UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. KIEWIT POWER CONSTRUCTORS CO., Respondent.	OSHRC Docket No. 11-2395

OPENING BRIEF ON REVIEW OF

KIEWIT POWER CONSTRUCTORS CO.

Arthur G. Sapper
James A. Lastowka
McDERMOTT WILL & EMERY LLP
500 North Capitol Street NW
Washington, D.C. 20001-1531
(202) 756-8246
Attorneys for Respondent,
Kiewit Power Constructors Co.

TABLE OF CONTENTS Page

TABLE OF CONTENTS Page

TABLE OF AUTHORITIES Page

Cases

Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES Page

TABLE OF AUTHORITIES Page

Statutes

Standards and Regulations

TABLE OF AUTHORITIES Page

TABLE OF AUTHORITIES Page

TABLE OF AUTHORITIES Page

Federal Registers

Rules

TABLE OF AUTHORITIES Page

Treatises

Miscellaneous

TABLE OF AUTHORITIES Page

Constitutional Provisions

Legislative Histories

I. Statement of the Case

Item 1 of Citation 1 alleged that Kiewit Power Constructors Co. ("KPCC") did not comply with 29 C.F.R. § 1926.50(g), which states: "Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use." During discovery, the deposition of the Secretary regarding validity issues was taken under FED.R.CIV.P. 30(b)(6) through her designee, Paul Bolon, Director of the Office of Construction Standards and Guidance ("Bolon Tr.").[1] In accordance with Judge Simko's order, OSHA filed its rulemaking record, which was later supplemented by consent.[2] KPCC moved to dismiss or for summary judgment, and for a declaratory order. The Judge granted the motion to dismiss, but thought it unnecessary to rule on the motion for summary judgment or for declaratory order. Both parties' petitions for discretionary review were granted.

II. Record and Incorporated Arguments

Inasmuch as KPCC's motion was supported by materials outside the pleadings (*e.g.*, the rulemaking record and OSHA's deposition testimony), it "must be treated as one for summary judgment under Rule 56." FED.R.CIV.P. 12(d). We thus rely on those materials.

As permitted by the briefing order, KPCC incorporates all its arguments in the submissions mentioned by the order. As to issue (3), KPCC additionally cites—

---

[1] Transcripts of depositions of parties taken under FED.R.CIV.P. 30(b)(6) are admissible. FED.R.CIV.P. 32(a)(3) ("*Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's … designee under Rule 30(b)(6)…."); ADV. COMM. NOTES ON 1970 AMENDMENTS to Rule 32(a); *Comm. Counsel. Serv., Inc. v. Reilly*, 317 F.2d 239, 243 (3d Cir. 1963).

[2] Attach. (CD-ROM) to Sec'y's Letter (June 26, 2012); Attach. (CD-ROM) to KPCC's Reply to Resp. of Sec'y to Mot. Summ. J. etc. (Oct. 16, 2012). References to the rulemaking record are to "RR:" The electronic file names are in Addendum B.

- Two statements to the Senate by Senator Javits, made while urging the compromise that permitted the Act's passage, that employers "would have plenty of time to contest [the standards]" and "plenty of opportunity to go into court and contest the rule." S. COMM. ON LABOR AND PUB. WELFARE, 92D CONG., LEGIS. HIST. OF THE OCCUP. SAFETY AND HEALTH ACT OF 1970, at 464 (1971) (Leg. Hist.);
- "Comparative Analysis of Significant Provisions of … S. 2193… and S. 4404…," Leg. Hist. at 302, 304 (under S. 2193, 91st Cong. (1970) (source of § 6(f)), "Judicial review of standards would also be possible in enforcement proceedings."; but under rejected S. 4404, 91st Cong., at 39 (1970) (Leg. Hist. 111), pre-enforcement review would be "exclusive");
- *Simplex Time Recorder Co. v. Sec'y*, 766 F.2d 575, 582-83 n.2 (D.C. Cir. 1985);
- Thomas J. Ryan, *Jud. Rev. of OSHA Standards: The Effect of the Right to Pre-enforcement Rev. of OSHA Standards on Subsequent Challenges*, 54 FORDHAM L.REV. 117 (1985).

KPCC also observes that the lack of feasibility and significant risk findings are substantive defects, and, with respect, that the Secretary's PDR did not raise the third issue stated in the Commission's briefing order.

III. Statutory and Regulatory Background.

A. The Cited Standard, 29 C.F.R. § 1926.50(g).

Section 1926.50(g) appeared in the Federal Register one day in 1993 as a final standard. "Incorp. of Gen. Ind. Standards Applicable to Constr. Work," 58 Fed. Reg. 35076-77, 35084 (1993). It had been copied from § 1910.151(c). *Id.* at 35305 ("App. A to Pt. 1926, Designations for Gen. Ind. Standards Incorp. Into Body of Constr. Standards").

The publication of § 1926.50(g) was not preceded by public notice (usually required by OSH Act § 6(b)(1)-(3) and APA, 5 U.S.C. § 553(b)-(c)), a proposed rule (*id*.), or an opportunity for public comment (*id*.). OSHA did not find that § 1926.50(g) was technologically and economically feasible in construction, that it addressed significant

risks in construction,[3] and that it was otherwise "reasonably necessary or appropriate" in construction,[4] nor did it give reasons (§ 6(e); APA § 556(c)) why § 1910.151(c) was "appropriate" for application to construction but other Part 1910 standards (*e.g.*, § 1910.212(a)(4)) were not. Instead, OSHA stated that it had "good cause" for omitting these notices, opportunities and findings. See p. 13 below.

B. The Walsh-Healey Public Contracts Act.

The Walsh-Healey Public Contracts Act, 41 U.S.C. former §§ 35-45 ("WHA"), requires that "no part of any…contract" with the Federal Government "for the manufacture or furnishing of materials, supplies, articles, and equipment…" "be performed…in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract." WHA § 1(e), 41 U.S.C. former § 35(e) (now § 6502(4)) (RR:7). The WHA "is not an Act of general applicability to industry. It applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract." *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507 (1943); 41 C.F.R. § 50-201.1 ("not an act of general applicability to industry"). When the WHA was being fashioned, the House removed the word "construction" from the Senate bill that eventually was

---

[3] *E.g., AFL-CIO v. OSHA*, 965 F.2d 962, 980 (technological), 982 (economic) (11th Cir. 1992); *Steelworkers v. Marshall*, 647 F.2d 1189, 1272-73 (economic), 1301 (technological; "undisputed principle that feasibility is to be tested industry-by-industry demands that OSHA examine the technological feasibility of each industry individually") (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981).

[4] OSH Act § 3(8) requires that standards be "reasonably necessary or appropriate." A standard must be found technologically and economically feasible, *Am. Textile Mfrs. Inst. v. Donovan,* 452 U.S. 490, 504 (1981), and to regulate a significant risk of harm, *Indus. Union Dep't v Am. Petrol. Inst.*, 448 U.S. 607, 608 (1980); *AFL-CIO*, 965 F.2d. at 980 ("establish that existing exposure levels *in the workplace* present a significant risk … or that the new standards eliminate or substantially lessen the risk") (emphasis added).

passed,[5] and then defeated an attempt to re-insert it. 80 CONG. REC. 10018, 10010 (1936). The WHA rested not on the Commerce Clause but on Congress's power to prescribe the conditions under which the Federal Government would enter into contracts. *American Can Co.*, 10 BNA OSHC 1305, 1312 (No. 76-5162, 1982).

In 1960, 41 C.F.R. § 50-204.270, a version of which is now the cited standard, was adopted under the WHA. 25 Fed. Reg. 13809, 13823 (Dec. 29, 1960). Nothing in the announcement gave notice to those with federal construction contracts that the standards might apply to them. On the contrary, it stated that the standards would apply to "industrial establishments" (*id.* at 13809), that they would be placed in a new Part 50-204, entitled, "Safety and Health Standards for Federal Supply Contracts" (*id.* at 13810), and that the standards were based on an "evaluation" and "[c]ausative analysis of injury frequency rates" in "industrial establishments." *Id.* at 13809.

In 1963, the Department proposed to amend the standard. 28 Fed. Reg. 10524, 10539 (1963) (proposing 41 C.F.R. § 50-204.265). The announcement was entitled "Safety and Health Standards For Federal Supply Contracts" and stated that it would apply to "federal supply contracts." Among the employer organizations said to have been consulted were the Electronic Industries Association and the Manufacturing Chemists Association. No construction industry association was listed and the announcement did not indicate that the standards might apply to construction.

In 1968, the Department proposed to amend Part 50-204, including the standard. 33 Fed. Reg. 14258, 14270 (1968) (proposing § 50-204.63(c)). The announcement was headed, "Federal Supply Contracts" and was stated to apply to contracts "for the

---

[5] *Compare* S. 3055, 74th Cong. § 1 (1936), *printed in* H. REP. NO. 2946, at 1 (1936) (no reference to "construction"), *with* S. 3055, 74th Cong. § 1 (1935) (would apply to "construction"), *printed in Gov't Purchases and Contracts: Hearing before the S. Comm. on Ed. & Labor*, 74th Cong., at 1 (1935).

manufacture or furnishing of materials, supplies ….” Among the employer organizations consulted were the Electronic Industries Association and the Manufacturing Chemists Association. No construction industry association was listed. The announcement did not indicate that the standards might apply to construction.

In 1969, the standard was amended and re-designated paragraph (c) of § 50-204.6. 34 Fed. Reg. 788, 789-90 (Jan. 17, 1969). Nothing in the announcement indicated that the standard might apply to construction. After its effective date was postponed (34 Fed. Reg. 2207 (Feb. 14, 1969), the rule was made effective, apparently without further amendment. 34 Fed. Reg. 7946, 7948 (May 20, 1969).

Section 50-204.1(a) states the scope of the WHA standards. After stating that WHA § 1(e) requires that contracts “for the manufacture or furnishing of materials, supplies, articles, and equipment…must contain” the safety stipulation on p. 3, § 50-204.1(a) stated: “This Part 50-204 expresses the Secretary of Labor’s interpretation and application of [WHA § 1(e)] with regard to *certain particular* working conditions.” (Emphasis added.) Similarly, § 50-204.1(d) stated that the standards in Part 50-204 “are for application to ordinary employment situations” and do not “purport to describe all of the working conditions which are [unsafe to]…employees. Where such other working conditions may be found to be [unsafe to]…employees, professionally accepted safety and health practices will be used.”

The Secretary’s official EMPLOYMENT LAW GUIDE states that the WHA applies to “employees who produce, assemble, handle, or ship goods under” contracts for “the manufacturing or furnishing of materials, [etc.].” LABOR DEP’T, EMPLOY. LAW GUIDE: FED. CONTRACTS-WORKING CONDITIONS: WAGES IN SUPPLY & EQUIPMENT CONTRACTS; WALSH-HEALEY PUBLIC CONTRACTS ACT (PCA); WHO IS COVERED, *available at* www.dol.gov/compliance/guide/walshh.htm. (For brevity, we refer to the WHA standards’ scope as “manufacturing,” though it also encompassed “supply” of materials.)

C. The Construction Safety Act.

The Construction Safety Act ("CSA"; formally, the Contract Work Hours and Safety Standards Act"), 40 U.S.C. former § 333(a) (now codified at § 3704), authorized adoption of standards governing federal contracts "for construction." Like the WHA, the CSA rested not on the Commerce Clause but on Congress's contracting power.

When Congress debated the CSA, Rep. Carl Perkins, chairman of the House Committee on Education and Labor when both the CSA and OSH Act were adopted, declared to the full House:

> Some people have been laboring under the impression that construction safety legislation is not necessary since they allege construction workers are already protected under the Walsh-Heal[e]y Act or the Service Contracts Act. I want to set the record straight right now…: Our committee has found that construction workers presently are not protected by any Federal safety or health laws. The result of this lack of protection is that thousands of men are being needlessly killed or disabled each year.
>
> The Walsh-Heal[e]y Act…provided that employees of supply contractors doing contract work for the Federal Government would be provided safe and healthful working conditions. … But in the case of construction workers the law is silent on the question of the safety of their working conditions while doing similar work under Federal or federally assisted contracts. …

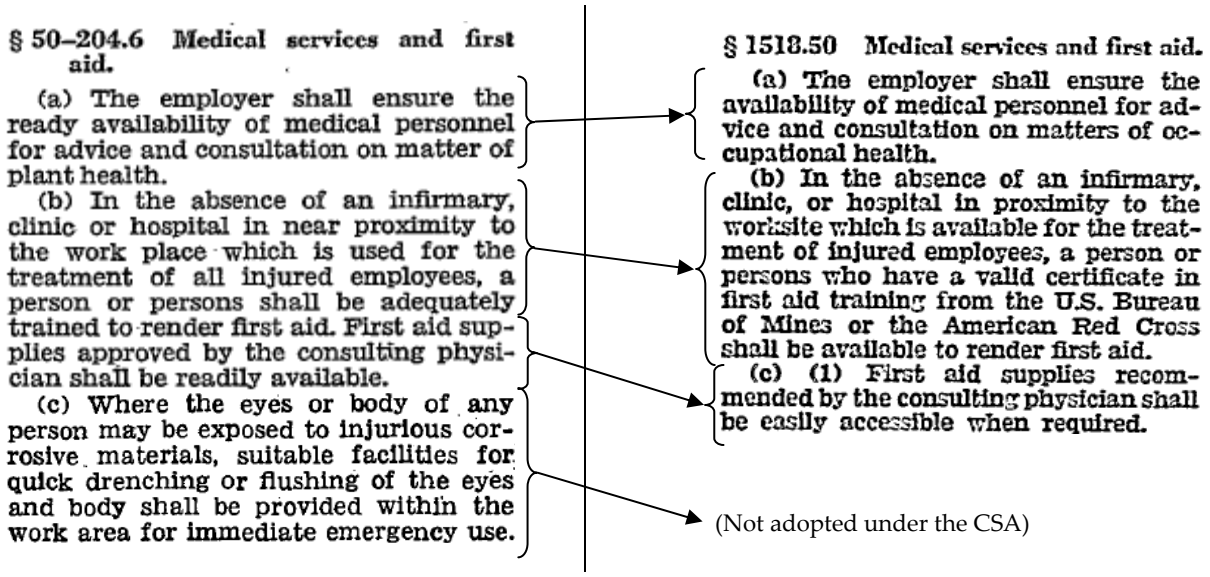
S. COMM. ON LABOR AND PUB. WELFARE, 91ST CONG., LEGIS. HISTORY OF THE FED. CONSTR. SAFETY ACT, at 34-35 (Comm. Print 1969) ("CSA Leg. Hist."). *See also* S. REP. NO. 320, 91st Cong., at 1, CSA Leg. Hist. at 95 (construction workers not covered by WHA).

