No. 11-2395

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SETH D. HARRIS,

ACTING SECRETARY OF LABOR,

Complainant,

v.

KIEWIT POWER CONSTRUCTORS CO.,

Respondent.

BRIEF FOR THE ACTING SECRETARY OF LABOR

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MAY 14, 2013

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STATEMENT OF ISSUES

(1) Considering *Am. Can Co.*, 10 BNA OSHC 1305 (No. 76-5162, 1982) (consolidated), was the Secretary permitted, under section 6(a) of the Occupational Safety and Health Act ("OSH Act"), to promulgate 41 C.F.R. § 50–204.6(c), an established federal standard under the Walsh-Healey Act requiring quick drenching facilities for exposed employees, as an occupational safety or health standard applicable to construction employers?

(2) In light of 29 C.F.R. §§ 1910.5, 1910.11(a) and 1910.151(c), did the administrative law judge ("ALJ") err in finding the incorporation of the general industry "quick drenching" provision into the construction standard at § 1926.50(g) invalid because the Secretary did not conduct notice-and-comment rule-making?

(3) Assuming that Respondent Kiewit Power Constructors, Inc. prevails on the first two issues, is the order that Kiewit seeks, declaring 29 C.F.R. § 1926.50(g) invalid, available, and, if so, would such declaratory relief be appropriate?[1]

STATEMENT OF THE CASE

This case concerns a citation that the Secretary issued to Respondent Kiewit Power Constructors Company, alleging a serious violation of 29 C.F.R. § 1926.50(g), after inspecting Kiewit's work site in Rogersville, Tennessee on August 3, 2011. ALJ Dec. 1; Amended Complaint, Ex. A. Kiewit's principal place of business is in Lenexa, Kansas. Answer, § A, para. 3. The citation proposed a penalty of $3,400. Amended Complaint, Ex. A. Kiewit moved to dismiss the complaint on the ground that the cited

[1] The Commission's briefing notice also asked the parties to brief whether Kiewit's challenge to the validity of 29 C.F.R. § 1926.50(g) is timely. Briefing Notice 1 (Mar. 4, 2013). Since the Secretary does not contest Kiewit's right to challenge this standard during an enforcement proceeding, he will not brief this issue here.

provision was invalidly adopted without notice-and-comment rule-making. ALJ Dec. 1; Kiewit Motion to Dismiss at 64. The ALJ granted the motion and vacated the citation. ALJ Dec. 10. The Acting Secretary of Labor filed a petition for discretionary review of the ALJ's decision. The Commission directed this case for review, and on March 4, 2013, issued a briefing notice specifying the issues to be briefed on appeal.

STATUTORY AND REGULATORY BACKGROUND

I. *Key Statutory Provisions*

The Secretary adopted the Walsh-Healey Act "quick drenching" provision, 41 C.F.R. § 50–204.6(c), as an occupational safety and health standard under sections 3(8), 3(10), 4(b)(2) and 6(a) of the Act. Section 6(a) of the OSH Act provides:

> Without regard to chapter 5 of title 5, United States Code [the rule-making provisions of the Administrative Procedure Act] or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any *established Federal standard*, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees.

29 U.S.C. § 655(a) (emphasis added).

Section 3(8) of the OSH Act defines "occupational safety and health standard " as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(8). Section 3(10) of the OSH Act defines an "established Federal standard" as "any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of

enactment of this Act."[2] 29 U.S.C. § 652(10). The Walsh-Healey Act "quick drenching" standard, 41 C.F.R. § 50–204.6(c), was such an operative safety and health standard in effect on December 29, 1970, the date that the OSH Act was enacted. *See* Dep't of Labor, Title 41, Part 50-204, "Safety and Health Standards for Federal Supply Contracts," 34 Fed. Reg. 7946, 7948 (1969) (promulgating § 50–204.6(c)). Thus, the Walsh-Healey Act "quick drenching" standard qualified as an established federal standard.

Further, section 4(b)(2) of the OSH Act provides that:

> [t]he safety and health standards issued under the . . . Walsh-Healey Act . . . are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this chapter shall be deemed to be occupational safety and health standards issued under this chapter, as well as under such other Acts.

29 U.S.C. § 653(b)(2). Accordingly, the "quick drenching" provision promulgated under the OSH Act in 29 C.F.R. § 1910.151(c) is an occupational safety and health standard, subject to OSH Act requirements, not a Walsh-Healey Act standard, governed by Walsh-Healey Act requirements.[3]

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[2] The OSH Act was enacted on December 29, 1970. OSH Act, Pub.L. No. 91-596, § 34, 84 Stat. 1590, 1620 (1970).

[3] OSH Act standards are enforceable by the Act's flexible enforcement scheme of citations, penalties and requests for injunctive relief against imminent dangers. *Am. Can Co.*, 10 BNA OSHC at 1312 & n.19. Walsh-Healey Act standards, by contrast, are backed up only by an inflexible enforcement scheme of federal contract cancellations and blacklisting. *Id.* at 1312 & n.17.

