrees that the expedited procedures used in promulgating § 1910.212 would render the standard unenforceable if and to the extent that it varied the requirements of its source. *Cf. United States v. Finley Coal Co.*, 493 F.2d 285 (6th Cir.), *cert. denied*, 419 U.S. 1089, 95 S.Ct. 679, 42 L.Ed.2d 681 (1974). Of course, the Secretary could properly extend the § 655(a) standards to cover employees whose employers were not governed by the source standards, as long as the extension did not operate to create a protection which had not been afforded to workers who were covered by the source. *See S.Rep.No. 1282, supra*, 1970, *U.S.Code Cong. & Admin.News* at 5182. *Compare, e. g., Underhill Construction Corp. v. Secretary of Labor*, 526 F.2d 53 (2d Cir. 1975), *with Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor*, 524 F.2d 1337 (7th Cir. 1975).

7. Congressman William Steiger, one of the Act's principal sponsors, has ruefully noted that, despite congressional expectations to the contrary, the sources of the § 655(a) standards "are not widely used, are hardly recognized, and if they were recognized, nobody knew what they were." *The Architect, the Engineer, and OSHA*, pp. 7–8 (Proceedings of the conference of the Amer. Inst. of Architects, June 25–26, 1973).

ignorance of a press brake guarding

h a requirement existed in 1971.

[4] We are similarly unpersuaded that the Commission erred in rejecting Diebold's claim that the Walsh-Healey standard could not have required press brake guarding because such guarding was impossible in 1971. In the first place, the standards promulgated under § 655(a) appear to have included some whose sources indisputably set impossible requirements. *See, e. g., AFL–CIO v. Brennan*, 530 F.2d 109, 120–22 (3d Cir. 1975) ("national consensus" standard imposing a universal "no-hands-in-dies" requirement for power presses, revoked by the Secretary as impossible). Second, we recognize that national safety legislation is not limited to the present "state-of-the-art" but may properly force technological advances through the promulgation of requirements which are beyond what industry is immediately capable of attaining. *See Society of Plastics Industry, Inc. v. OSHA*, 509 F.2d 1301, 1309 (2d Cir. 1975); *Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 548 (3d Cir. 1976). *See also Chrysler Corp. v. Department of Transportation*, 472 F.2d 659, 671–74 (6th Cir. 1972) (Automobile Safety Act of 1966). Thus, even if Diebold is correct that press brake guarding was generally impossible in 1971, that would not necessarily be incompatible with the correctness of the Commission's view that the Walsh-Healey source required such guarding.

[5] In any event, we do not read the Commission's interpretation as requiring an impossible performance. It is true, as the Secretary has recognized in the past and conceded on this appeal, that there are many situations in which the installation of point of operation guards on press brakes would in fact render the machines unfit for their intended uses. *See OSHA Field Information Memorandum No. 75–46*, CCH–

rective No. 100–44, CCH–ESHG ¶ 10,204 (January 21, 1976) (1975–76 Developments Transfer Binder), *revised, id.* ¶ 10,680 (October 26, 1976) (1977 Developments Transfer Binder). It is implicit in the Commission's decision, however, that § 1910.212 would not, and its Walsh-Healey source did not, require guarding in such cases. Rather, the standard applies only where there exists an identifiable and practical means for guarding the specific machine in the specific uses to which the cited employer puts it. *See, e. g., Production Control Units, Inc.* (OSHRC Docket No. 6976), 15 OSAHRC 617, 2 BNA–OSHC 3294, 1975–76 CCH–OSHD ¶ 20,238 (Ad.L.Judge, 1975).

[6] We believe that this approach places an eminently reasonable limitation on the breadth to which the standard's literal language might otherwise be extended. Further, it comports with the principle that where a standard imposes a duty without specifying the means of compliance, the Secretary has the burden of establishing the existence of a specific and technologically feasible means of compliance as an element of his showing that a violation has occurred. *See General Electric Co. v. OSHRC*, 540 F.2d 67, 70 (2d Cir. 1976); *Ace Sheeting & Repair Co. v. OSHRC*, 555 F.2d 439, 440–41 (5th Cir. 1977); *Irvington Moore, Division of U. S. Natural Resources, Inc. v. OSHRC*, 556 F.2d 431, 433 n. 3 (9th Cir. 1977).[8] Finally, and most importantly, we believe that this construction embodies a reasonable assessment of the intended nature of § 1910.212 (and its Walsh-Healey source) as a general "catch-all" or "gap-filler" intended to impose a point of operation guarding requirement in any case where a hazard exists and guarding is feasible but no other regulation addresses the problem.

8. Of course, where the regulation itself specifies the means for compliance, the burden rests on the employer to show the technological impossibility of the specified means. *See, e. g., A. E. Burgess Leather Co. v. OSHRC*, 576 F.2d 948, 952 (1st Cir. 1978); *Ace Sheeting, supra; Brennan v. OSHRC (Underhill Constr. Corp.)*, 513 F.2d 1032, 1035 (2d Cir. 1975). *See also I.T.O. Corp. of New England v. OSHRC*, 540 F.2d 543, 546 (1st Cir. 1976) (burden relative to economic nonfeasibility rests on the employer); *Arkansas-Best Freight Systems, Inc. v. OSHRC*, 529 F.2d 649, 654 (8th Cir. 1976) (same).

Diebold claims, however, that there is another regulation which does address press brakes and which in fact exempts them from any point of operation guarding requirements. In the same package of "interim standards" with which the Secretary adopted the general machine guarding requirement from the Walsh-Healey Act regulations, he also promulgated guarding requirements specifically applicable to mechanical power presses. 36 Fed.Reg. 10466, 10643 (May 29, 1971), *codified at* 29 C.F.R. § 1910.217. These requirements were drawn from a "national consensus" source standard originally issued by the American National Standards Institute (hereinafter "ANSI"). Section 1910.217 sets out both a general rule that power press points of operation be guarded and a detailed specification of the acceptable means for achieving that end. 29 C.F.R. § 1910.217(c). In addition, the section states:

> (5) *Excluded machines.* Press brakes * * * are excluded from the requirements of this section.

29 C.F.R. § 1910.217(a)(5).

Diebold argues that the exclusion of press brakes "from the requirements of" § 1910.217 should be read as an exemption of press brakes from point of operation guarding requirements altogether. Applying the principle that "[i]f a particular standard is specifically applicable * * *, it shall prevail over any different general standard which might otherwise be applicable * *," 29 C.F.R. § 1910.5(c)(1), Diebold contends that in relation to power presses (and therefore press brakes[9]) the general guarding requirements of § 1910.212 are pre-empted by the provisions of § 1910.217 as the standard "specifically applicable" to such machines. Since the latter standard excludes press brakes "from the requirements of this section," and those requirements include point of operation guarding, press brakes are, in Diebold's view, excluded or exempted from the guarding requirements of the sole standard which could properly impose them.

In contrast to Diebold's reading of § 1910.217(a)(5) as an exemption of press brakes from guarding requirements, the Secretary construes the language "excluded from the requirements of this section" as no more than a definition of the power press standard's scope or coverage. Thus, in the Secretary's view, § 1910.217 is "specifically applicable" only to a class of machines composed of all mechanical power presses except press brakes, so that there is no standard "specifically applicable" to press brakes and the general requirements of § 1910.212 can properly be applied.

