



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

KIEWIT POWER CONSTRUCTORS, INC.,

Respondent.

OSHRC Docket No. 11-2395

BRIEFING NOTICE

The Commission requests that the parties brief the following issues:

- (1) During the two-year period following the effective date of the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. § 655(a), section 6(a) of the OSH Act authorized the Secretary to promulgate any “established Federal standard” as an occupational safety or health standard unless the Secretary determined that its promulgation “would not result in improved safety or health for specifically designated employees.”

Under section 6(a) of the OSH Act, was the Secretary permitted to promulgate 41 C.F.R. § 50-204.6(c), a standard issued under the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.*, as an occupational safety or health standard applicable to employers engaged in construction? *See Am. Can Co.*, 10 BNA OSHC 1305 (No. 76-5162, 1982) (consolidated).

- (2) In light of 29 C.F.R. §§ 1910.5, 1910.11(a) and 1910.151(c), did the judge err in finding that 29 C.F.R. § 1926.50(g) is invalid pursuant to section 6(b) of the OSH Act, 29 U.S.C. § 655(b), and 5 U.S.C. § 553 of the Administrative Procedure Act, because the Secretary did not conduct notice-and-comment rulemaking in promulgating this provision?
- (3) Is Respondent’s challenge to the validity of 29 C.F.R. § 1926.50(g) timely?
- (4) Is the declaratory relief the Respondent seeks available and, if so, is granting it appropriate in this matter?

The briefing schedule will be simultaneous, with opening briefs from the parties filed within forty days of this Briefing Notice. Any reply briefs are to be filed within twenty days from when

the opening briefs are due. All briefs shall be filed and served via electronic mail.¹ The Commission grants the parties permission to file opening briefs that are up to fifty pages of text in length and reply briefs that are up to thirty-five pages of text length, and typeface shall be no less than 12 point for all briefs. If a party elects to incorporate by reference any arguments set forth in (1) the Secretary's Petition for Discretionary Review, (2) Respondent's Cross Petition for Discretionary Review, (3) Respondent's Motion to Dismiss or for Summary Judgment and Motion for Declaratory Relief Part One (Validity), and (4) Secretary's Response to the Respondent's Motion for Summary Judgment and Motion for Declaratory Order, that incorporation will not count towards page limits for the opening or reply briefs. Requests for permission to exceed these page limits will not be granted, nor will the Commission entertain requests to file sur-reply briefs.

Except as set forth above, briefs are to be filed in accordance with Commission Rules 7(c); 8(g) and 93.² Any party who does not intend to file a brief is asked to notify the Commission of its intent in writing within the applicable time for filing briefs and serve a copy on all other parties.

BY DIRECTION OF THE COMMISSION

Dated: March 4, 2013

/s/

Ray H. Darling, Jr.
Executive Secretary

¹ Parties are directed to contact the Executive Secretary's Office at 202-606-5400 for the appropriate email address to use when filing briefs for this matter with the Commission.

² The Commission requests that all briefs include an alphabetical table of authorities with references to the pages on which they are cited, and that an asterisk be placed in the left-hand margin of the table to indicate those authorities on which the brief principally relies. The Commission also requests that copies of cited authority, other than statutes, case law, law journal articles and legal treatises, be provided to the Commission and to the opposing party. Parties should be cautioned that these materials will be considered only if appropriate.