II. *Legislative History*

The legislative history of section 6(a) of the OSH Act reveals Congress's intent to require the Secretary to adopt established federal standards as OSH Act standards as soon as possible, without notice-and-comment rule-making, to provide immediate protection to underprotected workers. In the floor debates, members of Congress cited the large number of occupational injuries and the vast number of workers who lacked federal protection. Senator Williams, the sponsor of the bill that passed the Senate, S. 2193, pointed out, in the Senate debate, that every year, "over 7 million of the working force of 80 million are injured, 2.2 million are disabled . . . and 14,500 are killed." 116 Cong. Rec. 37,317, 37,345, 42,199, 42,204 (1970), *reprinted in Legislative History of the OSH Act of 1970* 411, 444, 1199, 1212. Senator Williams also noted that "the heaviest losses are in construction work." 116 Cong. Rec. at 37,345, *Legislative History*, at 444. In the House debate, Representative Gaydos observed that the Act "would protect at least 11 million workers now outside Federal protection . . . [and] at least 80 million workers now afforded insufficient protection." 116 Cong. Rec. 38,366, 38,388 (1970), *Legislative History* 977, 1036.

The bill that passed the Senate, S-2193, the Williams bill, and the one that passed the House, H.R. 19200, the Steiger-Sikes bill, 116 Cong. Rec. at 42,204, *Legislative History* at 1212, both emphasized the need to promulgate established federal standards as soon as possible, without notice-and-comment rule-making, to extend immediate, expanded protection to unprotected workers. The Senate Committee on Labor and Public Welfare, in recommending the passage of the Williams bill, S. 2193, reported that "[t]he bill also provides for the issuance in similar fashion [i.e., as rapidly as possible and

without notice-and-comment rule-making] 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." S. Rep. No. 91-1282, at 6 (1970), *Legislative History* 141, 146. The purpose of this rapid adoption and expansion in coverage of established federal standards was to provide an immediate nation-wide minimum level of health and safety. *Id.* The Steiger-Sikes bill, H.R. 19200, also provided for immediate promulgation of existing federal standards, without invoking APA procedures, to provide immediate protection to workers. 116 Cong. Rec. at 38,367-68, *Legislative History* at 981-83 (statement of Rep. Anderson).

III. *Regulatory History*

On May 29, 1971, pursuant to section 6(a) of the OSH Act, the Secretary adopted the Walsh-Healey Act "quick drenching" standard, 41 C.F.R. § 50-204.6(c), an "established federal standard," as an OSH Act general industry standard, codified at 29 C.F.R. § 1910.151(c).[4] OSHA, "Part 1910-Occupational Safety and Health Standards, National Consensus Standards and Established Federal Standards," 36 Fed. Reg. 10,466, 10,601 (1971). Section 1910.151(c), which is textually identical to its Walsh-Healey Act source, 41 C.F.R. § 50–204.6(c), provides that "[w]here 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." 29 C.F.R. § 1910.151(c).

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[4] Established federal standards promulgated under section 6(a) of the OSH Act, are exempt from notice-and-comment rule-making requirements because Congress recognized an immediate need to provide a nation-wide minimum level of safety and health, and because these standards would have already been subjected to close public scrutiny in their original issuance. *Diebold, Inc. v. Marshall*, 585 F.2d, 1327, 1330-31 (6th Cir. 1978).

Adopted established federal standards, such as § 1910.151(c), have general application and may be applied to employers in construction and other industries for which specific industry standards have been adopted if no such specific industry standard applies. 29 C.F.R. § 1910.11(a) ("[t]he provisions of this Subpart B adopt *and extend* the applicability of established Federal standards in effect on April 28, 1971, with respect to *every employer, employee, and employment covered by the Act.*") (emphasis added); *Bechtel Power Corp.*, 4 BNA OSHC 1005, 1008 (No. 5064, 1976) (Secretary acted within his statutory authority under sections (4)(b)(2) and 6(a) of the OSH Act in adopting § 1910.11 to extend established Federal standards to every covered place of employment), *aff'd*, 548 F.2d 248 (8th Cir. 1977); *see also* § 1910.5(c)(2) ("any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, . . . to the extent that none of such particular standards applies").

From the early days of the OSHA program, the Secretary recognized that:

> [t]here are circumstances where the safety and health standards for construction employment (29 CFR part 1926) are less comprehensive than the safety and health standards for general industry employment (29 CFR part 1910). In a number of cases, the Agency has determined that it is appropriate to cite a construction employer for a violation of a part 1910 standard, to effectuate the purposes of the OSH Act.

"Incorporation of General Industry Safety and Health Standards Applicable to Construction Work," 58 Fed. Reg. 35,076, 35,076 (1993).

On February 9, 1979, to promote better public understanding of OSHA's construction hazard enforcement policy, the Secretary published a notice in the Federal Register listing the entire text of 29 C.F.R. Part 1926, along with certain general industry standards which she had identified as applicable to construction work. OSHA, Parts

1926, 1910, "Identification of General Industry Safety and Health Standards (29 CFR Part 1910) Applicable to Construction Work," 44 Fed. Reg. 8,577, 8,577 (1979). In this notice, the Secretary specifically identified 29 C.F.R. § 1910.151(c) as one of these part 1910 standards applicable to construction work. "Identification," 44 Fed. Reg. at 8,589. The Secretary also noted that the identification of these applicable general industry standards was the first step in her long-range program of consolidating all the regulations applicable to construction work in a single comprehensive set of construction regulations in part 1926. *Id.* at 8,577.