[7, 8] Given the inartful drafting of § 1910.217(a)(5), neither interpretation can be branded as particularly unreasonable. In this instance, however, the Commission has adopted the Secretary's resolution of the ambiguity, and we are mindful of the great deference which we owe to the Commission's reasonable interpretations of the Secretary's regulations.[10] *Dunlop v. Ashworth, supra; Ron M. Fiegen, Inc., supra.* Our examination of the source standards for §§ 1910.212 and 1910.217 persuades us that the Commission's interpretation is not merely reasonable but probably the most reasonable of the available alternatives.

Thus, the Walsh-Healey source from which the Secretary derived § 1910.212 reads:

> Where existing standards prepared by [designated organizations including ANSI] *provide for point of operation guarding* such standards shall prevail.

9. As noted above, it is undisputed that a press brake falls within the general class of machines which the regulations label "power presses."

10. Diebold argues that the usual weight which we accord to administrative constructions is inappropriate in relation to § 1910.217 because that standard is an ANSI product and the administrative agencies had no role in its inception. This argument mistakes the nature of our deference to administrative constructions, which is founded primarily on the special expertise of each agency in its particular field and only secondarily on matters of authorship. *See Brennan v. OSHRC (Republic Creosoting Co.)*, 501 F.2d 1196, 1198-99 (7th Cir. 1974); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1262 (4th Cir. 1974). In any case, the meaning of § 1910.217 is at issue here only insofar as it relates to the scope of § 1910.212, and the Secretary was the author of the Walsh-Healey predecessor to the latter standard.

added). That language tends to support, though it hardly compels, the Commission's view that § 1910.212 gives precedence only to those specific standards which, unlike § 1910.217, affirmatively impose a point of operation guarding requirement on the machine in question. In addition, the exclusion language in § 1910.217—which Diebold reads as an exemption and the Commission construed as a definition of the section's scope—appeared under the heading "Scope" in the original ANSI source standard. ANSI B–11.1–1971 ¶ 1.1. Most importantly, as the product of a private organization, ANSI guidelines are dependent for their observance on the voluntary compliance of the affected employers. Because the ANSI predecessor to § 1910.217 was therefore precatory rather than mandatory, we believe it unlikely that its drafters intended to relieve employers from legally enforceable duties imposed by other sources such as the Walsh-Healey predecessor to § 1910.212. *See AFL–CIO v. Brennan, supra*, 530 F.2d at 112.

[9] Finally, Diebold argues that, as the Commission recognized, its resolution of the ambiguity in § 1910.217 creates something of an inconsistency in the structure of guarding requirements established by the regulations. Specifically, the Commission has determined that the temporary exclusion of some existing power presses from the guarding requirements of the power press standard does not operate to subject those presses to the immediately effective requirements of § 1910.212 as a generally applicable standard. *Stevens Equipment Co.* (OSHRC Docket No. 1060), 2 OSAHRC 1501, 1 BNA–OSHC 1227, 1971–73 CCH–OSHD ¶ 15,691 (1973). *See* 29 C.F.R. § 1910.217(a)(1)–(3).

The inconsistency of that decision with the Commission's treatment of the press brake exclusion in § 1910.217 may be more apparent than real, since the temporary "exclusion" is really more in the nature of a time-phased inclusion. Assuming, however, that there is an inconsistency, we do not believe it is fatal. After all, it should hardly be surprising that anomalies occur in "the Byzantine pattern of OSHA standards [Gilmore Steels Co., *supra*, 540 F.2d at 70 n. 2. Given the wide variety of sources for the initial standards package and the rapidity of its promulgation, we would be frankly surprised if there were not anomalies. *See, e. g., Builders Steel Co. v. Marshall*, 575 F.2d 663, 666 (8th Cir. 1978); *Diamond Roofing Co., supra*, 528 F.2d at 649–50; *Dunlop v. Ashworth, supra*, 538 F.2d at 563. *Cf. AFL–CIO, supra*, 530 F.2d at 115 n. 15. Indeed, a thoroughly integrated and internally consistent initial standards package probably would have required modification of some source standards, thereby raising serious questions as to the validity of their promulgation without benefit of the Act's full rule-making procedures. *See* note 6, *supra*.

III.

While we are persuaded that the Commission's interpretation of the applicable regulations is correct, that does not lead inexorably to a conclusion that the regulations may be applied in the instant case. Here, as it did before the Commission, Diebold argues that even if the Commission properly construed § 1910.212, the regulation is so vague in its requirements that its enforcement would violate the due process clause of the Fifth Amendment. Within certain limits, we find ourselves in agreement with that contention.

[10, 11] Among the myriad applications of the due process clause is the fundamental principle that statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid. In our jurisprudence,

> because 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). The principle applies with special force to statutes which regulate in the area of First Amendment rights, but the due process requirement of fundamental fairness is hardly limited to that context. Even

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. *See Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 48–50, 86 S.Ct. 1254, 16 L.Ed.2d 336 (1966); *Boyce Motor Lines v. United State*, 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367 (1952).

There is no doubt that the violation of § 1910.212 exposed Diebold to penalties. *See* 29 U.S.C. § 666. *See also Brennan v. Winters Battery Mfg. Co.*, 531 F.2d 317, 324–25 (6th Cir. 1975). Our concern, therefore, is with the question whether the regulation gave Diebold sufficient warning that press brakes were within the scope of its point of operation guarding requirements. The question is to be answered, of course, "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 S.Ct. 594, 600, 9 L.Ed.2d 561 (1963). Moreover, the constitutional adequacy or inadequacy of the warning given must be "measured by common understanding and commercial practice." *United States ex rel. Shott v. Tenan*, 365 F.2d 191, 195 (6th Cir. 1966), *cert. denied*, 385 U.S. 1012, 87 S.Ct. 716, 17 L.Ed.2d 548 (1967). *See also Jordan v. De George*, 341 U.S. 223, 231–32, 71 S.Ct. 703, 95 L.Ed. 886 (1951); *Stout v. Dallman*, 492 F.2d 992, 994 (6th Cir. 1974).

Certainly, if § 1910.212 stood alone, with its meaning (and hence the sufficiency of its warning) evaluated in the abstract, there would be substantially less merit to Diebold's claim. The due process clause does not impose drafting requirements of mathematical precision or impossible specificity. *United States v. Powell*, 423 U.S. 87, 94, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975); *Boyce Motor Lines, supra*, 342 U.S. at 340, 72 S.Ct. 329; *Stout, supra*, 492 F.2d at 994. Though the guarding requirement of § 1910.212 is stated quite generally, the generality is a necessary by-product of the broad scope of the subject matter and the nearly infinite variety of machines which might pose hazards of the sort within the rule's coverage. Thus, if our concern here were simply the non-specificity of the regulation, there would be little room for debate.

