BY ELECTRONIC MAIL

October 29, 2013

Ray H. Darling, Jr.
Executive Secretary
Occupational Safety and Health Review Commission
washoshrccommission@oshrc.gov

Re: *Kiewit Power Constructors Co.*, No. 11-2395

Dear Mr. Darling:

This letter responds to Kiewit's October 24, 2013 letter citing four immigration cases for the proposition that *Chevron* deference is inapplicable if a clear indication of statutory intent is required for judicial decision. Kiewit's cases are inapplicable because they concern the judicial requirement that a statute may not be applied retroactively unless there is clear statutory language evincing such intent. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). Absent such clear intent, Supreme Court precedent requires that the statute be applied only prospectively, and therefore the ambiguity necessary for *Chevron* deference does not exist. *Id*. at 320 n.46.

Here, by contrast, the disputed interpretation of 29 U.S.C. § 655(a) does not involve the retroactive application of a new statutory provision, but the scope of the Secretary's authority to promulgate established federal standards as OSH Act standards. Furthermore, the cited cases also do not support Kiewit's reliance on 5 U.S.C. § 559, the APA's anti-implied-repeal provision, a statutory codification of the familiar judicial presumption against repeals by implication.[1] *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007).

The anti-implied-repeal provision is inapplicable because § 655(a) *expressly* authorized the Secretary to promulgate established federal standards as OSH Act standards without notice-and-comment rule-making. As the Secretary showed in his reply brief, his interpretation of § 655(a) is entitled to *Chevron* deference because the provision is a jurisdictional provision of a statute he administers. Sec. Reply Br. 2 (citing *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1871 (2013) ("we have consistently held that *Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers. . . . One of our opinions explicitly says that no exception exists to the normal [deferential] standard of review for jurisdictional or legal questions concerning the coverage of an Act").

[1] This provision says "a subsequent statute may not be held to supersede or modify this subchapter [which includes notice-and-comment rule-making requirements]. . . except to the extent that it does so expressly." 5 U.S.C. § 559.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety
and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

/s/ Scott Glabman
SCOTT GLABMAN
Senior Appellate Attorney
U.S. Department of Labor
Frances Perkins Bldg.,
Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210-0001
(202) 693-5493

Cc: Arthur G. Sapper, Esq.
Lawrence J. Joseph, Esq.

"Kiewit Power Constructors Co.," No. 11-2395

Glabman, Scott - SOL [Glabman.Scott@dol.gov]

Sent: Tuesday, October 29, 2013 1:28 PM

To: washoshrccommission

Cc: asapper@mwe.com; ljoseph@larryjoseph.com

Attachments: Kiewit-OSHRC-Reply to Kiew~1.pdf (132 KB)

Dear Mr. Darling:

I attach the Secretary's reply to Kiewit's October 24, 2013 supplemental authority letter in the above case. I have e-mailed a copy of the reply to opposing counsel and counsel for aspiring *amicus curiae* APA Watch as indicated in the above cc line.

Sincerely,

Scott Glabman
Senior Appellate Attorney
Office of the Solicitor
Occupational Safety and Health Division
U.S. Department of Labor
(voice) (202) 693-5493
(fax) (202) 693-5466