On June 30, 1993, at the request of both labor and management groups, OSHA published a single volume of regulations applicable to the construction industry, incorporating all those general industry requirements, including § 1910.151(c), that the agency had previously determined were applicable to construction employment. "Incorporation of General Industry Standards," 58 Fed. Reg. at 35,076, 35,084, 35,305. This consolidation provided a "more comprehensive compilation of applicable safety and health standards," reducing the need for construction employers and employees to consult both parts 1910 and 1926 to identify applicable standards. *Id.* at 35,076. As part of this effort, § 1910.151(c), which had long been applicable to construction employment, was given its own part 1926 designation, § 1926.50(g).[5] "Incorporation," 58 Fed. Reg. at 35,084, 35,305. Section 1926.50(g) is textually identical to its general industry and Walsh-Healey Act sources, §§ 1910.151(c) and 41 C.F.R. § 50–204.6(c).

[5] Although the Secretary made every effort to identify all applicable general industry provisions in this notice, she acknowledged that other part 1910 provisions may also be applicable, and she set up a special procedure to address any such eventualities. 58 Fed. Reg. at 35,077.

Pursuant to § 1911.5, the Secretary expressly made a good cause finding that she was exempt from the notice-and-comment rule-making requirements of section 4 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553, and section 6(b) of the OSH Act, 29 U.S.C. § 655(b). "Incorporation," 58 Fed. Reg. at 35,077. This finding stated that notice-and-comment rule-making was unnecessary because the incorporation did not modify or revoke existing rights or obligations or create new ones, but simply provided additional information on the existing regulatory burden. *Id.*

THE ALJ'S DECISION

The ALJ found that OSHA's 1993 codification of the "quick drenching" requirement as § 1926.50(g) of part 1926 was a substantive change requiring notice-and-comment procedures because the construction standards in part 1926 had not previously contained this requirement. ALJ Dec. 8. The judge acknowledged that before the 1993 codification of § 1926.50(g), the "quick drenching" requirement in § 1910.151(c) could have applied to construction employers. ALJ Dec. 9 ("While 29 C.F.R. § 1910.151(c), a general industry standard, contained this requirement for quick drenching facilities, its terms may or may not apply to specific construction work"). The judge reasoned, however, that "[b]y moving the ["quick drenching"] requirement into the construction standard, there becomes a presumption of applicability to construction work that otherwise does not exist for provisions contained in general standards in Part 1910." *Id.* Moreover, the judge stated that the codification of the "quick drenching" requirement as a construction standard would make the affirmative defense of infeasibility more difficult for the employer to prove. *Id.* Thus, the judge concluded that the codification of

§ 1926.50(g) had a substantial impact on private parties engaged in construction activity and required a proposed rule subject to notice and comment. *Id.*

SUMMARY OF THE ARGUMENT

Section 6(a) of the OSH Act authorized the Secretary to extend the coverage of the Walsh-Healey Act "quick drenching" standard, 41 C.F.R. § 50.204.6(c), to construction employers without notice-and-comment rule-making. Section 6(a) expressly exempted the Secretary from APA rule-making requirements in ordering her to adopt established federal standards "as soon as practicable" within two years of the effective date of the Act. The legislative history of section 6(a) indicates that the purpose of adopting these established standards without notice-and-comment rule-making was to extend immediate expanded protection under the OSH Act to the many workers who were not covered by the source standards. The Secretary implemented this statutory purpose in promulgating 29 C.F.R. §1910.11(a), expressly adopting and extending the applicability of established standards "to every employee, employer and employment covered by the Act." Both the courts of appeals and the Commission have long recognized that, in adopting established federal standards as OSH Act standards, the Secretary was not required to adopt the source standards' scope and application limits but could expand them summarily to obey the statutory mandate to cover workers who were not covered by the source standards. Thus, section 6(a) permitted the Secretary's summary extension of the Walsh-Healey Act quick drenching standard from manufacturing employees to construction employees.

The ALJ erred in finding that the Secretary's adoption of the construction quick drenching provision, 29 C.F.R. § 1926.50(g), was a substantive change requiring notice-and-comment rule-making. The Secretary adopted the Walsh-Healey Act "quick drenching"

standard, 41 C.F.R. § 50.204.6(c), an established federal standard, as an OSHA standard of general application under section 6(a) of the Act, codified at 29 C.F.R. § 1910.151(c). As a result, § 1910.151(c) became applicable "to every employer, employee, and employment covered by the Act," § 1910.11(a), including construction employees exposed to injurious corrosive materials. Since the incorporation of the quick drenching provision into the construction standard at § 1926.50(g) was a mere codification of a requirement that already applied to construction work, the adoption of the construction quick drenching provision was not a substantive change requiring notice-and-comment rule-making.

Assuming the Commission finds § 1926.50(g) to be invalid, declaratory relief is not appropriate because it would not serve a useful purpose. Every purpose that Kiewit claims would be served by declaratory relief - resolution of this controversy, removal of uncertainty about the company's future compliance obligations, and clarification of the status of the cited provision - would also be achieved by a judgment that the provision is invalid. Accordingly, such relief should be denied.

ARGUMENT

I. *The Secretary Had Authority under Section 6(a) of the OSH Act To Extend the Coverage of the Walsh-Healey Act "Quick Drenching" Standard to Construction Employers Without Notice-and-Comment Rule-Making.*

Section 6(a) of the OSH Act, its legislative history, and the interpretive case law all demonstrate that the Secretary had authority to extend the coverage of the Walsh-Healey Act "quick drenching" standard to construction employers without notice-and-comment rule-making when she adopted that established federal standard as an occupational safety or health standard. Section 6(a) expressly exempted the Secretary from APA rule-making requirements (chapter 5 of title 5 of the U.S. Code) in ordering

her to adopt established federal standards "as soon as practicable" within two years of the effective date of the Act. 29 U.S.C. § 655(a).