[12] In the instant case, however, the non-specificity of the general guarding standard is but one in a collection of several factors which we believe operated together to deprive Diebold of a constitutionally sufficient warning. First is the inartful drafting of § 1910.217, the power press guarding standard. As described in § II, *supra*, that regulation is framed in terms which could well lead an employer reasonably to believe that press brakes had been specifically exempted from the generally applicable point of operating guarding requirements. Second is the undisputed "common understanding and commercial practice" relative to press brake guarding. As stated in the Secretary's brief on this appeal, press brake point of operation guarding has been "rarely used" in practice. *Brief for the Secretary of Labor*, Addendum C (at p. 62 of the Addendum). Thus, unless we embrace the untenable assumption that industry has been habitually disregarding a known legal requirement, we must conclude that the average employer has been unaware that the regulations required point of operation guarding. Third is the confirmation of industry practice by the pattern of administrative enforcement: Prior to the Commission's decision in *Irvington Moore*,[11] which was decided after the citations in the instant case, a clear majority of Administrative Law Judges had held § 1910.212 inapplicable to press brakes.[12]

11. *Irvington Moore, Div'n of U. S. Natural Resources, Inc.* (OSHRC Docket No. 3116), 16 OSAHRC 608, 3 BNA–OSHC 1018, 1974–75 CCH–OSHD ¶ 19,523 (1975), *rev'g.* 1973–74 CCH–OSHD ¶ 17,162 (Ad.L.Judge, 1974), *aff'd*, 556 F.2d 431 (9th Cir. 1977).

12. *See Irvington Moore*, note 11, *supra* (ALJ Kennedy); *Paccar, Inc.* (OSHRC Docket No. 1885), 1973–74 CCH–OSHD ¶ 17,331 (1974) (ALJ Watkins), *rev'd*, 17 OSAHRC 595, 3 BNA–OSHC 1133, 1974–75 CCH–OSHD ¶ 19,595 (1975); *Collator Corp.* (OSHRC Docket No. 2004), 1973–74 CCH–OSHD ¶ 17,464 (1974) (ALJ Winters), *aff'd on other grounds*, —— OSAHRC ——, 3 BNA–OSHC 2041, 1975–76 CCH–OSHD ¶ 20,446 (1976); *Sheet Metal Specialty Co.* (OSHRC Docket No. 5022), 1973–74 CCH–OSHD ¶ 17,773 (1974) (ALJ Chaplin), *rev'd*, 17 OSAHRC 212, 3 BNA–OSHC 1104, 1974–75

[13, 14] While none of these factors is particularly compelling on its own, their cumulative effect is such that we cannot ignore it. We recognize that the fairness of a regulatory warning is governed by a less stringent standard in the absence of criminal penalties or First Amendment implications. *Smith v. Goguen*, 415 U.S. 566, 573 n. 10, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). Further, we are aware that a duty of inquiry may properly be imposed on those engaged in business enterprises, as they should be alert to the probability that their conduct is of interest to one or more administrative agencies. *Id.*, 405 U.S. at 163, 92 S.Ct. 839. But on the undisputed facts of this case, we are unable to see how such a duty of inquiry could have been triggered. Whether an employer looked to the language of the regulations [13] or to industry practice, it would have been led to believe that press brakes had been specifically exempted from guarding requirements. To hold that in those circumstances the employer should have nonetheless been put on notice by a general guarding requirement which was applicable to all machines, and which made no mention of press brakes, would be to indulge a fiction having little relation to reality. "[G]reat caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *McDonald v. Mabee*, 243 U.S. 90, 91, 37 S.Ct. 343, 61 L.Ed. 608 (1917). Adhering to the facts here, we believe that the regulations were insufficient to warn employers that guarding of press brakes was required.

[15] Nor are we persuaded by the Secretary's argument that, whatever the adequacy of the warning as to other employers, Diebold must be held to have received notice because it was aware of the guarding requirement prior to issuance of the instant citations. Certainly, if Diebold had been aware of the guarding requirement, it would have received a constitutionally sufficient warning and could have no complaint on that score.

> [O]ne to whom application of a [rule] is constitutional will not be heard to attack the [rule] on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

United States v. Raines, 362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960). There is nothing in the record before us, however, to show that Diebold was so aware. The Commission did not rest its rejection of the due process claim on this ground but relied on its earlier stated view that reasonable men could not be led astray by the unfortunate wording of the press brake standard. *See Irvington Moore*, note 11, *supra*. For the reasons stated above, we disagree with that premise and we are not empowered to substitute a new ground for decision which the Commission itself did not invoke. *S. E. C. v. Chenery Corp.*, 318 U.S. 80, 95, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

Moreover, even if the Commission had found that Diebold was aware of the requirement, we would be hard put to discover substantial evidence in this record upon which to affirm such a finding. *See* 29 U.S.C. § 660(a). The sole evidentiary basis put forward by the Secretary is the

CCH–OSHD ¶ 19,546 (1975); *Clark Equipment Co.* (OSHRC Docket No. 7925), 1974–75 CCH–OSHD ¶ 19,399 (1975) (ALJ Worcester), *rev'd*, — OSAHRC —, 3 BNA–OSHC 1834, 1975–76 CCH–OSHD ¶ 20,238 (1975). *Contra: Gem-Top Mfg., Inc.* (OSHRC Docket No. 2795), 1973–74 CCH–OSHD ¶ 17,280 (1974) (ALJ Mitchell), *aff'd*, 16 OSAHRC 591, 3 BNA–OSHC 1022, 1974–75 CCH–OSHD ¶ 19,524 (1975), *aff'd*, 556 F.2d 431 (9th Cir. 1977); *Consolidated Metal Products* (OSHRC Docket No. 3620), 11 OSAHRC 621, 2 BNA–OSHC 3152, 1974–75 CCH–OSHD ¶ 18,474 (1974) (ALJ Donegan); *Production Control Units, Inc.* (OSHRC Docket No. 6976), 15 OSAHRC 617, 2 BNA–OSHC 3294, 1974–75 CCH–OSHD ¶ 19,193 (1975) (ALJ Burroughs).

13. Our conclusion in § II, *supra*, that the Secretary's construction of the regulations is the most reasonable of the available alternatives is premised not on the language of the regulations but on a careful examination of their source standards. We do not believe that the average businessman, or even his attorney (given the thousands of regulations promulgated under the Act), should be held to have conducted a similar examination in the absence of some additional factor warning that the particular regulation might be applicable.

fact that, prior to issuance of the instant citations, Diebold's plant engineers had already been seeking out a workable point of operation guarding device for the Company's press brakes. Considered simply in terms of probative value, an employer's attempts to render machinery or working premises more safe, without anything more, cannot reasonably support an inference that the attempts were made because the employer believed them to be legally required. Further, the drawing of such an inference would be repugnant to the purposes of the Act. Congress expected that safety in the nation's workplaces would be achieved as much by the voluntary efforts of employers as by the enforcement programs of the government. *See Dunlop v. Rockwell International*, 540 F.2d 1283, 1292 (6th Cir. 1976). If employers are not to be dissuaded from taking precautions beyond the minimum regulatory requirements, they must be able to do so without concern that their efforts will later provide the sole evidentiary basis for an adverse finding of the sort urged here. *See Cape and Vineyard Div'n of New Bedford Gas Co. v. OSHRC*, 512 F.2d 1148, 1154 (1st Cir. 1975).