In 1971, the Secretary proposed to adopt and, eleven days before the OSH Act's effective date, did adopt, standards under the CSA. 36 Fed. Reg. 1802 (Feb. 2, 1971) (proposed); 36 Fed. Reg. 7340 (April 17, 1971) (final). The scope of the CSA standards was "construction" work (specifically, "construction, alteration, and/or repair…") performed under a federal contract. § 1926.10.

Some CSA standards were modified versions of WHA standards. For example, the CSA noise standard was a modified version of the WHA noise standard. *Compare*

36 Fed. Reg. at 7348 (§ 1926.52)[6] *with* 41 C.F.R. § 50-204.10 (1969); *see also* the Labor Department Compilation of Sources of Part 1926 (April 17, 1971) ("Compilation") (Attachment J to SJ motion) (CSA noise standard "modified" from WHA standard).[7]

No CSA standard akin to § 50-204.6(c) was proposed or adopted. *See also* Bolon Tr. 72 (no equivalent to § 1926.50(g) in proposed CSA standards). The agency adopted in modified form as CSA standards all other paragraphs of § 50-204.6 (*i.e.,* (a) and (b)), but not paragraph (c). *Compare* § 36 Fed. Reg. at 7347 (adopting § 1926.50(a) and (b)) *with* § 50-204.6(a) and (b)); Compilation (paragraph (a) "changed after proposal hearings"; paragraph (b) "modified"). The agency did the following:



[6] The construction standards were then in Part 1518, which was designated Part 1926 at 36 Fed. Reg. 25232 (Dec. 30, 1971). For clarity, we use the later designation throughout.

[7] OSHA used this compilation to determine the derivation of the Part 1926 standards, and provided it in response to a FOIA request for such. Letter from M. Shepherd (SOL) (Sept. 7, 2012) ("OSHA provided the document … in response to a [FOIA] request … for 'a copy of the presumed document from which Mr. Swanson learned that 'OSHA adopted § 1926.56(a) with Table D-3 directly from section/paragraph 8.2 of the 1968 Bureau of Reclamation (Interior Department) standards/regulations in 1971.' See attached FOIA request dated March 7, 2003."); Letter from M. Shepherd (SOL) (Sept. 10, 2012) ("[t]he handwriting on the [facsimile] cover sheet appears to be that of Larry Davey, an OSHA employee with the Directorate of Construction.").

Among the CSA standards then adopted was § 1926.15(b), which states in part: "… 41 C.F.R. Part 50-204…express[es] the Secretary['s]…application of section 1(e) of the Walsh-Healey…Act to *certain particular* working conditions. None of the described working conditions [in 41 C.F.R. Part 50-204] are intended to deal with construction activities…." 36 Fed. Reg. at 7346 (emphasis added).

D. The Occupational Safety and Health Act of 1970.

On May 29, 1971, OSHA summarily (*i.e.,* without the notices, opportunities and findings noted on p. 2) adopted numerous national consensus standards and established Federal standards as standards applicable to employers in businesses affecting commerce; OSHA invoked only OSH Act § 6(a) as authority. 36 Fed. Reg. at 10466, 10467 ("Authority"), *id.* (§ 1910.1).

Among the standards OSHA so adopted were the CSA standards in Part 1926. 36 Fed. Reg. 10466, 10469 (May 29, 1971). OSHA did not re-publish them but incorporated them by reference through a new provision, § 1910.12, which also stated what scope Part 1926 would have under the OSH Act—"construction work" (work for "construction, alteration, and/or repair…"). This was the same work to which the CSA standards applied under the CSA (§ 1926.10), but without the language in § 1926.10 that restricted them to federally-contracted construction.

Similarly, OSHA adopted as OSH Act standards maritime standards originally adopted under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 941. Inasmuch as the LHWCA rested on Congress's power under Const. Art. III, § 2 (*Crowell v. Benson*, 285 U.S. 22 (1932)), the LHWCA standards in Parts 1915 through 1918 applied to "ship repair [etc.] on the navigable waters of the United States." *E.g.,* 29 C.F.R. § 1915.1 (originally, § 1501.1). OSHA did not re-publish the maritime standards but instead incorporated them by reference through §§ 1910.13 (incorporating by reference Part 1915, ship repair), 1910.14 (Part 1916, shipbuilding), 1910.15 (Part 1917, shipbreaking) and 1910.16 (Part 1918, longshoring). Those new

provisions also stated what scope the LHWCA-derived standards would have under the OSH Act (36 Fed. Reg. at 10469)—"ship repair," "shipbuilding," "shipbreaking," and "longshoring operations." This was the same work to which they applied under the LHWCA, but without the restriction to navigability in their parallel, native scope provisions (*e.g.*, §§ 1501.1 ("navigable waters") & 1501.2(c)-(d) ("ship repair").

OSHA also adopted the WHA standards as OSH Act standards, but not through incorporation by reference. Instead, they were re-designated and re-published in a new Part 1910, and placed in the same subparts as national consensus standards on the same subject matter. *E.g.*, Part 1910, Subpart I (containing WHA and national consensus standards on personal protective equipment); Subpart O (same, machine guarding). Among the WHA standards so adopted was 41 C.F.R. § 50-204.6, redesignated § 1910.151. § 1910.153 (1972) ("Sources of standards"), 36 Fed. Reg. at 10601 col. 2. As it did with the other established Federal standards, OSHA created a new scope provision (§ 1910.5(e)) to state the scope of WHA-derived standards under the new OSH Act. 36 Fed. Reg. at 10468. Like the other new scope provisions, § 1910.5(e) stated that the WHA-derived standards would apply to the same work they had previously regulated (*i.e.*, manufacturing) but without regard to whether a federal contract was involved:

> Whenever the source of a standard prescribed in this Part 1910 is indicated to be an established Federal standard published in 41 C.F.R. Part 50-204, the standard so prescribed is applicable only to plants, factories, buildings, or other places of employment where materials, supplies, articles, or equipment are manufactured or furnished. That is, the standard is intended to apply to manufacturing or supply operations which would be subject to the Walsh-Healey Public Contracts Act if there were a Federal contract (41 U.S.C. 35-45) for the procurement of the materials, supplies, articles, or equipment involved.

OSHA agreed that § 1910.5(e) meant that the WHA-derived standards in Part 1910 applied only to manufacturing, excluded construction, and did not apply "across the board to all industries." Bolon Tr. 64-66. (For this reason, KPCC does not argue that OSHA's incorporation on *this* date of the WHA standards into Part 1910 was invalid.)

On Sept. 9, 1971, OSHA summarily revoked § 1910.5(e), citing OSH Act § 6(a). 36 Fed. Reg. 18080. OSHA acknowledged that § 1910.5(e) "limits the application of" WHA-derived standards in Part 1910 to manufacturing but stated that the "purpose" of the revocation was to "remove the limitation." OSHA did not state how § 6(a) authorized the revocation; why it believed in May 1971 that the limitation was proper but in September 1971 believed the opposite; or why it removed that limitation from only the application of the former WHA standards and not the CSA or LHWCA standards. *See also* Bolon Tr. 95 (no explanation for difference). The revocation's effect was to apply the WHA standards to all OSH Act-covered work (Bolon Tr. 86-87, 94), "[r]egardless of whether an employer manufactures or furnishes materials…" (*id.* 94), even agriculture, ship breaking, and diving, as well as construction (*id*. 86-88). Thus, according to OSHA, this was the effect of the adoption and revocation of § 1910.5(e):

Native Statute	**Coverage Under Native Statute**		**Coverage Under OSH Act**		
	Constitutional Basis	**Type of Work**	**Constitutional Basis**	**Type of Work (36 FR 10466 (5/29/71))**	**Type of Work (36 FR 18080 (9/9/71))**
LHWCA	Navigable waters of U.S.	Ship repair, -building, -breaking, longshoring	Commerce	Ship repair, -building, -breaking, longshoring	Ship repair, -building, -breaking, longshoring
CSA	Federal/ federally-financed contract	Construction	Commerce	Construction	Construction
WHA	Federal contract	Manufacture/ furnish materials, supplies, articles, equipment	Commerce	Manufacture/ furnish materials, supplies, articles, equipment	All work, incl. agriculture, diving, construction, ship repair, -building, -breaking, longshoring, etc.

The revocation of § 1910.5(e) was not preceded or accompanied by public notice or findings that the WHA-derived standards were feasible as applied to construction work

or were "reasonably necessary or appropriate" in such work." OSHA's position is that § 6(a) authorized it to summarily extend the WHA standards to all employments, including construction. Bolon Tr. 104-05. Similarly, its position is that it could have summarily so extended the CSA standards to all employments. *Id.* 105-06. Although OSHA took the position that § 6(a) also authorized it to so extend the LHWCA maritime standards (*i.e.*, to manufacturing, construction, agriculture, etc.), it did not consider doing so because "they wouldn't have been a good fit." *Id.* 46-47.

1. The ACCSH Subcommittee, and Its 1974 Revolt

OSHA's attempt to make the former WHA standards applicable to construction apparently caused confusion among construction employers. On Dec. 4, 1973, the chairman of the Advisory Committee on Construction Safety and Health (ACCSH) (see CSA § 107(a), 40 U.S.C. § 333) stated (RR:29) that, "There is a need to appoint a committee dealing with developing one set of standards for the construction industry.… I am talking about·1910 versus 1926." OSHA announced the formation of a "Subcommittee on Editing Part 1910 for Construction Operations" and that, "The Subcommittee will consider review of the General Industries Standards, Part 1910, to determine which individual items may be applicable to construction operations." 39 Fed. Reg. 861 (Jan. 3, 1974).

The subcommittee met on several occasions (*e.g.*, RR:28), using an OSHA staff paper as a "working document" or "road map." Tr. 3-4 (Jan. 10, 1974) (RR:31); 1974 BNA OSHR CURRENT REPORT 1201. It decided to recommend that several Part 1910 standards not be verticalized, such as § 1910.266(c)(3). Tr. 15 (Jan. 10, 1974) (RR:31); Tr. 44 ("impractical" to take "entirely industrial requirements"). As to § 1910.151(c) (the eyewash standard), a sharp debate ensued (Tr. 81-89 (RR:31)), during which the chairman stated, "This is going to be a difficult one, gentlemen." Tr. 83. The subcommittee voted to delete the word "suitable" and to "flag" the standard for "special discussion" by the full committee. Tr. 88-89.

After several weeks, on Jan. 24, 1974, the subcommittee insisted to the full committee that any Part 1910 standards be "reworded," "adapted," not merely adopted verbatim:

> MR. LIVINGSTONE [chairman of subcommittee]:…I…would like to throw the suggestion to the [full] committee that in view of our study so far of the 1910 items that would be applicable to construction *and the needed rewording so that they would apply to construction* and to the way construction is oriented for compliance, that that 1926 standard be the only standard applicable to construction because we cannot comply with the items or construction cannot, in my opinion, comply with items that we have so far discussed and looked over in 1910.
> …The motion is to accept the 1926 as the only standard applicable to construction in view of the fact that the way 1910 is written the contractors cannot comply.
>
> * * *
>
> MR. FARRELL: Yes, but when you bring in 1910 into 1926 then I would say that would be the thing to accept, am I correct?
> MR. LIVINGSTON: We would continue the project. I don't believe the chairman would stop the project at this point of putting into 1926 those items in 1910 which are applicable *and rewording them*. This would continue and you would get this when the committee gets finished.
>
> * * *
>
> MR. LIVINGSTON: The reason for this, gentlemen, is that the way 1910 is written it is almost impossible for a contractor to comply with those items that, we have discussed and that we have looked at that are necessary to put into 1926.
> *They have got to be reworded*, there has got to be some deletions here and there in the thing that no way can we in our discussions been able to say that this can be taken right out of here, put over here as is. ...
> MR. BROWN: In support of the chairman of the subcommittee… I would say that I was impressed with many of the 1910 standards *that are not covered in any way in 1926* are designed for permanent facilities, are designed for an industrial setting and to try to move them into the transient construction job site is impossible….
>
> * * *
>
> MR. ANANIA: Well, are you proposing then just to throw that standard out?
> MR. SPOERER: No, no.
> MR. BROWN: Reword it.
> MR. COONEY:… Reword the 1910 standard and put it into 1926 to conform with what could possibly be workable.
> MR. ARO: Adapted.
> MR. COONEY: Is that right, Fred?
> MR. LIVINGSTONE: That is correct.