Further, the legislative history makes it clear that the purpose of adopting these established standards without notice-and-comment rule-making was to extend immediate expanded protection under the OSH Act to the many workers who were not covered by the source standards. Congressional debate revealed that:

(1) the heaviest losses of the over 7 million annual occupational injuries were in construction work, 116 Cong. Rec. 37,317, 37,345 (1970) (statement of Sen. Williams), *reprinted in Legislative History of the OSH Act of 1970*, at 411, 444; and

(2) at least 11 million workers were not protected by federal statutes or standards, and at least 80 million were underprotected, 116 Cong. Rec. 38,366, 38,388 (1970) (statement of Rep. Gaydos), *Legislative History*, at 977, 1036.

Accordingly, the Senate Labor and Public Welfare Committee reported that the Williams bill, S. 2193, the bill that passed the Senate, "provides for the issuance in similar fashion [i.e., as rapidly as possible and without notice-and-comment rule-making] 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." S. Rep. No. 91-1282, at 6 (1970), *Legislative History* at 146. Similarly, the Steiger-Sikes bill, H.R. 19200, the bill that passed the House, also provided for immediate promulgation of existing federal standards, without invoking APA procedures, to provide immediate protection to workers. 116 Cong. Rec. at 38,367-68, *Legislative History* at 981-83 (statement of Rep. Anderson).

The case law interpreting section 6(a) of the OSH Act reflects this Congressional purpose of expanding the scope of the established federal standards to provide immediate protection for uncovered workers. Both the courts of appeals and the Commission have long recognized that, in adopting established federal standards as OSH Act standards, the Secretary was not required to adopt the source standards' scope and application limits. Thus, the Sixth Circuit has held that "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." *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332 n.6 (6th Cir. 1976).

The Tenth Circuit specifically applied this principle to the Walsh-Healey Act standards, noting that the very purpose of adopting established standards was to extend protection to workers who had not been covered by the source standards: "Congress itself adopted the Walsh-Healey standards as occupational safety and health standards of general application. . . . Indeed, the principal purpose to be served by adopting standards established under previous federal statutes as standards of the Act was *to extend protection to many workers who had not been covered by previous standards*." *Lee Way Motor Freight, Inc. v. Secretary*, 511 F.2d 864, 869 (10th Cir. 1975) (emphasis added).

In a long line of cases, the Commission has also held, based on the legislative history of section 6(a) of the OSH Act, that Congress authorized the Secretary to expand summarily the scope of established federal standards to employers not originally covered by them. Thus, in *Am. Can Co.*, 10 BNA OSHC 1305, 1310-1313 (No. 76-5162, 1982) (consolidated), the Commission ruled that the Secretary had not impermissibly omitted

the scope and application provisions of the Walsh-Healey Act noise standard at 41 C.F.R. §50.204.1(a) and (c) in adopting that established standard under section 6(a) of the OSH Act. The Commission found that the Secretary's changes to the source standard were permissible without notice-and-comment rule-making because Congress created a very different enforcement scheme in the OSH Act from that established in the Walsh-Healey Act, and Congress's purpose in the OSH Act was to supersede the Walsh-Healey Act statutory scheme with a more effective one. *Am. Can*, 10 BNA OSHC at 1312; *see* OSH Act, § 4(b)(2) ("The safety and health standards promulgated under the . . . Walsh-Healey Act . . . are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective").

Similarly, in *Bechtel Power Corp.*, 4 BNA OSHC 1005, 1008 (No. 5064, 1976), aff'd, 548 F.2d 248 (8th Cir. 1977), the Commission held that the sections 4(b)(2) and 6(a) of the OSH Act authorized the Secretary to expand the coverage of the Construction Safety Act standards that she adopted as established federal standards to employers other than contractors and subcontractors without rule-making: "[t]he legislative history of the [OSH] Act makes clear that in adopting Construction Safety Act standards as established Federal standards under [the OSH Act], the Secretary was empowered by sections 4(b)(2) and 6(a) to extend their coverage without resort to formal rulemaking procedures." *Bechtel*, 4 BNA OSHC at 1008 (quoting S. Rep. No. 91-1282, at 6 (1970), *Legislative History of 1970*, at 146, quoted *supra* pp. 4-5).

Likewise, in *Brown & Root, Inc.*, 9 BNA OSHC 1407 (No. 77-805, 1981), the Commission upheld the Secretary's omission of the coverage limitations of the Longshoremen's and Harbor Workers' Compensation Act ship repair standards she

adopted as established federal standards under section 6(a). Citing *Bechtel*, the Commission held that the OSH Act empowered the Secretary to extend the coverage of the Longshore Act standards (which excluded the ship's crew and work supervised by the ship's officers) to all employees engaged in ship repair or related employment. *Id.* at 1408-09. The Commission concluded that the ALJ erred by determining the coverage of the adopted Longshore Act standards by reference to an antecedent standard instead of the broader OSH Act coverage standard, which superseded it. *Id.* at 1409.