[16] We emphasize that our holding as to the insufficiency of the warning given is reached with reference to the particular "facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975).[14] It is axiomatic that defects in the constitutional sufficiency of a regulatory warning may be cured by authoritative judicial or administrative interpretations which clarify obscurities or resolve ambiguities.[15] Once such a construction has been provided, wholly prospective application of the rule thus established does not offend due process since the interpretive decision itself provides the requisite warning. In relation to press brake guarding, the Commission's decision in *Irvington Moore* no doubt filled such a curative function, definitively establishing that the general machine guarding standard applies to press brakes. Thus, the prospective application of this interpretation—whether to Diebold or to other employers—is not affected by our decision.

[17] The validity of prospective enforcement of the Commission's interpretation does raise a question as to the precise disposition of the instant proceeding, since the Commission not only fined Diebold for its failure to provide guarding on the days the citations were issued but also ordered the Company to provide such guarding in the future. As to the fines, of course, the lack of a constitutionally sufficient warning precludes enforcement of the Commission's order. As to the requirement of future guarding on the other hand, it is at least arguable that prospective enforcement of the order would be inoffensive to the constitutional guarantee. *Cf. F. T. C. v. Ruberoid Co.*, 343 U.S. 470, 483–94, 72 S.Ct. 800, 96 L.Ed. 1081 (1952) (Jackson, J. dissenting); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L. Rev. 67, 77 n. 55 (1960). However, while we recognize that there are probably cases in which an order such as the present one could properly be treated as severable,[16]

14. In this regard, we note that somewhat similar due process claims regarding press brake guarding were raised and rejected in *Irvington Moore, Div'n of U. S. Natural Resources, Inc. v. OSHRC*, 556 F.2d 431 (9th Cir. 1977), and *Long Manufacturing Co. v. OSHRC*, 554 F.2d 903 (8th Cir. 1977). Our conclusion is not at odds with those decisions, however. In *Long*, the employer had actual knowledge of the regulatory requirement prior to the citations under review. 554 F.2d at 905–906. Similarly, in *Irvington Moore*, the employer's claims of having been misled were rejected by the court (with one judge concurring and one judge dissenting) as "not credible." 556 F.2d at 435. Here, by contrast, there is nothing of record to indicate Diebold's actual knowledge that guarding was required.

15. *Rose v. Locke*, 423 U.S. 48, 52, 96 S.Ct. 243, 46 L.Ed.2d 185 (1975); *Parker v. Levy*, 417 U.S. 733, 752–54, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974); *Smith v. Goguen*, 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Wainwright v. Stone*, 414 U.S. 21, 22–23, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973); *Jackson v. Dorrier*, 424 F.2d 213, 217–18 (6th Cir.), *cert. denied*, 400 U.S. 850, 91 S.Ct. 55, 27 L.Ed.2d 88 (1970).

16. The Act itself distinguishes between citations for past violations and proceedings following the employer's failure to correct violations once it has been cited. *Compare* 29 U.S.C. §§ 659(a) and 666(b) and (c) with *id.* §§ 659(b) and 666(d). *See Marshall v. B. W. Harrison Lumber Co.*, 569 F.2d 1303 (5th Cir. 1978).

with enforcement denied on due process grounds only in relation to the penalties for past conduct, we do not believe that this is such a case.

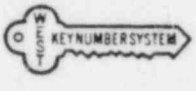
Before the Commission, Diebold relied in large part on its contention that the required guarding of its press brakes was technologically impossible. Both the Commission and the courts have habitually looked on such claims with a jaundiced eye when they have been raised for the first time in enforcement proceedings by employers who made no prior effort to seek either a variance, 29 U.S.C. § 655(d), or a modification of the applicable standard, *id.* § 655(c).[17] Indeed, in the instant case, one of the two Commissioners constituting the majority was of the view that Diebold's claim could not be addressed on its merits because of the Company's failure to "exhaust" these preliminary administrative remedies.[18] Whether such exhaustion is required or is merely to be preferred, the fact remains that an employer which has not previously sought a variance or modification starts with a distinct disadvantage when it claims impossibility in an enforcement proceeding.

In the instant case, the Commission's order that Diebold provide press brake guarding in the future necessarily rests on the Commission's rejection of the claim that such guarding is impossible, a holding which was substantially affected (indeed, as to half the Commission majority, was determined) by Diebold's failure to seek a variance. But Diebold's failure to seek a variance is directly attributable in turn to the insufficiency of the warning given by the regulations: Plainly, an employer has no reason to seek relief from a regulatory requirement unless it is first on notice that the requirement exists. Thus, even if we limited enforcement of the Commission's order to its prospective elements, we would nonetheless be enforcing an obligation which very well might not have been imposed had Diebold received a fair opportunity to seek a variance and, if unsuccessful in that quest, had it then been able to proceed without the procedural disadvantages visited on those who sidestep their variance opportunities.

Because the lack of a constitutionally sufficient warning thus affected the whole of the Commission's decision and order, we are unable to regard the prospective elements of the order as severable from the penalties. Rather, the only way by which to give Diebold the full benefit of the notice denied by the regulations is to vacate the order in its entirety.

IV.

For the foregoing reasons, the decision of the Commission is reversed, the order of the Commission is vacated, and the underlying citations are dismissed. No costs are taxed; each party will bear its own costs on this appeal.



17. *See, e. g., Atlantic & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 548–51, 555–56 (3d Cir. 1976); *Arkansas-Best Freight Systems, Inc. v. OSHRC*, 529 F.2d 649, 653 (8th Cir. 1976); *Deemer Steel Casting Co.* (OSHRC Docket No. 2792), 15 OSAHRC 162, 2 BNA–OSHC 1577, 1974–75 CCH–OSHD ¶ 19,221 (1975). *See also General Electric Co. v. Secretary of Labor*, 576 F.2d 558, 560–62 (3d Cir. 1978); *Irwin Steel Erectors v. OSHRC*, 574 F.2d 222, 223 (5th Cir. 1978).

18. Though the matter is not entirely clear, it appears that the other majority Commissioner may have viewed the failure to exhaust as shifting the burden of proof as to impossibility, *see* text and note at n. 8, *supra*, or as altering the standard of proof. Of course, given the limited scope of judicial review available under the Act, the Commission's treatment of burdens and standards of proof will often be determinative of the employer's rights.

that any spill which causes a sheen is "harmful" and therefore prohibited by § 1321(b)(3). Evidence of a sheen thus provides a sufficient basis for the Government to assess the § 1321(b)(6) civil penalty *unless* a defendant proves that its spill was not harmful under the circumstances. If a defendant introduces such evidence, as Chevron did here through Dr. Mackin, the Government must rebut with evidence that defendant's spill was of a harmful quantity under the circumstances.[12] Since the Government in the case *sub judice* did not come forward with any evidence at the administrative hearing, the penalty cannot be enforced.

Accordingly, the district court's grant of summary judgment is reversed, and the case is remanded for entry of summary judgment for defendant Chevron.

REVERSED AND REMANDED.