ACCSH Mtg. Tr. 105-09 (Jan. 24, 1974) (RR:33) (emphasis added). Nothing then happened for four years, until 1978, when ACCSH deliberations resumed. Thereafter, some Part 1910 standards (*e.g.*, § 1910.212(a)(4)) were, for feasibility reasons, not recommended for verticalization. *E.g.,* Tr. 165 (June 14, 1978) (RR:41).

2. The 1979 "Notice of Enforcement Policy"

In 1979, OSHA published a "Notice of Enforcement Policy" entitled, "Identification of General Industry Standards Applicable to Construction Work," 44 Fed. Reg. 8577 (1979). The notice interspersed among the construction standards those Part 1910 standards that OSHA "identified as also applicable to construction work." *Id*. at 8577 col. 1. In the notice, the text of § 1910.151(c) was placed after the construction industry "sanitation" standard, § 1926.51. *Id.* at 8589 col. 1. OSHA stated the inclusion criterion that it used—"those part 1910 standards (General Industry) which are *most likely* to be applicable to construction work…." *Id.* at 8577 col. 2 (emphasis added). It also stated that more standards may be added to its list "[i]f *enforcement experience* indicates that other part 1910 standards are applicable to construction…." *Id.* (emphasis added).

3. The 1993 Verticalizations

As noted above, § 1926.50(g) was adopted without the normally required rulemaking proceedings, findings etc. (p. 2). To justify their absence, OSHA cited the exception in 5 U.S.C. § 553(b)(3)(B), which states that "this subsection does not apply—…(B) when the agency for good cause finds…that notice and public procedure thereon are impracticable…[or] unnecessary…." OSHA claimed that the "impracticable" and "unnecessary" elements applied because, "This action does not affect the substantive requirements or coverage of the standards themselves. This incorporation does not modify or revoke existing rights or obligations, nor does it establish new ones. This action simply provides additional information on the existing regulatory burden." 58 Fed. Reg. at 35077. As support, OSHA asserted that the standards "have been identified as applicable to construction work." 58 Fed. Reg. at 35076.

The preamble, the rulemaking record, and the record here establish that the entity that "identified" the verticalized standards as "as applicable to construction work," and had "applied [them] to construction employment" (*id*.) was OSHA itself. The preamble stated that, "[i]n a number of cases, *the Agency* has determined that it is appropriate to cite a construction employer for violation of a part 1910 standard." *Id.* (emphasis added). OSHA also admitted here that its statement that verticalized Part 1910 standards had been applied to construction employment meant that they had been so applied "by OSHA." Bolon Tr. 55-56. See also the following OSHA documents, made part of the rulemaking record (and publicly available in OSHA's Docket Office and Regulations.gov), or the record here, or both: ACCSH Tr. 32 (Feb. 16, 1993) (RR:49; SJ Attach. C), *available at* www.regulations.gov/#!documentDetail;D=OSHA-ACCSH1993-1-2006-0161-0009 (assertion by committee member and head of "1910/1926 Recodification Work Group"[8] that standards "had been applied to construction" was based in part on "the compliance activity of [OSHA] inspectors."); Oral Arg. Tr. 51 ("we didn't change…obligations of…the construction industry because we had been doing that for a number of years."); OSHA PDR at 6 (OSHA verticalized standards "that *OSHA* then considered applicable to construction.") (emphasis added).

[8] "Report to ACCOSH on the proposed 1910/1926 Recodification Project" (Jan. 29, 1993) (RR:48), *also available at* www.regulations.gov/#!documentDetail;D=OSHA-ACCSH1993-1-2006-0161-0003. This document is in the rulemaking record and thus the record in this case. See e-mail message from M. Shepherd (SOL) (July 27, 2012) ("Please consider … the two documents that you attached to your email of 6/18/12, as a part of the compilation of documents that were produced on 6/26/12."); e-mail message from A. Sapper to M. Shepherd (June 18, 2012) (attaching RR:48, RR49), which are on the CD-ROM filed with the summary judgment papers on Oct. 16, 2012. In any event, the Commission may and should take official notice under 5 U.S.C. § 556(e) of this and other cited documents, such as ACCSH Mtg. Tr. at 32 (Feb. 16, 1993) (RR:49), which in addition to being in the record, is publicly available in the official OSHA rulemaking docket at Regulations.gov (www.regulations.gov/#!documentDetail;D=OSHA-ACCSH1993-1-2006-0161-0009).

OSHA also claimed here that during the 1993 verticalization, it made findings of feasibility and significant risk. Sec'y's Supp. Responses to KPCC's First Set of Req. for Admissions at 3 (filed June 26, 2012) (OSHA in 1993 found that § 1926.50(g) in construction is "feasible," "reasonably necessary or appropriate," and "addresses a significant risk"); Bolon Tr. 57 ("implicit" feasibility findings made in 1993).

IV. Argument

A. § 1926.50 Is Invalid.

Section 1926.50(g) is invalid because, *inter alia,* it was not preceded and accompanied by the required notices, opportunities and findings noted on p. 2; because OSHA failed to find or show good cause for these omissions; and, as we first show, because it failed to show that the Act "expressly" authorized the summary application of WHA, or WHA-derived, standards such as § 1910.151(c), to different work, such as construction.

1. Nothing in the OSH Act, "Express" or Otherwise, Indicates That Established Federal Standards Could Be Applied "To The Extent" of Applying to Different Work. It Shows the Contrary.

Although OSHA claims that OSH Act § 6(a) authorized OSHA to revoke § 1910.5(e) and change the kind of work covered by the WHA standards, it never stated what words in § 6(a) conferred this authority—a failure repeated in the PDR. There are no such words.

Section 6(a) (quoted on p. 17) exempted OSHA, for two years, from APA and OSH Act § 6(b) rulemaking requirements but only to the extent a document was a "national consensus standard" or an "established Federal standard." A corollary is the familiar principle that OSHA was not permitted to make substantive changes in those standards, for then it would not have adopted the "national consensus standards" (*Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 6 OSHC 1197 (10th Cir. 1977)) or the "established Federal standards" (*Underhill Constr. Corp. v. Sec'y of Labor,* 526 F.2d 53, 57 (2d Cir. 1975)).

The question thus seems, on first glance, to boil down to whether the scope provisions of established Federal standards that state the conditions or employment (*e.g.*, manufacturing) that the standards regulate are part of the "established Federal standards" and thus may not be deleted. For national consensus standards, the answer is clear: They may not be deleted. *Noblecraft Indus., Inc. v. Secr'y of Labor*, 614 F.2d 199, 204, 7 BNA OSHC 2059 (9th Cir. 1980) (unlawful to omit scope note excluding sawmilling, structural plywood manufacture). Professor Rothstein says that the rule is the same for established Federal standards: "OSHA coverage [of an established Federal standard] may not be broader than the coverage of the original source standard…." M. ROTHSTEIN, OCCUP. SAFETY AND HEALTH LAW § 4.9, p.94 (2012),[9] *citing Dravo Corp. v. OSHRC,* 613 F.2d 1120 (3d Cir. 1980); *see also id.* at 94-95 (WHA-derived standard must be construed to cover only those machines it covered under the WHA, citing *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1976) (quoted on p. 26 below)). OSHA disagrees, apparently taking the position that § 6(a)'s exemption from APA rulemaking requirements is so broad that it could summarily change the work regulated by established Federal standards.

The APA instructs courts to use a special, narrow and demanding criterion to resolve such a question: The APA's anti-supersession provision, 5 U.S.C. § 559, states that a "[s]ubsequent statute may not be held to supersede or modify this [act]…, except *to the extent* that it does so *expressly*." (Emphasis added.) A "departure from the [APA] norm must be clear" (*Dickinson v. Zurko*, 527 U.S. 150, 155 (1999)) and meet a "rigorous standard."[10] Because APA § 559 uses the word "except," the agency has the burden of

---

[9] He states: "…OSH Act coverage may not be broader than the coverage of the original source standard, such as those promulgated under the LHWCA. Therefore, maritime standards have been held not to be applicable to the structural shop of a shipbuilder."

[10] *Nichols v. Bd. of Trustees*, 835 F.2d 881, 895-96 n. 105 (D.C. Cir. 1987). *See also Marcello v. Bonds*, 349 U.S. 302, 310 (1955) ("[e]xemptions … not lightly to be presumed"); *Lane v.*

(continued…)

proving the APA "expressly" inapplicable to the "extent" claimed. See n. 15 and accompanying text. On APA questions, OSHA's view is not entitled to deference. *Prof. Reactor Operator Soc'ty v. NRC*, 939 F.2d 1047, 1051 (D.C. Cir. 1991).

Hence, § 6(a)'s exception from APA rulemaking applies only "to the extent" that it rests on "express" statutory language—and no further. And because employers can be penalized for violating § 1926.50(g), the constitutional rule requiring narrow construction also applies. *Comm. v. Acker*, 361 U.S. 87, 91 (1959) (re civil penalties, "The law is settled that 'penal statutes are to be construed strictly.'").

Thus, on closer examination, the true question here is: Did OSHA carry its burden of showing that the OSH Act states "expressly" that scope provisions of established Federal standards stating the work (*e.g.,* manufacturing) that they regulate are not part of the "established Federal standards"? Stated differently, did OSHA show that there is language in the OSH Act that "expressly" permitted OSHA to not merely extend established Federal standards without regard to federal contracts and navigability, but farther—"to the extent" they would apply to work for which they were not written?

There is no such "express" language. Former § 1910.5(e)'s very existence so attested. Had the Act contained such "express" language, OSHA would never have adopted § 1910.5(e).

OSH Act § 6(a) states in part that, "Without regard to [the APA or OSH Act 6(b) - (g)], the Secretary shall…by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard…." Not one word there supplies any "express" evidence, or even hints, that OSHA was permitted to summarily extend established Federal standards to work for which they were not written. Indeed, Congress rejected a proposal to permit that. See p. 21 below.

Dep't of Agric., 120 F.3d 106, 110 (8th Cir. 1997) ("forbids amendment of the APA by implication").

There are also no such "express" words in § 3(10)'s definition of "established Federal standard." On the contrary, § 3(10) *expressly* makes provisions of an "established Federal standard" that define the "employment" and "places of employment" to which the "standard" applies just as much a part of the "standard" as provisions stating required "conditions," "practices," etc. Section 3(10) defines an established Federal standard as an "occupational safety and health standard." An "occupational safety and health standard" by definition (§ 3(8)) "requires conditions," "practices," etc., in "employment" and "places of employment"—at least the latter two of which are defined by scope provisions. Moreover, work-defining scope provisions of established Federal standards define the "extent" to which the standards were "established" and were "operative" under § 3(10). Thus, work-defining scope provisions are part of the established Federal standards and cannot be disregarded.

That a scope provision is an integral and equal part of a standard is also clear from APA § 551(4)'s definition of "rule" (which OSHA and WHA standards are) as "an agency statement of *general or particular applicability*…designed to…prescribe law." (Emphasis added.) Inasmuch as scope provisions state "applicability," they are as much a part of a rule as those that "prescribe law." *Abbs v. Sullivan*, 756 F.Supp. 1172, 1187 (W.D. Wis. 1990) (APA "rule" definition has "three distinct elements:…(2) of general or particular applicability…"), *vac. on juris. grnds*, 963 F.2d 918 (7th Cir. 1992). Hence, courts treat scope provisions like other parts of a rule. *E.g.*, *Reich v. Gen. Motors Corp.*, 89 F.3d 313 (6th Cir. 1996) (OSHA may not ignore a word in scope provision); *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 2 (1st Cir. 1993) (same).

A contrary position would mean that a work- or equipment-limiting scope provision is not part of a "standard," which would be absurd. Section 50-204.1(a)'s specification of the work regulated by the WHA standards is just as much a part of the established Federal WHA standards as the scope provision for the agricultural standards in Part 1928 (§ 1928.1), or the scope provision for the construction fall standards in Subpart M

of Part 1926 (§ 1926.500), are of OSHA standards. It was about a scope-defining word ("crane") in the text of a standard that the Commission spoke in *Lisbon Contractors, Inc.*, 11 BNA OSHC 1971, 1973-74 (No. 80-97, 1984): "The Secretary's standards, which set policy, strike a balance between the protection of employees and the imposition of burdens on employers. To ignore the words of the standard and the underlying policy choices that they reflect, is to upset that balance and substitute a new one." The point equally applies to scope provisions that are set out separately.