The Commission has also sustained the Secretary's authority to change the scope and application provisions of the source standards she adopted as established federal standards without notice-and-comment rule-making in other cases. *See Lee Way Motor Freight, Inc.*, 1 BNA OSHC 1689, 1691 (No. 1105, 1974) (scope of material handling and storage Walsh-Healey standard adopted as OSH Act standard under section 6(a) properly expanded to cover transportation companies), *aff'd*, 511 F.2d 864, 869 (10th Cir. 1975); *Coughlan Constr. Co.*, 3 OSHC 1636, 1637-38 (Nos. 5303, 5304, 1975) (scope of Construction Safety Act excavation standard adopted as section 6(a) OSH Act standard validly expanded from federally supported construction to all construction); *see also Underhill Constr. Corp.*, 2 BNA OSHC 1556, 1557-58 (No. 1307, 1975), *aff'd*, 526 F.2d 53 (2d Cir. 1975) (Secretary not required to adopt the effective dates of Construction Safety Act standards promulgated under section 6(a) of the OSH Act, but could establish new effective dates). Thus, as the above discussion demonstrates, section 6(a) of the OSH Act, its legislative history, and the interpretive case law all establish the Secretary's authority to extend the coverage of the Walsh-Healey Act "quick drenching" standard to construction employers without notice-and-comment rule-making.

In its motion to dismiss to the ALJ, Kiewit argued that the "quick drenching" standard, adopted under section 6(a), 29 C.F.R. § 1910.151(c), is inapplicable to construction work primarily on the grounds that:

(1) the provision's source statute, the Walsh-Healey Act, and source standard, 41 C.F.R. § 50-204.6(c), did not apply to construction work, and the legislative history of section 6(a) of the OSH Act shows that Congress did not extend the source standard to apply to construction work, but only to all covered manufacturing work affecting interstate commerce; and

(2) the regulatory history of the Construction Safety Act standards, the source standards for part 1926, shows that the Secretary determined that 41 C.F.R. § 50-204.6(c) should not be applied to the construction industry.

Kiewit Motion to Dismiss at 16-25, 42-46.

These arguments are without merit. Kiewit's first argument that the quick drenching provision's source statute and standard did not apply to construction is irrelevant because the OSH Act was enacted to *extend* worker protections in response to inadequate existing remedies, *Atlas Roofing v. OSHRC*, 430 U.S. 442, 444-45 (1977), not to maintain the inadequate coverage of the status quo. As the Commission found in *Am. Can*, 10 BNA OSHC at 1312, Congress created a very different enforcement scheme in the OSH Act from that established in the Walsh-Healey Act, and Congress's purpose in the OSH Act was to supersede the Walsh-Healey Act statutory scheme with a more effective one. *Id.*; *see* OSH Act, § 4(b)(2) ("The safety and health standards promulgated under the . . . Walsh-Healey Act . . . are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective").

Furthermore, the Secretary implemented section 6(a) of the OSH Act with a regulation, 29 C.F.R. § 1910.11(a), that made adopted established federal standards, such as § 1910.151(c), standards of general application that may be applied to employers in construction and other industries for which specific industry standards have been adopted if no such specific industry standard applies. § 1910.11(a) ("[t]he provisions of this Subpart B adopt *and extend* the applicability of established Federal standards in effect on April 28, 1971, with respect to *every employer, employee, and employment covered by the Act.*") (emphasis added). Both the Commission and the Eighth Circuit upheld the validity of this regulation in *Bechtel Power Corp.*, 4 BNA OSHC 1005, 1008 (No. 5064, 1976) (Secretary acted within his statutory authority under sections (4)(b)(2) and 6(a) of the OSH Act in adopting § 1910.11 to extend established Federal standards to every covered place of employment), aff'd, 548 F.2d 248 (8th Cir. 1977); *see also* § 1910.5(c)(2) ("any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, . . . to the extent that none of such particular standards applies"). Thus, the Secretary's interpretation that section 6(a) of the OSH Act authorized her to extend the scope of the Walsh-Healey Act quick drenching standard to construction work is reasonable and is entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843-44 (1984) (agency's reasonable interpretation of a statute it administers given controlling weight).[6]

[6] In its reply to the Secretary's response to its motion to dismiss, Kiewit claims that the Secretary did not show her statutory authority to make Walsh-Healey standards applicable to construction work through § 1910.11(a). Kiewit Reply in Support of Motion to Dismiss at 5. Kiewit also asserts that, on its face, § 1910.11(a) only eliminated established federal standards' restrictions to federal contractors, and does not extend the scope of these standards to substantively different work. Kiewit Reply at 6. Both claims are unwarranted. As shown above, the Secretary's authority to make established federal standards applicable to *all* employers,

The legislative history of section 6(a) also indicates that Congress intended that established federal standards be adopted as OSH Act standards without notice-and-comment rule-making as quickly as possible and extended to additional employees who were not under the source standards' protection. *See supra* pp. 4-5 (citing applicable legislative history). Thus, the OSH Act mandate to adopt and expand the coverage of established federal standards without notice-and-comment rule-making as quickly as possible trumps Kiewit's arguments that the Walsh-Healey Act quick drenching standard did not apply to construction, and that the source standards for the OSH Act construction standards did not include such a provision. Indeed, it is precisely because these source standards did not provide needed protections for construction workers exposed to injurious corrosive materials that the Secretary's application of the quick drenching provision to the construction industry fulfilled the statutory mandate.