B & B INSULATION, INC., Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION and F. Ray Marshall, Secretary of Labor, Respondents.

No. 77-2211.

United States Court of Appeals, Fifth Circuit.

Nov. 16, 1978.

Employer petitioned for review of a final order of the Occupational Safety and Health Review Commission which determined that it violated OSHA by failing to comply with safety standard promulgated thereunder. The Court of Appeals, Roney, Circuit Judge, held that in the absence of evidence that employer's conduct fell below demonstrated practice in industry, Commission's decision that employer violated general federal admonition to require the "wearing of personal protective equipment" where there is "an exposure to hazardous conditions" was not supported by substantial evidence.

Reversed.

1. Labor Relations ⇐9.5

An employer cannot be held in violation of general federal admonition to require the "wearing of personal protective equipment" where there is "an exposure to hazardous conditions" when his conduct is representative of that of employers in his industry under similar circumstances. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

2. Labor Relations ⇐9.5

General federal admonition to require the "wearing of personal protective equipment" where there is "an exposure to hazardous conditions" is not unenforceably vague since standard requires only those protective measures which knowledge and experience of employer's industry, which employer is presumed to share, would clearly deem appropriate under circumstances. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

3. Administrative Law and Procedure ⇐390

Vagueness charge against agency regulation must be considered in light of regula-

(harmful quantity is determined at the time of the spill rather than after defendant's cleanup efforts, so that defendant's remedial action after a spill is irrelevant to the determination of "harmfulness"); *United States v. W. B. Enterprises, Inc.*, 378 F.Supp. 420, 422 (S.D.N.Y. 1974) (same).

12. We need not now decide whether the sheen test also creates only a rebuttable presumption in the context of § 1321(b)(5)'s duty to report harmful spills. While the statutory language is the same, the purpose of the reporting requirement is to enable an expeditious cleanup of the spill rather than to penalize for it, and that might allow the sheen test to serve as an irrebuttable presumption in that context. Since Chevron reported the spill and also concedes the validity of the reporting requirement even on the facts of this case, the sheen test as applied to § 1321(b)(5)'s reporting requirement is not before us.

tion's application where remedial civil legislation, rather than criminal, is involved and there is no potential deterrence of First Amendment activity. U.S.C.A.Const. Amend. 1.

4. Negligence ⇐4

"Reasonable man" is a fictional character of tort law wherein his conduct sets the standard below which behavior constitutes negligence.

See publication Words and Phrases for other judicial constructions and definitions.

5. Negligence ⇐124(3)

Because tort law's reasonable man personifies community ideal of reasonable behavior, evidence of customary conduct of those similarly situated may be probative in determining his behavior.

6. Negligence ⇐5

Custom is not dispositive in negligence cases.

7. Labor Relations ⇐9.5

Purpose of OSHA is preventive rather than compensatory. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

8. Labor Relations ⇐9.5

OSHA does not affect workmen's compensation in any way and creates no private right of action for an injured employee against his employer. Occupational Safety and Health Act of 1970, § 4(b)(4), 29 U.S.C.A. § 653(b)(4).

9. Labor Relations ⇐9.5

Preventive goals of OSHA are not advanced where broad standards are extended to encompass every situation which gives rise to an unlikely accident. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

10. Labor Relations ⇐9.5

In light of OSHA's preventive purpose and intended specificity of its standards, employer whose activity is not yet addressed by specific regulation and whose conduct conforms to common practice of those similarly situated in his industry should generally not bear an extra burden. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

11. Labor Relations ⇐9.5

Where Government seeks to encourage higher standard of safety performance in industry than customary industry practices exhibit, proper recourse is to standard-making machinery provided in OSHA, selective enforcement of general standards being inappropriate to achieve such purpose. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

12. Labor Relations ⇐27

Findings of the Occupational Safety and Health Review Commission are conclusive with respect to questions of fact where substantial evidence on record considered as whole supports them. Occupational Safety and Health Act of 1970, § 11(a), 29 U.S.C.A. § 660(a).

13. Labor Relations ⇐9.5

Secretary of Labor has burden of proving all elements of a violation of OSHA. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

14. Labor Relations ⇐9.5

In absence of evidence that employer's conduct fell below demonstrated practice in industry, Occupational Safety and Health Review Commission's decision finding that employer violated general federal admonition to require the "wearing of personal protective equipment" where there is "an exposure to hazardous conditions" was not supported by substantial evidence. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.

P. Allan Port, Houston, Tex., for petitioner.

Carin A. Clauss, Sol. of Labor, U. S. Dept. of Labor, Benjamin W. Mintz, Assoc. Sol. for OSHC, Allen H. Feldman, Asst. Counsel for Appellate Litigation, Nancy L. Southard, Atty., Ray H. Darling, Jr., Executive Secretary, OSHRC, Thomas L. Holzman, Michael Levin, Counsel for Appellate Litigation, U. S. Dept. of Labor, Washington, D. C., for respondents.

Petition for Review of an Order of the Occupational Safety and Health Review Commission.

Before RONEY, RUBIN and VANCE, Circuit Judges.

RONEY, Circuit Judge:

[1] This Occupational Safety and Health Act case raises the question of whether an employer can be held in violation of a general federal admonition [29 C.F.R. § 1926.28(a)] to require the "wearing of personal protective equipment" where there is "an exposure to hazardous conditions" where his conduct is representative of that of employers in his industry under similar circumstances. In holding that the employer cannot be so held, we sustain the regulation against a *facial* constitutional challenge, but limit its application to those conditions which the cited employer's industry would recognize as hazards requiring the use of safety equipment, the absence of which constitutes a violation. The result in this case is to reverse the Commission's assessment of a nonserious violation on the ground that there is not substantial evidence in the record to support a finding that a reasonably prudent employer in the insulation industry would have understood that the use of safety belts was mandated by the conditions for which B&B was cited.

The employer, B & B Insulation, Inc. (B&B), pursuant to § 11 of the Occupational Safety and Health Act of 1970 (Act), 29 U.S.C.A. § 651 *et seq.*, petitioned for review of a final order of the Occupational Safety and Health Review Commission (Commission). This Court has jurisdiction under 29 U.S.C.A. § 660(a). The Commission determined that B&B violated section 5(a)(2) of the Act, 29 U.S.C.A. § 654(a)(2), by failing to comply with 29 C.F.R. § 1926.28(a), a safety standard promulgated thereunder.[1]

The facts of an accident which led to the citation are undisputed. B&B is an insulation subcontractor which employs approximately 250 employees. On August 9, 1974, B&B was engaged in insulation of steam pipes at a lumber company. The 8-inch steam pipe being insulated was located approximately 23 feet above the ground. Two feet above the steam pipe was a network of steel girders supporting a conveyor belt. Two feet below was a series or "rack" of three parallel pipes on which the foreman and one employee stood. The rack consisted of a 16-inch and a 14-inch pipe separated by a 15-inch space through which ran a third pipe of unspecified diameter. The foreman and an employee straddled the center pipe with one foot on each outside pipe and walked down the rack as insulation of the steam pipe progressed. A third employee, who remained on the ground,

1. The purpose of the Act, to assure safe and healthful working conditions, is accomplished in part by authorizing the Secretary of Labor to set mandatory occupational safety and health standards. 29 U.S.C.A. § 651(b)(3). The standards, applicable to all businesses affecting interstate commerce, *id.*, impose two types of duties on employers. The employer's "general duty" is to furnish employment and a place of employment free from "recognized hazards that are causing or are likely to cause death or serious physical harm." *Id.* § 654(a)(1). The employer must also comply with the specific standards issued pursuant to the Act, which may also articulate general duties. *Id.* § 654(a)(2).