In sum, nothing in the Act's words even comes close to being an "express" indication that OSHA was authorized to summarily apply established Federal standards "to the extent" that they would apply to work different than for which they were written. All indications are to the contrary. The application of §§ 50-204.6(c) and 1910.151(c) to construction was, therefore, invalid.

a. The Senate Report Passage Does Not Supply "Express" Evidence That Established Federal Standards Could Be Summarily Applied "To The Extent" That They Would Apply to Different Work. On the Contrary, It Refutes OSHA's Position.

OSHA, however, cites the following passage from a Senate report:

> The purpose of this procedure is to establish as rapidly as possible national occupational safety and health standards with which industry is familiar. …
>
> The bill also provides for the issuance in similar fashion of those standards which have been issued under other Federal statutes and which under this act may be made applicable to *additional employees* who are not under the protection of such other Federal laws. Such standards have already been subjected to the procedural scrutiny mandated by the law under which they were issued;….

S. REP. NO. 1282, at 6 (1970) (emphasis added), Leg. Hist. at 145–46. OSHA argues (PDR 9-10) that this passage grants it "authority, under section 6(a)…, to extend the coverage of Walsh-Healey Act standards, and other established federal standards…."

Even if committee report language could substitute for the "statute" demanded by APA § 559, or were relevant at all,[11] this language does not suggest, let alone state "expressly," the "extent" demanded by OSHA's extravagrant reading—that the established Federal standards could be summarily applied to work different than for which they had been written. It does not hint that "additional employees" means all employees, doing any kind of work. "Additional" means "added" or "supplementary"—not any and all (NEW OXFORD AM. DICTIONARY 18 (2d ed. 2005)); it connotes "uniting one thing to another" (BLACK'S LAW DICTIONARY 35 (5th ed. 1979))—not everything and anything. Nothing in the report suggests—let alone "expressly"—that established Federal standards would be extended to "additional employees" by anything other than removing their restrictions to federal contracts and navigability.

If anything, the Senate report passage expressly refutes OSHA's position, for it states that the established Federal standards would be those "with which industry is familiar" and that "have already been subjected to the procedural scrutiny mandated by the law under which they were issued." (OSHA agrees that Congress expected both criteria to be satisfied. § 1910.1(a)).) As shown in Part III.B above, the construction industry had neither been "familiar" with the WHA manufacturing standards nor had given them "scrutiny." Not only did the WHA not apply to construction, and not only did it lack "general applicability to industry (p. 3 above)," but announcements of proposed and final WHA standards stated that they would apply to "supply" contracts. They said nothing about construction or gave notice to the construction industry that the standards might be applied to them. And it was only manufacturers, not constructors, who gave "scrutiny" to the WHA standards, and only "to the extent" they applied to

[11] *Shannon v. United States*, 512 U.S. 573 (1994) ("courts have no authority to enforce [a] princip[e] gleaned solely from legislative history that has no statutory reference point.") (quoting *Elec. Workers Local 474 v. NLRB*, 814 F.2d 697, 712 (D.C. Cir. 1987)).

manufacturing, not construction. Even OSHA has acknowledged that notice to and scrutiny of standards by manufacturers does not substitute for notice to and scrutiny by constructors. Pp. 36, 41 (regarding, *e.g.,* lead, cadmium, bloodborne pathogens and electrical standards); Bolon Tr. 36-37. OSHA's reading would therefore negate the Senate report's express assurances to the Senate.

Moreover, Congress rejected language that would have authorized OSHA's position. The version of § 6(a) in the committee bill reported to the House stated: "The Secretary shall…by rule promulgate…any established Federal standard then in effect (*not limited to its present area of application*)…." H.R. 16785, 91st Cong., at 7 (April 7, 1970); Leg. Hist. at 721, 727 (emphasis added). The competing Steiger bill (H.R. 19200, 91st Cong., at 8 (Sept. 15, 1970); Leg. Hist. at 763, 770), lacked that phrase. It was the Steiger bill that was adopted by the House. Leg. Hist. at 1092, 1094, 1114. (The OSH Act is often known as "the Williams-Steiger Act." *E.g.,* 29 C.F.R. Part 1975, "Coverage of Employers Under the Williams-Steiger Occupational Safety and Health Act of 1970.")

OSHA's position would defeat congressional intent in a third way: It would violate Congress's direction that all construction industry standards be developed using the mechanisms not merely of the OSH Act but also of the CSA. The conference committee that adopted the OSH Act in its final form stated (Leg. Hist. at 1186):

> The conferees intend that the Secretary develop health and safety standards for construction workers covered by [the CSA,] pursuant to the provisions of that law and that he use the same mechanisms and resources for the development of health and safety standards for *all the other construction workers newly covered by this Act....* [Emphasis added.]

Before a construction standard may be adopted, the CSA requires not just consultation with ACCSH but also public notice to the construction industry, an opportunity to comment, and a public hearing. CSA § 107(a), 40 U.S.C. § 333. Under OSHA's position, however, it may simply declare WHA standards applicable to construction without

these CSA safeguards and even if, as here, the Labor Department had, in a notice-and-comment rulemaking, already decided to not adapt that standard to construction.

OSHA's position also violates Fifth Amendment due process because it is based on an arbitrary and capricious inconsistency—that only the WHA standards were extended to all industries, and not the CSA and LHWCA standards.[12] Confirming this arbitrariness is that OSHA never explained the difference in treatment, either in the Federal Register (Bolon Tr. 95 ("[t]here's no explanation of the difference")) or before the Judge. OSHA never pointed to any feature of the WHA standards that suggested (contrary to their scope provisions) that they could be applied to all industries. It never explained why it deleted only § 1910.5(e), and did not delete from §§ 1910.12-.16 their restrictions to "construction," "ship breaking," etc. (thereby extending the CSA and LHWCA standards to all industries).

There is a reading, however, that does give effect to the Senate report's assurance that the established Federal standards are those "with which industry is familiar" and that "have already been subjected to the procedural scrutiny mandated by the law under which they were issued," *and* permits their extension to "additional employees." It is OSHA's original reading: That the established Federal standards may apply to "additional employees" performing the same work that the standards were designed to regulate but without regard to whether their employers have federal contracts or work on navigable waters. Under this reading, CSA standards could be applied under the

[12] *Dent v. W. Virginia*, 129 U.S. 114 (1889) ("due process of law … exclude[s] everything that is arbitrary and capricious"). Even before APA § 706(2)(A), administrative action could be struck down as arbitrary and capricious. *Pac. States Box & Basket Co. v. White*, 296 U.S. 176 (1935); *Nat'l Clients Coun., Inc. v. Legal Servs. Corp.*,617 F.Supp. 480, 485-86 (D.D.C. 1985) (pre-APA requirement for "rationally based" agency action no different than APA's arbitrary, capricious standard); *Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 697 (D.C. Cir. 1991) (same).

OSH Act to construction affecting commerce, instead of only federally-contracted construction; the WHA standards would apply to manufacturing affecting commerce, instead of only federally-contracted manufacturing; and the LHWCA standards would apply to maritime work affecting commerce, instead of only maritime work on "navigable" waters.

By contrast, OSHA's reading of the report permits far-reaching absurdities. If OSHA could have disregarded the established Federal standards' scope provisions, it could have applied manufacturing standards to construction, agriculture, deep-sea diving, ship breaking, anything. Bolon Tr. 86-88. And, vice versa, CSA standards could have been applied to manufacturing, agriculture, etc. Bolon Tr. 105-06. Such extravagant readings of legislative history must be avoided. *E.g., In re Sinclair*, 870 F.2d 1340, 1342-43 (7th Cir. 1989) (declining to follow conference statement). Just as "Congress…does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not…hide elephants in mouseholes" (*Whitman v. Am. Truck. Ass'ns*, 531 U.S. 457, 468 (2001))—even less does it does so in legislative history.

In sum, OSHA's position would defeat the report's express assurances to the Senate, take the legislative history snippet there far beyond any "extent" to which it "expressly" supports a departure from APA rulemaking, defeat congressional intent and, without reason, read the Senate report so extravagantly as to be absurd.

b. The WHA Standards Applied Only to Manufacturing.

It is also indisputable that the WHA standards applied only to manufacturing:

- Section 50-204.1(a) stated that the WHA standards apply to "the manufacture or furnishing of materials, supplies, articles, and equipment." Section 50-204.1(c) stated that "This Part 50-204 expresses the Secretary of Labor's interpretation and application of [Walsh-Healey Act § 1(e)] with regard to *certain particular working conditions*." (Emphasis added.) Even within manufacturing, the WHA standards were "for application to ordinary employment situations" and did not "purport

to describe all of the working conditions which are [unsafe to]…employees." § 50-204.1(d).

- The WHA standards were based on an "evaluation" and "[c]ausative analysis of injury frequency rates" in "industrial establishments." 25 Fed. Reg. at 13809.
- OSHA's official EMPLOYMENT LAW GUIDE (p. 5) states that the WHA applies to "employees who produce, assemble, handle, or ship goods under" contracts for "the manufacturing or furnishing of materials, [etc.]."

Moreover, the WHA standards (and § 50-204.6(c) specifically) were affirmatively inapplicable to construction:

- The legislative histories of the WHA and CSA Acts state that the WHA did not apply to construction. See pp. 3-6 above, which describe how, while the WHA was being fashioned, the House removed language covering "construction" from the Senate bill that eventually became the WHA, and defeated an attempt to re-insert it.
- OSHA's regulation (§ 1926.15(a)) states that "None of the described working conditions [in 41 C.F.R. Part 50-204] are intended to deal with construction activities…."
- The courts have long so held. *E.g., Gracey v. Elec. Workers Local 1340*, 868 F2d 671, 673 (4th Cir. 1989) ("Workers on federal construction contracts were protected under the Davis-Bacon Act…while those performing work under federal supply contracts were covered by the Walsh-Healey Public Contracts Act….").
- As to § 50-204.6(c) specifically, under the CSA the Labor Department chose to not adapt § 50-204.6(c) for use in construction. See p. 7 above.

Accordingly, applying the WHA standards to construction was a substantive change.

c. The Case Law Cited By OSHA Is Inapposite.

None of the cases that OSHA cites is apposite, for none dealt with whether WHA standards could validly be applied to construction or non-manufacturing work. None

considered APA § 559 or the other materials referenced here. The expressions that OSHA cites are not only inapposite but are general, in disregard of the Supreme Court's admonition that "general expressions transposed to other facts are often misleading." *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944). Inference from such language is far too feeble to be considered equivalent to the "express" statutory language demanded by APA § 559.

- *American Can* did not involve different work, but application of the WHA manufacturing standards to manufacturing. Moreover, it did *not* broadly uphold the deletion of WHA scope provisions. It upheld the deletion of only certain passages in the WHA scope provisions and only because they were so "anomalous" under the Act as to be "inconsistent" with "congressional intent." Thus, the Commission found that the "legality, fairness or propriety" provision of § 50-204.1(c) "would have introduced elements of an enforcement scheme that Congress found unsuitable for broadly regulating worker safety and health." 10 OSHC at 1311-12 ("more than anomalous"; "specially reflected" WHA's "inflexible," "very different enforcement scheme"). The Commission took a "similar view" of § 50-204.1(a)'s quotation from WHA § 1(e)'s state-law provision: Not only was "Congress' purpose…to supersede" this provision, but adopting it would have "circumvented…the state plan provision of the [OSH] Act." 10 OSHC at 1312-13 ("peculiar feature," "odd state of affairs"). None of that can be said of this case; nothing indicates that limiting WHA-derived manufacturing standards to manufacturing would be inconsistent with or circumvent congressional intent, and OSHA has never made such a ridiculous claim. Moreover, *American Can* did not involve features of the WHA scope provisions that reflected substantive safety judgments as to which "employment" and "places of employment" (under § 3(8) and thus § 3(10)) the WHA standards regulated. *American Can* is thus not only inapposite, but any inferences from its language would be far too feeble to be considered equivalent to the "express" statutory language demanded by APA § 559.

- *Bechtel Power Corp.*, 4 BNA OSHC 1005 (No. 5064, 1976), *aff'd*, 548 F.2d 248 (8th Cir. 1977), did not deal with the application of WHA manufacturing standards to construction, but application of CSA standards (Part 1926) to construction—specifically, to an employer whose employees were working on a construction site and exposed to construction hazards. More importantly, the validity issue there was not whether OSHA could extend the CSA standards to different *work,* but, by dropping *contractual* status as a coverage criterion, could extend coverage to different *entities*. 4 OSHC at 1008 col. 2 (at headnote 3): "Bechtel…argues that, in adopting the [CSA] standards…, the Secretary was not authorized to expand their coverage to employers other than contractors and subcontractors"—the entities to which the CSA applies. And as shown on p. 35, *Bechtel*'s reliance on § 1910.11 is irrelevant to a WHA standard. Thus, *Bechtel* falls far short of supplying the "express" evidence on the different-work issue demanded by APA § 559.