Kiewit's contrary interpretation of the legislative history of section 6(a) is without merit. On Kiewit's view, the only expansion of the scope of the established federal standards adopted as OSH Act standards that the legislative history authorizes without rule-making is an extension of the scope of, e.g., Walsh-Healey Act standards from federally supported manufacturing work to all covered manufacturing work affecting interstate commerce, but not to construction work.[7] Kiewit Motion to Dismiss at 43-46 (quoting S. Rep. No. 91-1282, at 6 (1970), *Legislative*

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employees and employments covered by the Act has been upheld by the Commission and the Eighth Circuit. As also noted above, *see supra*, p. 14, the Commission and the Tenth Circuit upheld the Secretary's authority under section 6(a) to extend the scope of a material handling and storage Walsh-Healey Act standard to transportation work, a substantively different type of work. *Lee Way Motor Freight, Inc.*, 1 BNA OSHC 1689, 1691 (No. 1105, 1974) (scope of material handling and storage Walsh-Healey standard adopted as OSH Act standard under section 6(a) properly expanded to cover transportation companies), *aff'd*, 511 F.2d 864, 869 (10th Cir. 1975).

[7] Section 3(5) of the OSH Act exempts the U.S. government, excluding the Postal Service, and state governments, including political subdivisions, from coverage under the Act. 29 U.S.C. § 652(5).

History 141, 146, quoted *supra*, pp. 4-5). Kiewit claims that only its narrow interpretation is consistent with the Senate report's expectation that the adopted standards would be familiar to industry and would "have already been subjected to the procedural scrutiny mandated by the law under which they were issued." Kiewit Motion at 44-45 (quoting S. Rep. No. 91-1282, at 6, *Legislative History* at 146). In further support of its restrictive reading of the scope extension of source standards permitted by section 6(a), Kiewit claims that the House rejected a provision in H.R. 16785, the Daniels bill, that (according to Kiewit) would have expressly authorized the Secretary's broader interpretation. Kiewit Motion at 46 (quoting H.R. 16785, 91st Cong. § 6 (1970)) ("The Secretary shall . . . promulgate . . . any established Federal standard then in effect (not limited to its present area of application) . . .").

Kiewit's reading of the legislative history is not controlling. The Secretary's interpretation that the statute authorized him to adopt established Walsh-Healy standards as OSHA standards of general application is plainly reasonable, even if not the only possible reading. *Bechtel*, 4 BNA OSHC AT 1008, *Lee Way Motor Freight*, 511 F.2d at 869. The Secretary's construction is consistent with the clear Congressional intent to extend immediate, expanded protection to employees not under the protection of existing federal standards. A contrary result does not follow simply because some employers subject to the established federal standards' expanded application would not be familiar with their substantive requirements. There is no indication in the legislative history that Congress expected anything more than that industry in general would be familiar with the established federal standards, not that every specific industry, such as construction, would necessarily be familiar with every established federal standard that applied to it. The quick drenching provision met that expectation, as well as the expectation that it would have already been subjected to the procedural scrutiny required by

the statute under which it was issued, by being promulgated as a Walsh-Healey Act standard through notice-and-comment rule-making.

Moreover, the House's rejection of the Daniels bill, H.R. 16785, allegedly authorizing the Secretary's broad interpretation of the expanded scope of adopted established federal standards, does not show that Congress rejected the Secretary's interpretation. There was never an up or down vote on the scope provision in question. Instead, the House voted to substitute H.R. 19200, the Steiger-Sikes bill, for the Daniels bill, H.R. 16785, 116 Cong. Rec. 38,697, 38,715, 38,723-24 (1970), *Legislative History*, 1057, 1091-92, 1112, 1117, which, unlike the Steiger-Sikes bill, required adoption of established federal standards as interim (not permanent) standards and required a public hearing and notice-and-comment rule-making to promulgate a standard. H.R. 16785, 91st Cong. § 6, *Legislative History*, 721, 727; H.R. 19200, 91st Cong. § 6(b), *Legislative History* 763, 770. Therefore, one cannot say whether the House rejected the Daniels bill because of these latter two provisions or because of its supposedly expanded scope provision, or because of some combination of the three.[8] One cannot even say whether the parenthetical modifying "established federal standard" in the Daniels bill, i.e., "(not limited to its present area)," made the scope of the standard broader than the corresponding provision in the Steiger-Sikes bill, which lacked this parenthetical, or whether the parenthetical merely clarified, without changing, the scope of the provision. Thus, Kiewit's legislative history argument does not prove that Congress rejected the Secretary's interpretation of section 6(a).

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[8] It is also possible that the House rejected the Daniels bill for other reasons, such as the fact that it assigned the power to adjudicate citation contests to the Secretary whereas the Steiger-Sikes bill created an independent occupational safety and health appeals commission for that purpose. H.R. 16785, 91st Cong. § 11(b), H.R. 19200, 91st Cong. §§ 10-11, *Legislative History* 740-41, 785-96. The bitter dispute over this issue seriously jeopardized the enactment of the OSH Act. S. Rep. No. 91-1282, at 55 (1970) (individual views of Sen. Javits), *Legislative History* 141, 194.

Kiewit's second argument - that the general industry provision § 1910.151(c) does not apply to construction work because the Secretary supposedly determined in the rule-making for the Construction Safety Act standards, the source standards for part 1926, that the quick drenching provision should not be included - is invalid. In the first place, contrary to Kiewit's assertion, Kiewit Motion to Dismiss at 21-25, there is nothing in the regulatory history showing that the Secretary *determined* that a "quick drenching facilities" provision *should not* be applied to the construction industry. Instead, the passages that Kiewit quotes show only the absence of a quick drenching provision from the final rule. A provision can be left out of a rule for many reasons, including accidental omission, but mere absence is not an affirmative determination that the provision is inappropriate.