29 C.F.R. § 1926.28(a), a § 654(a)(2) standard, provides

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

tied sections of the insulation to a rope which was pulled up by the employee on the rack. The sections were then carried along the rack and delivered to the foreman who placed them around the steam pipe.

The insulation was secured with stainless steel wire until a permanent covering could be installed. The coil of wire remained on the ground with the running end trailing from the foreman's position on the rack. Nine feet below the rack, mounted on poles, ran the energized and uninsulated power lines of an electric trolley used to transport lumber.

On the date in question, the trailing wire came into contact with the power line and electrocuted the foreman. When the other employee on the rack touched the foreman's body, he received an electrical shock, lost consciousness, and fell backward over the pipes and into a concrete ditch below, fracturing his skull. Neither the foreman nor the employee wore a safety belt.

In response to this accident, an Occupational Safety and Health Administration (OSHA) compliance officer inspected the worksite on August 13 and 14, 1974. B&B was cited for a nonserious violation[2] because of failure to require its employees to use personal protective equipment, as required by 29 C.F.R. § 1926.28(a).[3] The citation was grounded on the failure to require the use of safety belts or lifelines.

B&B timely contested the citation and the $90 penalty, 29 U.S.C.A. § 659(c), and the Secretary of Labor filed a formal complaint. 29 C.F.R. § 2200.33. The administrative law judge vacated the citation and proposed penalty, finding "no evidence in the record to show that a reasonably prudent person, fully knowledgeable of the insulation installation business would have known that safety belts and lifelines would be necessary equipment within the meaning and intent of section 29 C.F.R. § 1926.28(a)." On review the Commission reversed the decision by a 2-1 vote, affirming the citation and imposing a $90 penalty.

[2] B&B argues that 29 C.F.R. § 1926.28(a) is unenforceably vague for failure to provide employers with reasonable notice of what is required. We share B&B's concern with the generality of the standard's command.[4] We conclude, however, that its requirements are not unforeseeable if the standard is read to require only those protective measures which the knowledge and experience of the employer's industry, which the employer is presumed to share, would clearly deem appropriate under the circumstances.

2. The Act does not define a "nonserious" violation. The OSHA field operations manual states that nonserious violation citations are to be issued "where an accident or occupational illness resulting from violation of a standard would probably not cause death or serious physical harm, but which would have a direct or immediate relationship to safety or health of employees." *Occupational Safety and Health Administration, U. S. Dep't of Labor, Field Operations Manual* VIII-B2 (1974).

The Act itself provides that a "serious violation" exists where "there is a substantial probability that death or serious physical harm could result . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C.A. § 666(j).

3. B&B was also cited for a serious violation of 29 C.F.R. § 1926.400(c) for permitting employees to work in close proximity to electric power lines which had not been de-energized or effectively insulated. That citation was affirmed by the administrative law judge and further review was not sought.

4. Uncertainty as to what a standard requires has an economic impact on employers in the construction industry. Only the employer aware of his responsibility for often costly safety equipment is able to cover its cost in contract bids submitted before construction begins. If a contract bid includes costs which an employer thought required by the standard, but were not, his bid may be noncompetitive with those which did not include such cost, and he may lose the job. *See* Stokes, *Legal Considerations of the Occupational Safety and Health Act of 1970*, in the *Occupational Safety and Health Act* 75-76 (B.Wallis ed. 1972); Sabo, *OSHA Problems in the Construction Industry, Proceedings of the American Bar Association National Institute on Occupational Safety and Health Law* (1976) 215-217, 222.

[3] Because this is remedial civil legislation, rather than criminal, and because no potential deterrence of First Amendment activity is involved, the vagueness charge must be considered in light of the regulation's application. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 36, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974).

Due process considerations mandate standards carrying "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo*, 332 U.S. 1, 8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877 (1947).

No Circuit Court of Appeals has yet considered a vagueness challenge to 29 C.F.R. § 1926.28(a) in its present form. The regulation was initially promulgated pursuant to authority granted the Secretary of Labor in § 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C.A. § 333 (1969). When adopted by the Secretary on May 29, 1971 as an OSHA standard under 29 U.S.C.A. § 655(a), this "established Federal standard" [5] read as follows:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions *and* where this part indicates the need for using such equipment to reduce the hazards to the employees.

(Emphasis added).

As so worded, the standard was held unenforceably vague by the Ninth Circuit in *Hoffman Construction Co. v. OSHRC*, 546 F.2d 281 (9th Cir. 1976), when applied to the asserted need for safety lines attached to a structure on which employees were working forty feet above the ground. The court acknowledged the danger involved as a matter of "general intuition." Noting the conjunctive structure of the standard's command, however, the court found no specific instructions among the subsections of Part 1926 to tell the employer when protective equipment is required. 546 F.2d at 283.

The regulation was reworded on December 16, 1972 to substitute "or" for the "and" in italics above. 37 Fed.Reg. 27,510 (1972). The *Hoffman* court expressly declined to comment on the revised versions.[6] 546 F.2d at 283 n.5.

Although the Commission has consistently upheld the standard as not unenforceably vague, each decision by the Commission has produced as many conflicting interpretations as there were participating commissioners, both under the old regulation,[7] and

5. The Act authorizes standards of three types: national consensus standards or established federal standards adopted for OSHA use within two years of the Act's effective date, 29 U.S.C.A. § 655(a), permanent standards developed by the Secretary of Labor along with an advisory committee, 29 U.S.C.A. § 655(b), and emergency temporary standards, 29 U.S.C.A. § 655(c).

An "established Federal standard" is any operative occupational safety and health standard established by any federal agency in effect at the enactment of the Act. 29 U.S.C.A. § 652(10). "National consensus" standards are those emanating from a nationally recognized standard producing organization. *Id.* § 652(9).

6. Commissioner Moran maintains that the standard in its present form is invalid because the Secretary failed to comply with rulemaking procedures of 29 U.S.C.A. § 655(b) in accomplishing the revision. The amendment, which claimed to make no substantive change, was achieved by mere substitution of "or" for "and" in the Secretary's December 16, 1972 revision of construction standards. *See* 37 Fed.Reg. 27,503 (1972). Commissioner Moran argues that the original version remains in effect and requires, as suggested in *Hoffman*, designation of a particular construction standard requiring use of such equipment. *B & B Insulation, Inc.*, OSHRC Docket No. 9985, BNA 5 O.S.H.C. 1265 (1977) (Moran, dissenting).

In light of the "nonsubstantive" nature of the amendment, the other two commissioners have held that the amended version is to be read the same as the original. *Eichleay Corp.*, OSHRC Docket No. 2610, BNA 2 O.S.H.C. 1635 (1975).