- *Diebold, Inc. v. Marshall*, 585 F.2d 1327 (6th Cir. 1976), involved application of a former WHA manufacturing standard to manufacturing, not construction. Moreover, as Professor Rothstein notes, the court rejected OSHA's position: "the Secretary may not enforceably construe a [§ 6(a)] standard to impose requirements which the standard's source did not impose. …. Thus,…whether § 1910.212 applies to press brakes is determined by whether its Walsh-Healey source applied to press brakes." 585 F.2d at 1332. That is this case, for the WHA standards did not impose requirements on construction. The Secretary, however, relies on an ambiguous dictum in a footnote: "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." 585 F.2d at 1332 n.6. OSHA reads this to mean that the court approved extending manufacturing standards to construction without rulemaking. Not only does it not *say* that (the footnote is warning against expanding equipment-based

source standards, which is what *Diebold* involved), but the Supreme Court recently admonished courts to "resist reading a single sentence unnecessary to the decision as having done so much work." *Ark. Game & Fish Comm. v. United States*, 568 U.S. _ (2012) (slip. op. at 11). OSHA has never denied that extending WHA standards to work they did not cover is a substantive change. Yet, the same footnote states that substantive changes "would render the standard unenforceable." OSHA would thus take out of context an ambiguous dictum in a footnote to override a clear holding in text. That falls far short of meeting APA § 559's requirement for "express" statutory language.

- *Lee Way Motor Freight, Inc. v. Secretary*, 511 F.2d 864 (10th Cir. 1975), likewise involved application of WHA standards to non-construction. Moreover, it did not involve a validity issue, let alone whether the WHA standards could validly be applied to non-manufacturers. No form of "valid" or its synonyms appear in either the Commission or the court opinion. The court did not mention the substantive-change issue, nor the lack of notice-and-comment rulemaking, nor their significance. The only issue raised by the employer was whether a former WHA standard should be *construed* to apply more broadly than it applied under the WHA. That is not the issue here.

In sum, OSHA's validity argument has no merit. Nothing in the Act's words or legislative history comes even close to being the "express" indication that OSHA was authorized to summarily apply established Federal standards "to the extent" that they would apply to work different than for which they were written. All indications are to the contrary. Inasmuch as § 50-204.6(c) applied only to manufacturing and, in any event, affirmatively did not apply to construction, OSHA had no authority to extend it to construction without rulemaking.[13]

---

[13] The Commission need not hold that the WHA-derived standards are invalid as applied to all non-manufacturing. It could more narrowly hold that the WHA-derived standards, or § 1926.50(g) in particular, do not validly apply to *construction*. First, § 1926.15(b) states, "None of the described working conditions [in 41 C.F.R. Part 50-204]

(continued…)

d. The Revocation of § 1910.5(e) Was Invalid For Other Reasons.

We showed above that § 1910.5(e), which excluded construction and other non-manufacturing work from the scope of WHA-derived standards (Bolon Tr. 64-66), confined the former WHA standards to their lawful scope, and thus that its revocation was unlawful.

But the revocation of § 1910.5(e) was unlawful for other reasons as well: It was done without explanation, without consideration of the language of the Act and its legislative history, without explanation of the change in position (*i.e.,* why OSHA thought in May 1971 that the WHA standards could not be applied to manufacturing but in September 1971 thought that they could), and without explanation of why the WHA standards were treated differently—why they, but not the CSA or LHWCA standards, were expanded to all workplaces. Bolon Tr. 95 ("[t]here's no explanation of the difference"). Not only is such conduct arbitrary and capricious (see n. 12 above and accompanying text), but OSHA's failure to explain the inconsistency violated the requirement that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). Furthermore, because § 1910.5(e) stated a substantive rule of applicability, it could not be revoked without giving public notice and inviting public comment. *Am. Mining Congress v. MSHA*, 995 F.2d 1106, 1108-13 (D.C. Cir. 1993). (Even interpretive rules may not be revoked without notice and comment. *Alaska Professional Hunters Ass'n v. FAA,* 177 F.3d 1030, 1033-34 (D.C. Cir. 1999).) Inasmuch as § 1910.5(e) was unlawfully revoked, it should be treated as if it were still in effect.

---

are intended to deal with construction activities…," which reflects the legislative histories of the WHA and CSA Acts (pp. 3, 6). Second, as shown on p. 7, the Secretary decided to forgo adaptation of the WHA ancestor of § 1910.151(c) to construction.

Before Judge Simko, OSHA argued that § 1910.5(e) had to be revoked because it created a "conflict" with §§ 1910.5(c)(2) and 1910.11(a). Inasmuch as this argument did not appear in the revocation's preamble, reliance on it would violate the pre-APA rule of *SEC v. Chenery*, 318 U.S. 80, 95 (1943)—that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *See also N. Air Cargo v. Postal Service*, 674 F.3d 852, 860 (D.C. Cir. 2012) (agency action may be upheld only on the basis of the agency's own contemporaneous justification, not *post hoc* argument of counsel).

Even if the argument were considered, it is meritless. First, there was no "conflict" with § 1910.11(a), for neither § 1910.11(a) nor Subpart B applies to WHA-derived standards. Contrary to the PDR, § 1910.11 did not "adopt and extend the applicability of" the WHA standards (or, indeed, any established Federal standards). Instead, § 1910.11 states that provisions of *Subpart B* adopted and extended the applicability of *certain* established Federal standards—but the WHA standards were not among them. The WHA standards had instead been adopted and extended by being copied into Part 1910. See p. 9 above and § 1910.1(b), in Subpart A, which states that Part 1910 "contains" established Federal and consensus standards. Thus, there could not have been a "conflict" with § 1910.11—and, as shown in Part IV.A.2.a(ii) below, even less with § 1910.5(c)(2).

Second, even if § 1910.11 applied, there still would not have been any "conflict." Sections 1910.5(c)(2) & (e) and 1910.11(a) would have together amounted to a statement that WHA-derived standards apply to all commerce-affecting employers engaged in manufacturing—just as §§ 1910.5(c)(2), 1910.11(a) and 1910.12 together amount to a statement that the CSA standards apply to all commerce-affecting employers engaged in construction. Just as § 1910.12 limits the reach of the CSA standards to "construction work" without "conflicting" with § 1910.11(a) or § 1910.5(c)(2), § 1910.5(e) limited the reach of the WHA standards to manufacturing without "conflicting" with § 1910.11(a)

or § 1910.5(c)(2)). Like these other provisions, §§ 1910.5(e) and 1910.11(a) spoke to different points, with one speaking generally and one speaking more narrowly, and with one qualifying the reach of the other.

Third, if there were a conflict, it was arbitrary and capricious to resolve it by applying the WHA manufacturing standards to construction and everything else. *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 593 (D.C. Cir. 2002) ("arbitrary and capricious" to "use[] a tank to block a mousehole"). If "conflict" had actually been OSHA's concern, it could simply have re-written § 1910.11 to state that the standards apply to that aspect of commerce stated in their respective scope provisions. That "conflict" had nothing to do with OSHA's action can also be seen from OSHA's failure to revoke the work-limiting phrases (such as "construction work") in §§ 1910.12, .13-.16. Before Judge Simko, the observation was made that these phrases equally "conflicted" with 1910.11, and yet they were not revoked. KPCC challenged OSHA to explain why they too had not been revoked, and why the CSA and LHWCA standards too were not applied to all work. OSHA had no answer.

Fourth, no supposed "conflict" in an agency's rules can justify a statutory violation—the application of the WHA standards to work that they did not previously cover, and thus an unlawful substantive change. Rather than violate the Act, OSHA should, if it were truly necessary, have just re-written its rules.

e. OSHA Was Not Authorized By § 4(b)(2) To Apply The WHA Standards To Construction.

OSHA may argue that, or the Commission may ask whether, OSH Act § 4(b)(2) authorized application of the WHA standards to construction. Aside from insurmountable *Chenery* problems (OSHA relied on § 6(a), not § 4(b)(2)), such an argument would contravene § 4(b)(2)'s words and make § 6(a) redundant, and it is directly refuted by the Act's legislative history. It would also permit anarchic absurdities: Standards written for manufacturing would be applied to construction,

agriculture, longshoring or shipbuilding; construction, longshoring and shipbuilding standards would apply to manufacturing and agriculture.

Section 4(b)(2) states that "[t]he safety and health standards promulgated under" the WHA, CSA, LHWCA, and other statutes "shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts." Even if this language meant that the WHA, LHWCA, and CSA standards could be enforced against "employers" under the OSH Act and without regard to § 6(a) (and it does not mean either, as we show below), not one word in § 4(b)(2) suggests that the work covered by the "standards" would change—that, for example, manufacturing standards would apply to construction, or vice versa. The reason is simple: The "standards" deemed by § 4(b)(2) "to be occupational safety and health standards issued under this Act" are "[t]he safety and health standards *promulgated under*" the WHA, CSA, LHWCA, and other statutes. As so "promulgated," those standards came with their own scope provisions. Nothing in § 4(b)(2) provided a mechanism for stripping them out, or authority to ignore them or change the work they cover.

Nor does § 4(b)(2) mean that the standards listed there are enforceable against "employers." All that § 4(b)(2) said and, as shown below, all that Congress meant, was that, even before established Federal standards were adopted under § 6(a), OSHA could issue under OSH Act §§ 9(a) and 17 (both of which permit prosecutions for violations of either § 5(a) *or* "standards") citations and penalties against government contractors and maritime employers alleging violations of the WHA or CSA standards as "promulgated under" *those* statutes, *i.e.*, with their scope provisions. *Gen. Motors Corp.*, 9 BNA OSHC 1331 n.17 (No. 79–4478, 1981) (under § 4(b)(2), "Walsh-Healey standards could have been enforced *against government contractors* under the [WHA] or the [OSH] Act") (emphasis added). Penalties under the WHA were known for their weakness (*American Can*, 10 OSHC at 1312) and Congress wanted OSHA to use OSH Act sanctions until the established Federal standards were adopted. That is what Congress meant by saying

that the enforcement process of the OSH Act would be "added" to those of the previous statutes. H.CONF.REP. 91-1765, at 33 (1970), Leg. Hist. at 1186. The standards that would have been cited would have been just what § 4(b)(2) identified—the standards "promulgated under," for example, the CSA, with their native scope provisions intact, not as the standards would be separately adopted under § 6(a). Any other reading would make § 6(a) redundant.

Representative Steiger, a chief architect of the OSH Act, expressly so stated immediately before the vote on the Conference Report:

> Let me add a comment on what may appear to be an inconsistency between the last sentence of section 4(b)(2) and the expedited procedures set out in section 6 to adopt early interim standards. The last sentence in section 4(b)(2) is included to insure that standards under existing laws will not be repealed by this enactment and will remain effective until superseded by the promulgation of standards under section 6(a) . At that time the newly promulgated standards will become standards under this Act and existing laws, thereby preserving remedies available under existing laws. *To construe this provision otherwise would be to make the early standards-setting procedures in section 6(a) meaningless or a mere redundancy.*

Leg. Hist. 1217 (emphasis added). Section 4(b)(2) would accomplish what Mr. Steiger intended only if it is read literally—*e.g.*, if the CSA standards could be applied under the OSH Act *with* their native scope provisions restricting them to federal contractors. Otherwise, § 6(a) would indeed be "meaningless or a mere redundancy."

The above explains why OSHA did not rely on § 4(b)(2) in its 1971 actions or in its response to KPCC's motion: The standards mentioned in § 4(b)(2) were citable only against government contractors and maritime employers (rather than employers in commerce) and were the standards as "promulgated under" the prior statutes, *i.e.*, with their native scope provisions intact, for § 4(b)(2) gave OSHA authority no authority to remove, disregard, or amend them. Thus, § 4(b)(2) is inapposite.

2. OSHA Has The Burden of Proving That The 1993 Adoption of § 1926.50(g) Fell Within An Exception to Rulemaking Requirements.

Section 1926.50(g) is also invalid because OSHA failed to demonstrate good cause for dispensing with public notice and comment and OSH Act rulemaking findings.

Inasmuch as APA § 553(b)(3)(B) provides an "exception,"[14] the burden is on OSHA to establish it.[15] The exception is "narrowly construed and reluctantly countenanced,"[16] and poses a "high bar." *United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010). "[C]ircumstances justifying reliance on this exception are 'indeed rare' and will be accepted only after the court has 'examine[d] closely proffered rationales justifying the elimination of public procedures." *Council of the S. Mtns, Inc. v. Donovan*, 653 F.2d 573, 580 (D.C. Cir. 1981). Judicial review on the issue is *de novo*.[17]

---

[14] *E.g., Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 92 (D.C. Cir. 2012) ("exception"); *Nat'l Nutritional Foods Ass'n v. Kennedy*, 572 F.2d 377, 384 (2d Cir. 1978) ("exceptions").