In any case, the Secretary's determination whether the quick drenching provision should be included as a Construction Safety Act standard is not relevant to the applicability of the provision to construction employers under the OSH Act. Congress determined in the OSH Act that established federal standards, like the Walsh-Healey Act and the Construction Safety Act standards, provided inadequate coverage of workers, and ordered the Secretary to supersede these standards as soon as possible with more effective OSH Act standards that covered more workers, especially construction workers. Kiewit's argument that the required extension of these necessary protections under the OSH Act should be barred by the restrictions of ineffective predecessor standards would thwart the statutory purpose of providing immediate coverage for unprotected workers.

II. *The ALJ Erred in Finding That the Secretary's Adoption of the Construction Quick Drenching Provision Was a Substantive Change Requiring Notice-and-Comment Rule-Making.*

The ALJ committed a fundamental legal error in concluding that the mere codification of the general industry "quick drenching" requirement, 29 C.F.R. § 1910.151(c), into part 1926 substantively changed the legal rights of the parties and so required notice and comment procedures. As an "established federal standard," in effect on April 28, 1971, the Walsh-Healey Act "quick drenching facilities requirement," 41 C.F.R. § 50-204.6(c), was adopted as an OSHA standard under § 6(a) of the Act and codified at 29 C.F.R. § 1910.151(c). "Established Federal Standards," 36 Fed. Reg. at 10,601. As a result, § 1910.151(c) became applicable "with respect to *every employer, employee, and employment covered by the Act.*" 29 C.F.R. 1910.11(a) (emphasis added); *see also* 29 C.F.R. § 1910.5(c)(2) ("any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, . . . to the extent that none of such particular standards applies"). Therefore, since no construction standard pre-empted § 1910.151(c), that established federal standard applied to construction work from its effective date as an OSH Act standard.

Both the Commission and the courts of appeals have upheld the Secretary's statutory authority under section 4(b)(2) and 6(a) of the OSH Act to adopt established federal standards as occupational safety and health standards of general application without rule-making. In *Lee Way Motor Freight, Inc.*, 1 BNA OSHC at 1691, *aff'd*, 511 F.2d 864, 869 (10th Cir. 1975), the Commission held that 29 C.F.R. § 1910.22(c), a walking-working surface standard requiring covers or guardrails for unguarded pits, applied to the employer's transportation operations even though the standard's Walsh-Healey Act source standard was headed "Material handling and

storage," and did not apply to transportation companies. The Commission held, and the Tenth Circuit, affirmed, that the standard was applicable because "Congress itself adopted the Walsh-Healey standards as occupational safety and health standards of general application," applicable to industry generally. *Lee Way,* 1 BNA OSHC at 1691, *aff'd,* 511 F.2d 864, 869 (10th Cir. 1975); *see also Coughlan Constr.*, 3 OSHC at 1638 (Congress authorized the Secretary to promulgate established federal standards, including Construction Safety Act standards, as standards of general applicability without further rule-making proceedings). Similarly, in *Bechtel*, 4 BNA OSHC 1005, 1008 (No. 5064, 1976), *aff'd*, 548 F.2d 248 (8th Cir. 1977), the Commission held that the Secretary acted within his statutory authority under sections 4(b)(2) and 6(a) of the OSH Act in adopting 29 C.F.R. § 1910.11 to extend established federal standards to every covered place of employment.

The Secretary specifically identified § 1910.151(c) as one of the general industry requirements applicable to construction work in a list published in the *Federal Register* on February 9, 1979, over fourteen years before the provision was incorporated into part 1926. "Identification," 44 Fed. Reg. at 8,589. The Secretary explained that the identification of these applicable provisions was the first step in her long-range project of consolidating all of the construction requirements in part 1926. *Id.* at 8,577.

The Secretary's 1993 *Federal Register* notice giving the "quick drenching" requirement its own part 1926 designation did not change the rights and obligations of construction employers in any way. The 1993 notice simply consolidated in a single volume all of the regulations, whether from part 1910 or part 1926, that OSHA had previously determined were applicable to construction. "Incorporation," 58 Fed. Reg. at 35,076. The judge's conclusion that this purely ministerial action created "a substantial impact on private parties," ALJ Dec. at 9, is

plainly wrong. Contrary to the judge's unsupported and entirely unexplained assertion, the designation of the "quick drenching" requirement as a part 1926 standard did not lessen the burden on the Secretary to prove the applicability of the standard in an enforcement proceeding. ALJ Dec. at 9. In any case involving an alleged violation of a part 1926 standard, the Secretary must prove that the employer was actually engaged in construction work, as defined in 29 C.F.R. 1910.12(b), as an element of her case in chief. *See B.J. Hughes, Inc.*, 10 BNA OSHC 1545, 1546-47 (No. 76-2165, 1982) ("We have previously stated that the construction standards only apply to actual construction work or to related activities that are an integral and necessary part of construction work."). There is no "presumption of applicability" for construction standards. ALJ Dec. at 9. If the Secretary fails to show that the employer was actually engaged in construction work, a citation for violation of a part 1926 standard must be vacated. *Hughes*, 10 BNA OSHC at 1547 (§ 1926.28(a) did not apply to employer's cement servicing operations where the Secretary did not show that its oil drilling process constituted construction).