B&B cites the *Hoffman* case as precedent but does not raise the claim of the amended regulation's invalidity on procedural grounds.

7. *See, Hoffman Construction Company*, OSHRC Docket No. 644, BNA 2 O.S.H.C. 1523 (1975); *Carpenter Rigging & Contracting Corp.*, OSHRC Docket No. 1399, BNA 2 O.S.H.C. 1544 (1975).

the new.[8] This case itself was decided with three different written opinions. This continuing "three-way split in the interpretation of the standard," as referred to in the concurring opinion of Commissioner Cleary, might well evidence to some the very vagueness charged by the petitioner. If the regulation is such that the commissioners themselves cannot agree upon what it demands, it may seem to require different things to different employers, the cornerstone of the uncertainty argument.

For the objectivity needed to rescue § 1926.28(a) from unconstitutional uncertainty, however, we look to cases construing analogous OSHA standards and to the tort law concept of the "reasonable man." Several circuits have upheld, despite its lack of precision, 29 C.F.R. § 1910.132(a), the subject standard's general industry analogue.[9] This Court rejected the employer's vagueness claim in *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974), finding that section drafted "with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury." The Court identified as inherent in the standard, the test of whether or not a reasonable person would have recognized the hazard. In *Ryder* the hazard recognized by the "reasonable person" to warrant use of protective footwear was that of foot injuries to dock workers in contact with heavy freight and equipment in a confined area.

The "reasonable person" test was also read into 29 C.F.R. § 1910.132(a) by the Fourth Circuit in *McLean Trucking Co. v. OSHRC*, 503 F.2d 8 (4th Cir. 1974). Again the use of protective footwear for loading dock workers was the safety obligation of which the employer was deemed to have notice. The reasonable person approach, the Court noted, accords with congressional purpose as reflected in the general duty clause of the statute itself,[10] the language of which is at least as imprecise as that of 29 C.F.R. § 1910.132(a).

In a third protective footwear case, *Arkansas-Best Freight Systems, Inc. v. OSHRC*, 529 F.2d 649, 655 (8th Cir. 1976), the Eighth Circuit endorsed the "reasonable person" interpretation, a test of foreseeability of danger warranting protective equipment, to determine the applicability of the difficult protective equipment standard.

In *Cape & Vineyard Div. v. OSHRC*, 512 F.2d 1148 (1st Cir. 1975), § 1910.132(a) was applied to an alleged failure of the employer to require protective equipment against electrical shock in utility company repair work. The "reasonable person" test was embellished to ask "whether a reasonably

8. *See, e. g., Lehr Construction Co.*, OSHRC Docket No. 7240, BNA 6 O.S.H.C. 1352 (1978); *State Home Improvement Co.*, OSHRC Docket No. 14098, BNA 6 O.S.H.C. 1249 (1977); *Sweetman Construction Co.*, OSHRC Docket No. 3750, 3 BNA O.S.H.C. 2056 (1976); *Isseks Brothers, Inc.*, OSHRC Docket No. 6415, BNA 3 O.S.H.C. 1964 (1976).

9. Construction work is governed by Part 1926 of the OSHA regulations. General industry standards catalogued in Part 1910 may also apply to the construction industry where no Part 1926 standards exist to cover working conditions in issue. 29 C.F.R. §§ 1910.5, 1910.12.

29 C.F.R. § 1910.132(a), a general industry standard, provides:

> Protective equipment . . . shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, . . . encountered in a manner capable of causing injury or impairment in the function of any part of the body . . .

10. The statutory general duty clause [29 U.S.C.A. § 654(a)(1)] *see* note 1, *supra*, addresses "recognized hazards." In a floor speech proposing an amendment which became the final version of the general duty clause, Representative Daniels stated:

> A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is "recognized" is a matter for objective determination; it does not depend on whether the particular employer is aware of it.

116 Cong.Rec. 38377 (1970).

prudent man familiar with the circumstances of the industry would have protected against the hazard." 512 F.2d at 1152.

The *Cape & Vineyard* test was relied upon by the Ninth Circuit in *Brennan v. Smoke-Craft, Inc.*, 530 F.2d 843, 845 (9th Cir. 1976) to determine the need for protective gloves in the sausage manufacturing industry. It was endorsed most recently by the Second Circuit in *American Airlines, Inc. v. Secretary of Labor*, 578 F.2d 38, 41 (2d Cir. 1978), in the context of a requirement for protective footwear for airline cargo handlers.

The clarity of the standard *sub judice* is equally well served by the "reasonable person" approach if applied with a sensitivity to the circumstances in which it is used.

[4–6] The "reasonable man" is, of course, a fictional character borrowed from tort law wherein his conduct sets the standard below which behavior constitutes negligence. *See generally*, W. Prosser, *Law of Torts* at 149–80. Because the reasonable man personifies the community ideal of reasonable behavior, evidence of customary conduct of those similarly situated may be probative in determining his behavior. *Id.* at 166–68. *See, e. g., Ward v. Hobart Manuf. Co.*, 450 F.2d 1176, 1185 (5th Cir. 1971) (where defendant manufacturer conformed with standards prevailing in the industry and no strong evidence countered customary practices, this Court found little to indicate defendant's conduct was unreasonable). Custom is, however, not dispositive in negligence actions. "[W]hat ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Texas & Pacific Ry. Co. v. Behymer*, 189 U.S. 468, 470, 23 S.Ct. 622, 623, 47 L.Ed. 905 (1903).

The Commission here purported to decide what the reasonable employer in B&B's industry would have done under the conditions for which B&B was cited. The Commission's conclusion is inaccurate because it is based entirely upon the opinion of people employed by the Government and depends not at all upon the evidence drawn from the people employed by the industry. This application of the reasonable person rule stands the principle on its head. The common law reasonable man standard was developed and applied in direct reference to persons who would be subject to judgment by that standard. Here, the Commission would decide ad hoc what would be reasonable conduct for persons of particular expertise and experience without reference to the actual conduct which that experience has engendered. In other words, the Commission would assert the authority to decide what a reasonable prudent employer would do under particular circumstances, even though in an industry of multiple employers, not one of them would have followed that course of action.

This disregard of demonstrated industry custom is clearly beyond the intention of the cases which first borrowed the reasonable man theory to construe OSHA standards. As the Court said in *Ryder, supra:*

> So long as the mandate affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster.

497 F.2d at 233. In *Cape & Vineyard, supra* at 1152, the court observed that conduct of the reasonably prudent employer would generally be established by reference to industry custom and practice. The *Smoke-Craft* court, only after failing to find a relevant industry custom with which to compare the employer's conduct, sought other evidence that a reasonably prudent employer would have protected against the alleged hazard. *Smoke-Craft, supra* at 845. *But see, Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 30–31 (7th Cir. 1976).

[7–9] Where the reasonable man is used to interpolate specific duties from general OSHA regulations, the character and purposes of the Act suggest a closer identification between the projected behavior of the reasonable man and the customary practice of employers in the industry. The purpose

reducing industrial accidents depends upon employer compliance through elimination of legislatively identified safety and health hazards by 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.