[15] *Action on Smoking & Health v. CAB*, 713 F.2d 795, 801 n.6 (D.C. Cir. 1983) ("onus on the [agency]"); *Tenn. Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144, 1146 (D.C. Cir. 1992) ("exception"; agency "failed to demonstrate sufficient cause for setting aside these important safeguards"); *N. Arapahoe Tribe v. Hodel*, 808 F.2d 741, 751 (10th Cir. 1987) (agency "bears the burden").

[16] *Tenn. Gas*, 969 F.2d at 1144; *New Jersey v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980) (same); *see also Ind. Guard Ass'n Local No. 1 v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995) ("narrowly construed"); *Levesque v. Block*, 723 F.2d 175, 184 (1st Cir. 1983) (same); *Mobay Chem. Corp. v. Gorsuch*, 682 F.2d 419, 426 (3d Cir.) (same), *cert. denied*, 459 U.S. 988 (1982); Note, *The "Good Cause" Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act*, 68 GEO.L.J. 765, 773 (1980).

[17] "It will thus be the duty of reviewing courts … to determine the meaning of the words and phrases used. For example, in several provisions the expression 'good cause' is used." H.REP. NO. 752, 79TH CONG. (1945), *reprinted in* LEGIS. HISTORY OF THE APA, S.DOC. NO. 248, 79TH CONG., at 200 (1946). *Accord*, *Mid-Tex Elec. Coop., Inc. v. FERC*, 822 F.2d 1123, 1132 (D.C. Cir. 1987) ("close" examination); *Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n. 11 (9th Cir. 2003) ("de novo"); *Wash. State Farm Bureau v. Marshall*, 625 F.2d 296, 306 (9th Cir. 1980) ("free to make an independent determination").

a. Inasmuch as OSHA's Statement of Good Cause Failed to Show That § 1910.151(c) Applied to Construction, OSHA Failed To Show Good Cause for Asserting That Its Action "Does Not Affect the Substantive Requirements…of the Standards."

OSHA's claim of "good cause" in 1993 rests on its assertion that its action did "not affect the substantive requirements or coverage of the standards…[, or]…modify or revoke existing rights or obligations, nor…establish new ones." 58 Fed. Reg. at 35076.

An agency must do more than assert good cause; it must support the assertion. A good cause finding must "incorporate[ ]…a brief statement of reasons therefor…." APA § 553(b)(3)(B). "A true and supported or supportable finding of necessity or emergency must be made and published." H.REP. NO. 752, 79TH CONG. (1945), *reprinted in* LEGIS. HISTORY OF THE APA, S.DOC. NO. 248, 79TH CONG., p 200 (1946). "Conclusory" assertions are insufficient. *Mobil Oil Corp. v. DOE*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979).

OSHA's statement of good cause (58 Fed. Reg. at 35077 col. 1) did not explain or support its assertion that OSHA's action changed nothing. It did not explain how, or even assert that, all Part 1910 standards—including all WHA-derived standards (such as § 1910.151(c)) and all national consensus standards—always apply to construction as a matter of law. Moreover, such an assertion would have been untrue and, as shown on p. 36 below, OSHA knew it would have been untrue.

(i) Counsel's Attempt to Prove The Applicability of the WHA Standards to Construction Is Procedurally Improper and Meritless.

To fill the gap in OSHA's 1993 good cause statement, OSHA's counsel argues (PDR at 6) that § 1910.11(a) declared that Part 1910 standards apply "with respect to every employer, employee, and employment covered by the Act." Counsel has also argued that OSH Act § 6(a) and case law authorized OSHA to apply WHA standards to construction and to revoke § 1910.5(e).

Inasmuch as none of these arguments appeared in the statement of reasons that accompanied the good cause finding, they must be disregarded. *Mack Trucks, Inc. v.*

EPA, 682 F.3d 87, 95 (D.C. Cir. 2012) ("cannot consider" agency arguments not in good cause statement); *United States v. Johnson*, 632 F.3d 912, 928 (5th Cir. 2011); *Buschmann v. Schweiker*, 676 F.2d 352, 357 (9th Cir. 1982) (reasons must accompany rule). Moreover, under the pre-APA rule *Chenery* rule, "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." In any event, none of the arguments have merit.

(ii) Sections 1910.5(c)(2) and 1910.11(a) Could Not Have Authorized The Extension of WHA Standards To Construction.

There is something quite odd about OSHA's principal validity argument: It rests on OSHA's rules, rather than statutes. PDR at 2-3: "Adopted established federal standards, such as § 1910.151(c), have general application and may be applied to employers in construction and other industries…," citing §§ 1910.5(c)(2) and 1910.11(a). But the validity question turns on statutes, not rules, for rules cannot authorize a departure from the APA or OSH Act § 6(b), or extend standards farther than § 6(a) authorized. OSHA cannot disagree, for it has made the same argument. In *Solis v. Summit Contractors, Inc.*, 558 F.3d 815 (8th Cir. 2009), OSHA argued that § 1910.12 (which appeared unheralded in the same announcement as §§ 1910.5(c)(2) and 1910.11(a)) would be "invalid" if understood to "alter" the established Federal standards "in any substantive way." Sec'y Br. in *Summit* at 43-44 (filed July 30, 2007) (in appendix).

The argument also relies on a misstatement. As shown on p. 29 above, contrary to the PDR, § 1910.11 did not "adopt and extend the applicability of" the WHA standards (or, indeed, any established Federal standards). Instead, § 1910.11 states that provisions of *Subpart B* adopted and extended the applicability of *certain* established Federal standards—but the WHA standards were not among them. See p. 9 above and § 1910.1(b), in Subpart A, which states that Part 1910 "contains" established Federal and consensus standards. Thus, § 1910.11 is irrelevant to this case.

b. The 1993 Preamble's Vague Allusion to § 1910.5(c) Does Not Show "Good Cause" for Dispensing with Rulemaking.

As noted on p. 34, OSHA's statement of good cause did not explain or support its implied position that all Part 1910 standards—including all WHA-derived standards and all national consensus standards—always apply to construction as a matter of law.

Elsewhere—not in the statement of good cause but in a "background" section (58 Fed. Reg. at 35076)—the preamble briefly and vaguely referred to § 1910.5(c): "In a number of cases, the Agency has determined that it is appropriate to cite a construction employer for violation of a part 1910 standard, to effectuate the purposes of the OSH Act. (See 29 CFR 1910.5(c)…."). OSHA thus seemed to imply, without outright stating, that a Part 1910 standard would apply to construction so long as no specifically applicable standard in Part 1926 preempted it.

First, the APA requires reasons to be "state[d]," not implied. OSHA was required to explain, if it could, how § 1910.5(c) authorized the verticalizations, and it did not. Implication—especially outside the good cause statement—does not suffice.

Second, OSHA could not have explained how § 1910.5(c) authorized verticalizations, for it well knew that the implication was not, in the words of the APA's legislative history, "true and supported or supportable." As we show below, by 1993, OSHA had, despite § 1910.5(c), acknowledged that there are Part 1910 standards without Part 1926 counterparts that do not apply to construction because they were not originally intended to so apply. OSHA had even undone verticalizations on that ground. On none of these occasions did OSHA mention § 1910.5(c), or suggest that the absence of a preempting standard in Part 1926, or the mere presence of a standard in Part 1910, means that the Part 1910 standard applies to construction. For example:

- In 1990 OSHA stated that the electrical standards, which have no express exclusion for construction, do not apply to construction because they were not originally intended to so apply. Letter from G. Reidy (OSHA) to G. Kennedy (NUCA)

(1990), *available at* www.osha.gov/pls/oshaweb/owadisp.show_document?p_table =INTERPRETATIONS&p_id=20081 (SJ Attach. G). See 55 Fed. Reg. at 31986 col. 3.

- In 1992, OSHA formally stated that the Bloodborne Pathogen Standard, § 1910.1030, which appears in Part 1910 and does not expressly exclude construction, "does not apply to the construction industry [because] the construction industry was not explicitly afforded notice [by the proposed standard] and, in fact, did not participate in the rulemaking process." Letter from Sec'y of Labor L. Martin to R. Georgine, "Constr. Activities and Operations and the Bloodborne Pathogens Standard" (1992) (SJ Attach. H), *available at* www.osha.gov/pls/oshaweb/owadisp. show_document?p_table =INTERPRETATIONS&p_id=20968.

- In 1996 OSHA revoked its 1993 verticalization of several Part 1910 electrical standards into Part 1926[18] because they were intended to apply only to "general industry" work rather than to construction. *See* 61 Fed. Reg. 41738 (1996), citing the preamble at 55 Fed. Reg. 31984 (1990) (Part 1910 electrical standards limited to "general industry and maritime"),[19] and revoking the adoption of §§ 1926.416(a)(4), (f) and (g), and 1926.417(d). OSHA stated that, because their Part 1910 counterparts "did not apply to construction employment[,]…[a]ny application of §§ 1910.333-334 to construction work would require further rulemaking." 61 Fed. Reg. at 41738 col. 2.

OSHA would never have revoked these verticalizations or declared these Part 1910 standards inapplicable to construction had it believed that § 1910.5(c) meant that all Part 1910 standards automatically apply to construction, even if they were not originally

[18] §§ 1910.333(c)(2), (10); .334(a)(1), (2)(iii), (5), (b)(1)-(2), (c)(1)-(3); .333(b)(2), *adopted as* §§ 1926.416(a)(4), (f) & (g), and 1926.417(d). 58 Fed. Reg. at 35179-35181, 35305-06.

[19] 55 Fed. Reg. 31984 col. 1, 31986 cols. 2-3 (1990) (electrical standards would apply to "general industry"; rulemaking limited to "general industry and maritime"; construction excluded.). See also 46 Fed. Reg. 4034, 4039 (1981).

intended to be so applied. These examples also explain why OSHA did not in 1993 forthrightly say that the absence of a preempting Part 1926 standard meant that a Part 1910 standard necessarily applied to construction, or say that mere presence in Part 1910 means that a standard necessarily applies to construction. OSHA knew that such assertions would be untrue. Bolon Tr. 46 (agreeing that "unpreempted Part 1910 standards don't automatically apply to construction work"; applicability "depends on their rulemaking history."). As Judge Simko observed (JD 8, 9), a Part 1910 standard "may or may not" apply to construction. The idea that all Part 1910 standards apply to construction unless there is a preempting construction standard is a myth that not even OSHA believes.

Moreover, OSHA would have been unable to explain how § 1910.5(c) could *lawfully* have authorized verticalizations. Section 1910.5(c) could not validly be used to apply to construction a WHA-derived standard that was not intended to so apply, for that would have substantively changed the application of the WHA ancestor. No regulation, let alone one not adopted in notice-and-comment rulemaking, may have that effect. See p. 35 above.

In sum, OSHA was required by the APA to explain how, as a matter of law, all Part 1910 standards applied to construction, and it did not. Nowhere did OSHA make a finding on what it has admitted is the only relevant point—that the verticalized standards applied all along to construction as a matter of law. Bolon Tr. 46. Nowhere did OSHA state that it had examined the standards' rulemaking history and determined that the standards applied to construction. Inasmuch as OSHA failed to consider or explain how WHA-derived standards applied to construction in the first place, its good cause finding was not "based on a consideration of the relevant factors" and "entirely failed to consider an important aspect of the problem." *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (invalid as "arbitrary and capricious").

There is another reason why OSHA could not have relied on § 1910.5(c). OSHA did not dispute KPCC's showing (Mot. 35-36) that § 1910.5(c) indicates only which of two *applicable* standards is controlling if one is generally applicable and one is more specifically applicable and thus preemptive. Section 1910.5(c) is inapposite if (as here) one of the two standards is not applicable in the first place—a point that rests not upon § 1910.5(c) (which is silent on the matter) but on the standard's rulemaking history. That is the way that § 1910.5(c) is written: Paragraph (c)(1) states that if a standard "is specifically *applicable*" to a condition, it "shall prevail" over any different general standard "which might otherwise be *applicable.*" (Emphasis added.) Paragraph (c)(2) likewise states that "any standard shall *apply according to its terms*…to the extent that none of such particular standards *applies*." (Emphasis added.) Nothing in § 1910.5(c)(2) permits OSHA to apply an *inapplicable* general industry standard—*i.e.,* one that was never intended to apply in the first place—to construction. Indeed, OSHA agreed that one would not ask whether one standard preempts another if one of them "is not even applicable in the first place." Bolon Tr. 38. And § 1910.5(c) obviously says nothing about whether a standard is applicable in the first place. Only if understood this way would § 1910.5(c) would yield a correct answer when applied to, *e.g.*, § 1910.1030.

Yet, OSHA never conducted the first step of the two-step inquiry that § 1910.5(c) requires—determine that a Part 1910 standard is *applicable* to construction and, if so, only then determine whether there is a *more* applicable Part 1926 standard. Again, OSHA's good cause finding was not "based on a consideration of the relevant factors" and "entirely failed to consider an important aspect of the problem." *State Farm,* 463 U.S. at 43.