The ALJ was equally off base in stating that "once these [part 1910] requirements are incorporated into the vertical industry specific construction standards, feasibility of compliance becomes more difficult or even impossible for a cited employer to challenge." ALJ Dec. at 9. There is nothing in the Act or Commission precedent to suggest that the affirmative defense of infeasibility is more difficult for employers to establish for violations of construction standards than for other standards. In short, the judge's conclusion that publication of the 1993 Incorporation notice substantively changed the rights and obligations of private parties has no basis in fact or law. The Secretary properly made a good cause finding that she was exempt from notice-and-comment rule-making requirements because the incorporation did not modify or

revoke existing rights or obligations or create new ones, but simply provided additional information on the existing regulatory burden. "Incorporation," 58 Fed. Reg. at 35,077.

In its motion to dismiss to the ALJ, Kiewit raises two primary objections, one procedural and one substantive, to the Secretary's 1993 incorporation of the quick drenching requirement into part 1926. Kiewit argues first that the Commission cannot rely on section 6(a) of the OSH Act as the basis for the Secretary's adoption of § 1926.50(g) because the Secretary did not offer that rationale in his incorporation of that provision. Kiewit Motion at 53. Kiewit also contends that the Secretary's position that adopted established federal standards are standards of general application would lead to the absurd consequence that standards for one industry could be applied, without notice-and-comment rule-making, to completely unrelated industries, such as manufacturing standards to construction, construction standards to agriculture, and maritime standards to manufacturing. *Id.* at 54-56.

Kiewit's objections are unwarranted. In the first place, the Secretary's adoption of § 1926.50(g) was not based on section 6(a). Section 6(a) was the statutory basis for the promulgation of § 1910.151(c), which applied as a standard of general application "to every employer, employee and employment covered by the OSH Ac." 29 C.F.R. § 1910.11(a). The promulgation of § 1926.50(g) was a purely ministerial action, part of the Secretary's consolidation in one volume of all regulations that the Secretary had previously determined were applicable to construction. "Incorporation," 58 Fed. Reg. at 35,076. Moreover, the alleged absurdity of Kiewit's attempted *reductio ad adsurdum* never materializes because standards have content restrictions imposed by their terms. The general industry quick drenching requirement, for example, applies only where employees "may be exposed to injurious corrosive materials." §

1910.151(c). As such, the requirement applies to industries where the possibility of such exposure exists, and does not apply where such exposure is not possible.

III. *In the Event That The Commission Finds § 1926.50(g) Invalid, Declaratory Relief Would Serve No Useful Purpose and Should Be Denied.*

Declaratory relief is available e under the Administrative Procedure Act, 5 U.S.C. § 554(e), which provides that an agency "in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty." *Id.* Declaratory relief is appropriate only when:

(1) the judgment will serve a useful purpose in clarifying and settling the legal relations at issue; or

(2) it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceedings.

Maryland Cas. Co. v. Rosen, 445 F.2d 1012, 1014 (2d Cir. 1971). "A declaratory judgment is inappropriate solely to adjudicate past conduct." *Gruntal & Co. v. Steinberg*, 837 F. Supp. 85, 89 (D. N.J. 1993).

In two requests for declaratory relief, its motion to dismiss and its cross-petition for discretionary review, Kiewit has been unable to identify a single useful purpose that would be served by a declaratory order in this case that would not be achieved if the Commission finds the challenged standard invalid. In its motion to dismiss, Kiewit claims that a declaratory order that 29 C.F.R. 1926.50(g) is invalid would terminate this controversy, remove uncertainty about the company's future compliance obligations, and clarify the status of a frequently cited standard. Kiewit's Motion to Dismiss at 64. Kiewit does not explain, however, why, a judgment that the cited standard is invalid would not achieve these purposes. In its cross-petition, Kiewit claims that the ALJ's denial of declaratory relief was wrong, but does not point to a useful purpose that such relief would serve. Kiewit's CPDR at 3-4.

In *Granite City Terminals Corp.*, 12 BNA OSHC 1741, 1748 (No. 83-882-S, 1986), after vacating the alleged violation, the Commission declined to issue a declaratory order stating that the company's current use of a clam shell bucket with safety belt protection was in compliance with 29 C.F.R. § 1918.23(b). The Commission found that such an order would serve no useful purpose since the question whether use of a clam shell bucket with a safety belt complied with the cited standard was moot. *Granite City*, 12 BNA OSHC at 1748. *See also Madison Underground Inc.*, 16 BNA OSHC 1297, 1298 (No. 90-3249, 1993) (declining declaratory relief where Secretary's interest in having the violation affirmed to establish the company's violation history had already been achieved by affirmance of a separate willful item). Similarly here, every purpose that Kiewit claims would be served by a declaratory order would be achieved by a judgment that the cited standard is invalid if the Commission should strike down the provision. Alternatively, such relief would not apply if the provision is upheld. Accordingly, declaratory relief would serve no useful purpose and should be denied.

CONCLUSION

For these reasons, the Commission should uphold the validity of § 1926.50(g), and remand this case to the ALJ for decision on the merits.

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May 14, 2013

CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of May 2013, I served a copy of the preceding *Brief for the Acting Secretary of Labor* by fax and by e-mail on:

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