[10] The Act indicates that Congress thought specificity of standards desirable.[12] In light of the Acts preventive purpose and the intended specificity of its standards, the employer whose activity is not yet addressed by a specific regulation and whose conduct conforms to the common practice of those similarly situated in his industry [illegible] is entitled to an explanation.

[11] Where the Government seeks to encourage a higher standard of safety performance from the industry than customary industry practices exhibit,[13] the proper recourse is to the standard-making machinery provided in the Act, selective enforcement of general standards being inappropriate to achieve such a purpose.[14] The use of standard-making procedures assures that not only would employers be apprised of the conduct required of them and responsibility for upgrading the safety of the industry would be borne equally by all its members, but the resulting standard would benefit from input of the industry's experts,[15] both

11. *Id.* For example, the Act does not affect workmen's compensation in any way, 29 U.S.C.A. § 653(b)(4), and creates no private right of action for an injured employee against his employer. *Jeter v. St. Regis Paper Co.*, 507 F.2d 973 (5th Cir. 1975). Tort law, on the contrary, is concerned with providing for after-the-fact payment of damages by one whose negligence caused the injury. *See* 116 Cong.Rec. 38371 (1970) in which Congressman Steiger warned of the dangers of rigidly applying the tort law concept in an OSHA enforcement context.

12. The Senate Report, referring to standards promulgated by the Secretary under § 655(b), expresses the intention that they "shall represent feasible requirements, which, where appropriate, shall be based on research, experiments, demonstrations, past experience, and the latest scientific data. . . . Insofar as practicable, standards are to be expressed in terms of objective criteria and the performance desired." S.Rep. No. 91-1282, 91st Cong., 2d Sess. Reprinted in [1970] U.S.Code Cong. & Admin.News, pp. 5177, 5183-84. Detailed occupational safety and health regulations fill well over 1,000 pages of the Code of Federal Regulations. *See* 29 C.F.R. § 1910 *et seq.* The Senate Report emphasizes that the general duty clause would not be a substitute for reliance on specific standards. It would, rather, "simply enable the Secretary to insure the protection of employees who are working under *special circumstances for which no standard has yet been adopted.*" [1970] U.S.Code Cong. & Admin.News, *supra* at 5186 (emphasis added).

13. "In the area of safety, . . . the Secretary is not restricted by the status quo. He may raise standards which require improvements in existing technologies or which require the development of new technology . . . ." *Society of Plastics Industry, Inc. v. OSHA*, 509 F.2d 1301, 1309 (2d Cir.), *cert. denied*, 421 U.S. 992, 95 S.Ct. 1998, 44 L.Ed.2d 482 (1975) (standard prohibits worker exposure to concentrations of vinyl chloride).

14. For a discussion of standards formulation through administrative rulemaking rather than ad hoc adjudication, *see Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 202, 67 S.Ct. 1575, 1580, 91 L.Ed. 1995 (1947). The Court advised "The function of filling the interstices of the [Holding Company] Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."

Arguments against ad hoc standard setting in application of the Act's general duty clause are presented in Andrews and Cross, *Defending An Employer Against An Alleged Violation of the General Duty Clause*, 9 Gonzaga L.Rev. 399, 408-09 (1974); Morey, *The General Duty Clause of the Occupational Safety and Health Act of 1970*, 86 Harv.L.Rev. 988, 992-93 (1973). *But see, National Realty & Constr. Co., Inc. v. OSHRC*, 160 U.S.App.D.C. 133, 142, 489 F.2d 1257, 1266 n. 37 (1973).

15. *See generally, National Roofing Contractors Ass'n v. Brennan*, 495 F.2d 1294 (7th Cir. 1974), discussing promulgation of construction industry standards.

When the Secretary determines the need for a specific standard, he may receive comments from an advisory committee which must include persons qualified by experience and affiliation to present the views of employers and employees in the industry. 29 U.S.C.A. §§ 655, 656(b). The proposed standard is published

employer and employee, cost and technology obstacles faced by the industry could be weighed,[16] and more interested parties can participate in the process.

Viewed in the light of a constitutionally applied regulation, B&B's challenge of the evidentiary basis for the Commission's decision must be sustained.

[12, 13] The Commission's findings are of course conclusive with respect to questions of fact where substantial evidence on the record considered as a whole supports them. 29 U.S.C.A. § 660(a). The Secretary has the burden of proving all elements of a violation. 29 C.F.R. § 2200.73. In this case that burden included a demonstration that a reasonable insulation industry employer would have used safety belts where B&B did not. Of the eleven witnesses who testified at the hearing, however, only the OSHA compliance officer who issued the citation to B&B believed that safety belts would have been appropriate under the circumstances. The compliance officer had never before issued a citation to employees working on a pipe rack without safety belts and had no statistics or personal knowledge concerning falls from pipe racks. He expressed a position similar to that espoused by Commissioner Cleary in the Commission decision below that where a full haz... exists it must be protected against regar... less of the degree of hazard or probab... of a fall.[17]

Although having some simplistic ap... such an approach to fall hazards w... seem to require safety belts for an ordin... set of stairs, because people do fall d... stairs from time to time, and are seriou... injured. To state such a proposition is s... ficient to refute the suggestion that C... gress intended its regulations to go so fa...

The Secretary of Labor introduced n... evidence of customary procedures in the industry. B&B, on the contrary, produced a variety of witnesses representing labor and management to demonstrate that the "reasonable man" would have done no more than B&B under these circumstances.[18]

[14] In absence of evidence that B&B's conduct fell below the demonstrated practice in the industry, the Commission's decision was not supported by substantial ev... dence.

REVERSED.

and interested persons are permitted to submit written comments and may demand a public hearing on the proposal. 29 U.S.C.A. § 655(b)(2), (3).

16. *See American Petroleum Institute v. O.S.H.A.*, 581 F.2d 493 (5th Cir. 1978); *American Federation of Labor v. Brennan*, 530 F.2d 109, 121-122 (3d Cir. 1975); *Industrial Union Dep't, AFL-CIO v. Hodgson*, 162 U.S.App.D.C. 331, 342, 499 F.2d 467, 478 (1974).

17. Commissioner Cleary found the risk of a fall in this case to be demonstrated by the fatal fall which occurred and regarded resort to industry practice or even injury records unnecessary. *B&B, supra* at 1270. We reject Commissioner Cleary's approach, observing that prevention is not served by hindsight determinations of hazardous conditions and that the Act is not intended to make the employer guarantor of his employees' safety in circumstances where occurrence of injury is neither likely nor foreseeable.

18. For example, the business manager of Asbestos Local 22 testified that the danger of construction people falling off pipes is minimal. The foreman of Union Carbide and president of the local said that he would not have worn a safety belt under these conditions, considering them nonhazardous. The local supervisor of the Construction Services Division of Owens-Corning Fiberglass testified that accident statistics do not exist for these circumstances and it is probably not a risk area. He would not have thought safety belts required by OSHA regulations in this case. The president of Fuller-Austin Insulation Co. testified that he would not have required further safety measures in this situation. He had served as a member of the National Insulation Contractors Association committee on OSHA matters several years before and would not have interpreted the standard to require further safety measures under the cited conditions.