OSHA argued before Judge Simko that Commission precedent about § 1910.5(c) addresses the issues raised here. It cited *Brown & Root Inc.*, 9 OSHC 1833, 1839 (No. 76-190, 1981), and (in other papers, *West. Waterproofing, Inc.*, 7 BNA OSHC 1499, 1501 (No. 14523, 1979)), both of which state that § 1910.5(c) "governs the application of

general industry standards to construction work…." Neither is apposite, for neither employer argued and neither opinion discussed whether a Part 1910 standard may be applied where, as here, the employer objects that it was not intended to apply to construction or could not validly be applied to such work. In *Western Waterproofing,* the employer claimed that two uncited Part 1926 standards preempted a cited Part 1910 standard. It did not claim that the Part 1910 standard was inapplicable in the first place but only that it was preempted. In response, the Commission applied § 1910.5(c), stating that it "governs the application of general industry standards to construction work…." Much the same is true of *Brown & Root.* Thus, neither case concerned whether a Part 1910 standard can be applied to construction if it was not intended to so apply *ab initio.* Instead, the employers assumed that the cited Part 1910 standards applied to construction, and discussed only preemption. Cases are not precedent on points that they did not consider.[20]

3. The Public Was Entitled To Comment on Whether § 1910.151(c) Was "Appropriate" To Apply to Construction. The "Good Cause" Exception Did Not Permit OSHA to Make Substantive Judgments Without Public Participation.

One of the most egregious aspects of OSHA's 1993 verticalization was that it rested on OSHA's private judgments as to the "appropriateness" of the application of Part 1910 standards to construction.

The "unnecessary" prong of the "good cause" exception applies when amendments are "minor or merely technical," and of little public interest. *Nat'l Nutri. Foods Ass'n v. Kennedy*, 572 F.2d 377, 384-85 (2d Cir. 1978) (per Friendly, J.) (quoting S. REP. NO. 752, at

[20] *Cagle's Inc.*, 21 BNA OSHC 1738, 1744 (No. 98-0485, 2006) (previous cases did not consider issue); *Northwest Airlines, Inc.*, 8 BNA OSHC 1982, 1988 (No. 13649, 1980) (same); *see generally Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (question must be "squarely addressed"); *Underhill Constr. Corp. v. OSHRC*, 526 F.2d 53, 54 n.3 (2d Cir. 1975) (issue neither briefed nor argued in prior decision).

200). It is "confined to those situations in which the administrative rule is a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public." *Util. Solid Waste Activs. Grp. v. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) (invalidating not "inconsequential" EPA amendment, public would be "greatly interested"); *Nat'l Family Plan. & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 241 (D.C. Cir. 1992) (HHS directive invalid; rulemaking would "force important issues into full public display"); J. LUBBERS, A GUIDE TO FED. AGENCY RULEMAKING 107 (4th ed. 2006) ("minor technical amendments that involve little exercise of agency discretion.").

None of that can be said here. That this was not a "purely ministerial action" (OSHA PDR at 7) or "routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public," is shown by the following:

- OSHA claimed that in 1993 it made findings of feasibility and significant risk. Sec'y's Supp. Responses to KPCC's First Set of Req. for Admissions at 3 (filed June 26, 2012) (asserting that OSHA in 1993 found that § 1926.50(g) "is feasible as applied to construction work," "is reasonably necessary or appropriate as applied to construction work," and "addresses a significant risk of harm in construction work"); Bolon Tr. 57 ("implicit" feasibility findings made in 1993).

- OSHA did not just apply all WHA-derived standards to construction. It took the extra step of determining whether their application to construction was "appropriate." OSHA picked and chose those WHA-derived standards and other § 6(a) standards that it thought *should* be applied to construction. Moreover, it stated that it would add other Part 1910 standards to Part 1926 if "enforcement experience" "indicate[s]" that they too are "applicable to construction." 58 Fed. Reg. at 35077.

- Whether a standard should be applied to construction is often an intensely debated question in OSHA rulemakings. *E.g.*, 57 Fed. Reg. 42102 (1992) (separate cadmium standard for construction developed because "differences in job duration, exposure and worksite conditions warrant unique treatment"); 43 Fed. Reg. 52986

(1978) (explaining exclusion of construction from lead standard); Bolon Tr. 36-37 (construction and non-construction standards may address the same hazard differently because of "feasibility" concerns, or "require different solutions" or "present a significant risk in one setting but not in the other").

- OSHA consulted with ACCSH, a body that is required to be consulted only about substantive changes to a construction standard (*Nat'l Constructors Ass'n v. Marshall*, 581 F.2d 960, 971 (D.C. Cir. 1978)), and which for this task formed a special subcommittee to determine which Part 1910 standards should be placed in Part 1926.
- The ACCSH subcommittee's debates were often intense. *E.g.*, Tr. 165 (June 14, 1978) (RR:41) (regarding § 1910.212(a)(4)); Tr. 81-89 (Jan. 10, 1974) (RR:31) (§ 1910.151(c), including Tr. 83 ("This is going to be a difficult one, gentlemen.") and Tr. 88-89 (vote to "flag" § 1910.151(c) for "special discussion" by the full committee.)
- The subcommittee frequently voted to delete or alter words in the standards. *E.g.,* Tr. 88-89 (voting to delete the word "suitable" from § 1910.151(c)).
- OSHA admitted that "ACCSH did not have to automatically recommend verticalization just because it did not see a preempting Part 1926 standard"; that ACCSH "could have recommended for exclusion from verticalization a Part 1910 standard that it thought wasn't feasible in construction work"; and that ACCSH "could have recommended for exclusion from the verticalization a standard they thought wasn't a good fit with construction work." Bolon Tr. 78-81.
- The subcommittee revolted against the entire effort because the Part 1910 standards need to be adapted, not adopted verbatim. See p. 12.
- Even after the ACCSH committee process ran its course, OSHA still professed uncertainty as to whether the chosen standards were suitable for application to construction: "every effort has been made to identify those… standards which are *most likely* to be applicable to construction work." 58 Fed. Reg. at 35077 (emphasis added).

- Verticalized standards were given a different status than unverticalized ones, which could not be cited in construction except through a "special procedure … established by the National Office." 58 Fed. Reg. at 35077.

The purpose of notice-and-comment rulemaking is to counter the institutional bias engendered by the inbred process followed here. See *Choc. Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4th Cir. 1985) (notice-and-comment helps "the agency maintain[] a flexible and open-minded attitude towards its own rules."); *see generally Chamber of Commerce v. OSHA,* 636 F.2d 464, 470-71 (D.C. Cir. 1980). Consultation with an advisory committee is no substitute for notice-and-comment rulemaking. *See Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002) (consulting selected members of affected public insufficient; rule invalid).

The public was thus entitled to comment on the correctness of the ACCSH subcommittee's and OSHA's view as to the appropriateness, feasibility and wisdom of applying the WHA standards to construction. The public could have observed that the WHA standards were expressly written only for "*certain particular* working conditions" (§ 50-204.1(a); § 1926.15(b)), *i.e.*, manufacturing. It could have observed that the Department had already concluded (p. 7), in a CSA notice-and-comment rulemaking, that the WHA ancestor of § 1910.151(c) *should not* be applied to construction. The public could have observed that the WHA standards "identified" as "applicable" to construction were, as a matter of law, not applicable. The public could have pointed out that the Department's own regulation (§ 1926.15(b)) stated that the WHA standards did not apply to construction. And the public could have observed that issuing citations citing a Part 1910 standard—no matter for how long—is not a proper basis for copying a standard into Part 1926.

This last point bears emphasis. One of OSHA's main criteria for selecting Part 1910 standards for verticalization was that its inspectors had a history of citing them in construction. See p. 14 above ("been applied to construction employment" meant

applied "by OSHA"). That OSHA inspectors had issued citations to construction employers, or that OSHA officials had concluded that they could, is not good cause for concluding that the cited standards applied or should be applied to construction. It is not even weak cause. It is no cause. If it were good cause, then OSHA could summarily, without public participation, write into law interpretations of standards merely because they have been reflected in citations. That is a recipe for lawlessness. OSHA failed to satisfy the "unnecessary" prong for good cause.

OSHA also failed to satisfy the "impracticable" prong. ""Impracticable" means a situation in which the due and required execution of the agency functions would be unavoidably prevented by its undertaking public rule-making proceedings." S.DOC. NO. 248, 79TH CONG., at 200 (1946). An example is an imminent threat. *Mack Trucks*, 682 F.3d at 93. Inasmuch as the verticalization effort was going on for decades, that could not be plausibly said here. If ACCSH could be consulted, so could the public.

In addition, Judge Simko's rejection of OSHA's assertion that the verticalization changed nothing was wise and insightful. First, the Judge's practical observation (JD 9) that the placement of a WHA-derived standard into Part 1926 makes "feasibility of compliance more difficult…to challenge" is unassailable. Such placement lends added credence to the supposition that the standard is feasible as applied to construction or addresses a significant risk of harm there, and thus, as a practical matter, increases the evidentiary burden on employers to prove infeasibility, *de minimis,* or invalidity as applied and, if relevant under a particular standard (*e.g.,* § 1926.95(a)), to disprove "hazard." The public should have been permitted to comment on the fairness of this. The public might have suggested that an interpretive regulation be placed in Part 1926 stating that certain asterisked provisions do not imply or carry a presumption that they are feasible as applied to construction or that they address a significant risk there.

Second, as the Judge observed (JD 8, 9), a Part 1910 standard "may or may not be applicable" to construction. *E.g.,* the Bloodborne Pathogens Standard and the Part 1910,

Subpart S electrical standards do not apply to construction even though their scope provisions do not say so. See p.36. It is OSHA's burden to prove that Part 1910 standards apply to construction and, depending on their rulemaking history, it may be unable to do so. As Judge Simko noted, however, placing a Part 1910 standard into Part 1926 raises "a presumption of applicability to construction work that otherwise does not exist…." Employers and judges alike would thus be misled into supposing that an erroneously verticalized standard applies to construction, and into not challenging whether OSHA had met its burden of proving applicability or challenging whether the standard is valid as so applied. The public should have been permitted to comment on this. It might have suggested that an interpretive regulation state that certain asterisked provisions in Part 1926 might not validly apply to construction.

Third, Judge Simko was correct that the verticalization shifted to the employer the burden of proving infeasibility or greater hazard plus alternative measures. OSHA's attempt (PDR at 7) to refute this rests on an irrelevant case—a verticalized Part 1910 standard *applicable* to construction. If the Part 1910 standard (such as § 1910.1030) were *in*applicable to construction, Judge Simko's observations would apply with full force: If OSHA were unable to show applicability to construction, it would have to instead cite § 5(a)(1) and bear the burden of proving feasibility and usefulness (negation of greater hazard). *Ed Cheff Logging*, 9 BNA OSHC 1883, 1890 (No. 77-2778, 1981).

Inasmuch as OSHA lacked good cause, § 1926.50(g) is invalid.

4. In 1993, OSHA Had No Authority to Dispense With Notice-And-Comment Rulemaking Or Rulemaking Findings.

Even if good cause within the meaning of the APA was established for the 1993 verticalization, it nevertheless was insufficient under OSH Act § 6(b). OSHA acknowledged that, ordinarily, it would have been required to follow APA and § 6(b) procedures for the verticalizations. See 58 Fed. Reg. at 35077 col. 1. (It could not have acted under § 6(a) for that authority had expired long before.) The APA's good cause

dispensation applies "*[e]xcept when* notice or hearing is required by statute." APA § 553(b) (emphasis added). OSH Act § 6(b) expressly requires notice and, upon request, a hearing, when promulgating a standard. Thus, the APA dispensation does not apply. *See Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 91-92 (D.C. Cir. 2012) ("[rulemaking] language [in organic statute, akin to § 6(b)(1)-(3)] seems to support…argument"; rejecting argument because of other provision without OSH Act analogue). And because the OSH Act provides no good-cause exception to § 6(b)'s rulemaking requirements, OSHA had no right (§ 1911.5 notwithstanding) to not follow them. Nor can OSHA argue that the APA limits the rulemaking requirements in the OSH Act, for APA § 559 states that the APA "do[es] not limit or repeal additional requirements imposed by statute or otherwise recognized by law."

B. Item 1 Must Alternatively Be Vacated Because OSHA Did Not Produce Evidence Showing That It Could Satisfy Its Burden of Proof.

The Commission could alternatively[21] vacate Item 1 because, contrary to FED.R.CIV.P. 56(e), OSHA failed to produce evidence showing it could satisfy its burden of proof. That rule requires the party with the burden of proof to show that it has evidence on necessary elements of its case. "Rule 56(e)…*requires* the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (emphasis added). "Rule 56(c) *mandates* the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.* at 323 (emphasis added).

[21] *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 4 (1st Cir. 1993) (affirming on grounds different than those below, citing authorities); *All Erec. & Crane Rental Corp. v. OSHRC*, 2012 WL 6028627 (6th Cir. 2012) (unpublished) ("Although the ALJ did not reach this element of the …defense, we could affirm on this ground.").

OSHA completely failed to present evidence on several crucial points, each of which are sufficient to vacate. OSHA's only evidence that the Part B mixture, and thus the Parts A-B mixture, were "corrosive" were MSDS and label statements required by § 1910.1200 ("HazCom Standard") of mixtures defined as "corrosives." But the HazCom Standard then defined Part B as a "corrosive," and required such "corrosive" warnings and statements, if as little as one percent of the mixture consists of a "corrosive" (§ 1910.1200(d)(5)(ii) and (g)(2)(C)(i) (2011)) and, as to the Parts A-B mixture, if as little as 0.5 percent of a mixture consists of a "corrosive." Such warnings and statements do not mean that a mixture is a "corrosive," let alone an "injurious corrosive," within the meaning of § 1926.50(g). 48 Fed. Reg. 53280, 53296, 53292 col. 3 (1983) (requirements reflect "possible hazards," not significant risk; whether actually hazardous is "not known" unless mixture tested as a whole).[22] OSHA so admitted in its Rule 30(b)(6) deposition. Sotak Tr. 70-71 (hazard and risk "two different things"; chemical might pose hazard but not risk); *id.* at 71-72 (MSDS must state hazard even if no significant risk prevent); *see also id.* at 74-75. And in the recent Globally Harmonized System (GHS) amendments to the standard, OSHA agreed explicitly. 77 Fed. Reg. 17574, 17711 (2012) (pre-amendment standard required mixtures with 1% toxic material be considered acutely toxic even if "no effect is expected to result"). OSHA also admitted that it has no evidence as to the strength (acidity/basicity) of the alleged "corrosive" and admitted that, rather than a "corrosive," it could actually be an "irritant." Sotak Tr. 31, 41-42, 44-45. And § 1910.1200 is silent on whether something is "injurious."

[22] OSHA'S GUIDANCE FOR HAZARD DETERMINATION FOR COMPLIANCE WITH THE OSHA HAZARD COMMUNICATION STANDARD (29 CFR 1910.1200), *available at* www.osha.gov/dsg/hazcom/ghd053107.html ("Hazard determination does not involve an estimation of risk.").

OSHA also admitted that it has no evidence that the distance to the nearest flushing facility was too far on the facts (Sotak Tr. 80-81) ("Q. So how far is too far in the facts of this case? A. I don't know."); admitted that it has no evidence on how far the cited operation was from the closest water hose (Tr. 76); it produced no evidence refuting KPCC's showing (Hinz Decl. ¶ 19; Perry Decl. ¶ 15 (the allegedly affected employee)) that water hoses and other water sources were "common throughout the construction site, usually as close together as every twenty feet"; and it produced no evidence refuting KPCC's showing that an employee could without difficulty walk to a hose in a few seconds (Perry Decl. ¶ 15). Appendix A, § 1910.1200 (2011), defines a "corrosive" as a substance that causes damage after an exposure of "four hours." See *Con Agra Flour Mill. Co.,* 16 BNA OSHC 1137, 1142 (No. 88-1250, 1993) (standard requires flushing facilities available "before [employees] suffer injury"); *Atl. Battery Co.,* 16 BNA OSHC 2131, 2167-2168 (No. 90-1747, 1994) (whether distance is excessive depends on, *inter alia*, "strength and amounts of the corrosive material...; …the distance between the area where the corrosive chemicals are used and the washing facilities"). Inasmuch as OSHA failed to present evidence on these elements, the item should be vacated on this ground.

V. Conclusion

The order of Judge Simko vacating Item 1 of Citation 1 should be affirmed, and a declaratory order issued declaring that paragraph (g) of 29 C.F.R. § 1926.50 is invalid.

Respectfully submitted,

/s/ 

Arthur G. Sapper, Esq.
James A. Lastowka, Esq.
McDERMOTT WILL & EMERY LLP
Attorneys for Respondent, Kiewit Power Constructors Co.

Certificate of Service

I HEREBY CERTIFY that on this 14th day of May 2013—

- I caused to be sent a copy of the foregoing (labeled "11-2395 Respondent's Opening Brief.pdf") by, as ordered by the Commission, electronic mail to Glabman.Scott@dol.gov; and
- I caused, in accordance with the Commission's briefing order and its instructions for implementing § 2200.8(g), to be sent by Federal Express to the following physical address a CD-ROM containing the appendix to the brief:

Scott Glabman, Esq., Senior Appellate Attorney
Room S-4004
Office of the Solicitor
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20036-3419

/s/ 
Arthur G. Sapper, Esq.
McDermott Will & Emery LLP

Addendum Table of Contents

Addendum A: Rulemaking History of
41 C.F.R. § 50-204.6(c), 29 C.F.R. § 1910.151(c), and 29 C.F.R. § 1926.50(g)

Statute	Standard	Event	Coverage	Citation	Notice-and-Comment Rulemaking?
Walsh-Healey Act	41 C.F.R. § 50-204.6(c)	Proposal (as § 50-204.63(c))	Federal contracts for "manufacture or furnishing of materials, supplies, articles, and equipment"	33 Fed. Reg. 14258, 14270 (1968)	Yes
		Final Rule		34 Fed. Reg. 788, 789-90 (1969); 34 Fed. Reg. 7947 (1969)	
Constr. Safety Act	None	Proposal: no version of 41 C.F.R. § 50-204.6(c) proposed for application to construction	Federal contracts for construction	36 Fed. Reg. 1802 (Feb. 2, 1971)	Yes
		Final Rule: no version of 41 C.F.R. § 50-204.6(c) applied to construction		36 Fed. Reg. 7340 (April 17, 1971)	
OSH Act	29 C.F.R. § 1910.151(c)	Final Rule: 41 C.F.R. § 50-204.6(c) adopted as 29 C.F.R. § 1910.151(c)	§ 1910.5(e) (revoked 9/9/71): "plants, factories, [etc.]… where materials … or equipment are manufactured or furnished"	36 Fed. Reg. 10466, 10601 col. 2 (1971); 36 Fed. Reg. 18080 (1971) (revoking § 1910.5(e)).	No; adopted under OSH Act § 6(a).
	29 C.F.R. § 1926.50(g)	Final Rule: § 1910.151(c) applied to construction	Construction	58 Fed. Reg. 35076, 35084 col. 1 (1993)	No

Addendum B: Index to Rulemaking Record

RR No.	Original File Name	Corrected File Name
1	19360600 49Stat 2036-Chapter 881- an act.pdf	
2	19400000 Title 41USC-secs 35HnS-38Regs.pdf	
3	v3Titles3450[1].pdf	19400000 Title 41 U.S.C. § - secs 35HnS-38Regs.pdf
4	19420500 56Stat277-Chapter 306 amend Title 41-sec35-subsec(c).pdf	
5	19630809 28FedReg8208-50-204-Radiation.pdf	
6	19631001 28FedReg10524-50-204 proposed revisions-1thru300.pdf	
7	19640000 Title 41Walsh-Healey short name sec 35 37 USC.pdf	
8	19640129 29FedReg1437-50-204-radiation.pdf	
9	19640131 29FedReg1620-50-204-306-radiation.pdf	
10	19650416 30FedReg5483-radiation.pdf	
11	19680920 33FedReg14258 propsdrule 50-204 pubcmnt.pdf	
12	19690000 41CFRChapter50-204-subsec264-269-270 eye first aid.pdf	
13	19690117 34FedReg788 Chapter50-204-subsec6c revzd.pdf	
14	19690423 34FedReg6779-Chapter50-204-subsec36 radiation-mining.pdf	
15	19690520 34FedReg7948-Chapter50-204-subsec6c.pdf	
16	19700000 41CFR50-204-6c.pdf	
17	19700124 35FedReg1005-Chapter50-204-subsec6a	

RR No.	Original File Name	Corrected File Name
	revzd.pdf	
18	19710202 36FedReg[II] prpsd 1518.pdf	
19	19710222-23 OSHA-ACCSH1971-1-2006-0067-0002[1].pdf	
20	19710417 36FedReg[II]-final rules 1518.pdf	
21	19710814 36FedReg5[1] delayd effect date for residential mods.pdf	
22	19710923 ACCSH stndrds discussion.pdf	
23	19710923 OSHA-ACCSH1971-3-2006-0069-0001[1].pdf	
24	19710928 36FedReg5[1]-1518prpsd rules.pdf	
25	19711215 OSHA-ACCSH1971-5-2006-0071-0001[1].pdf	
26	19720000 29CFR1910SubK-151c.pdf	
27	19731203 OSHA-ACCSH1973-4-2006-0088-0001[1].pdf	
28	19731204 OSHA-ACCSH1973-4-2006-0088-0002[1].pdf	
29	19731204 OSHA-ACCSH1973-4-2006-0088-0002[2].pdf	
30	19740103 39FedReg771[1] see 861ACCSH-notice.pdf	
31	19740110 OSHA-ACCSH1974-1-2006-0089-0002[1].pdf	
32	19740111 OSHA-ACCSH1974-1-2006-0089-0003[1].pdf	
33	19740124 OSHA-ACCSH1974-1-2006-0089-0004[1].pdf	
34	19740627 39FedReg23502 repub 1910-source of 151c.pdf	
35	19750000 29CFR1910SubK-151c.pdf	
36	19750000 41CFR50-204-6c.pdf	
37	19780530 OSHA-ACCSH1978-1-2006-0110-0001[1].pdf	

RR No.	Original File Name	Corrected File Name
38	19780530 OSHA-ACCSH1978-1-2006-0114-0001[1].pdf	
39	19780613 OSHA-ACCSH1978-1-2006-0110-0002[1].pdf	
40	19780613 OSHA-ACCSH1978-1-2006-0114-0002[1].pdf	
41	19780614 OSHA-ACCSH1978-1-2006-0110-0003[1].pdf	
42	19780614 OSHA-ACCSH1978-1-2006-0114-0003[1].pdf	
43	06_14_78 Hearing Transcript.pdf	19780614 Hearing Transcript.pdf
44	19790209 44 FR 8577 1910 applicable to 1926.pdf	
45	19790406 44FedReg20940.pdf	
46	19790406 44FedReg20940 corrections to 9Feb79 notice.pdf	
47	19920519 OSHA-ACCSH1992-1-2006-0158-0002[1] 1910 to 1926 presentation.pdf	
48	19930129 OSHA-ACCSH1993-1-2006-0161-0003.pdf	
49	19930216 OSHA-ACCSH1993-1-2006-0161-0009.pdf	
50	19930630 58 FR 35160 1910 applcble to-renumbered in 1926.pdf	

Addendum C: Table of Contents of Appendix (on CD-ROM)

Index to Rulemaking Record (Addendum B)

Rulemaking Record (RR:)

Transcripts of ACCSH Meetings: Jan. 24, 1974, Tr. 105-09; Jan. 10, 1974, Tr. 15, 44, 81-89, 113; June 14, 1978, Tr. 165.

Labor Department Compilation of Sources of Part 1926 (April 17, 1971), excerpts, with authenticating letters; compilation in full

1974 BNA OSHR CURRENT REPORT 1201

36 Fed. Reg. 10466 (1971), adoption of 29 C.F.R. Part 1910, incl. § 1910.5 and 1910.151

36 Fed. Reg. 18080 (Sept. 9, 1971) (revoking § 1910.5(e))

"Identification of General Industry Standards Applicable to Construction Work," 44 Fed. Reg. 8577, 8589 col. 1 (1979)

55 Fed. Reg. 31984-86, 32007 (1990) (adopting Part 1910 electrical standards)

"Incorporation of General Industry Standards Applicable to Construction Work," 58 Fed. Reg. 35076, 35084 col.1 (1993); and "Appendix A to Part 1926, Designations for General Industry Standards Incorporated Into Body of Construction Standards," *id.* at 35305 col. 2

61 Fed. Reg. 41738 (1996) (revoking §§ 1926.416(a)(4), (f) and (g), and § 1926.417(d))

Letter from G. Reidy (OSHA) to G. Kennedy (Nat'l Utility Contractors Ass'n) (1990), *available at* *http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20081*

Letter from Sec'y of Labor L. Martin to R. Georgine, "Construction Activities and Operations and the Bloodborne Pathogens Standard" (1992), *available at* *http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20968*

Excerpt from transcript of ACCSH Meeting, at p.32 (Feb. 16, 1993) (OSHA-ACCSH1993-1-2006-0161-0009), with authenticating letters

Sec'y Br. at 43-44 (filed July 30, 2007), in *Solis v. Summit Contracts., Inc.*, 558 F.3d 815 (8th

Cir. 2009), *available at* http://www.dol.gov/sol/media/briefs/summit-07-30-2007.htm

LABOR DEPARTMENT, EMPLOYMENT LAW GUIDE: FEDERAL CONTRACTS-WORKING CONDITIONS: WAGES IN SUPPLY & EQUIPMENT CONTRACTS; WALSH-HEALEY PUBLIC CONTRACTS ACT (PCA); WHO IS COVERED, *available at* www.dol.gov/compliance/guide/walshh.htm

OSHA, GUIDANCE FOR HAZARD DETERMINATION FOR COMPLIANCE WITH THE OSHA HAZARD COMMUNICATION STANDARD (29 CFR 1910.1200), *available at* www.osha.gov/dsg/hazcom/ghd053107.html

Deposition of the Secretary of Labor under Rule 30(b)(6) (through P. Bolon) (validity)

Deposition of the Secretary of Labor under Rule 30(b)(6) (through M. Sotak) (violation)