**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.

# REPLY BRIEF FOR THE ACTING SECRETARY OF LABOR

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**STATUTES AND REGULATIONS:**

I. *The Secretary Reasonably Interpreted Section 6(a) of the OSH Act as Authorizing Extension of Coverage of the Walsh-Healey Act "Quick Drenching" Standard to Construction Employers Without Notice-and-Comment Rule-Making*.

In his opening brief, the Acting Secretary demonstrated that Section 6(a) of the OSH Act expressly exempted the Secretary from the Administrative Procedure Act ("APA") notice-and-comment rule-making requirements in ordering him to adopt established federal standards "as soon as practicable" within two years of the effective date of the Act. Acting Sec. Op. Br. at 2. The Acting Secretary also showed that the legislative history of section 6(a) records 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. *Id*. at 4-5. The Acting Secretary further established that both the courts of appeals and the Commission have long held 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. *Id*. at 12-14. Thus, the Acting Secretary proved that section 6(a) permitted the Secretary's summary extension of the Walsh-Healey Act quick drenching standard from manufacturing employees to construction employees.

Respondent Kiewit Power Constructors, Inc. and its aspiring *amicus curiae* APA Watch argue that the construction standard "quick drenching" provision, 29 C.F.R. § 1926.50(g), which is identical to its Walsh-Healey Act and OSH Act general industry predecessors, 41 C.F.R. § 50-204.6(c) and 29 C.F.R. § 1910.151(c), is invalid because it was not promulgated in accordance with APA notice-and-comment rule-making requirements. Kiewit Op. Br. at 2, 15-46; APA Watch Br. at 4-17. Kiewit and APA Watch are mistaken. APA notice-and-comment rule-making requirements are inapplicable here because section 6(a) of the OSH Act expressly

exempted the Secretary from them in ordering him to promulgate established federal standards as occupational safety and health standards, "as soon as practicable" and "[w]ithout regard to chapter 5 of title 5, United States Code [the APA notice-and-comment rule-making requirements], or to the other subsections of this section [the OSH Act notice-and-comment rule-making requirements].[1] Consequently, contrary to Kiewit's and APA Watch's assertions, the first issue that the Commission asked the parties to brief, whether section 6(a) of the OSH Act permitted the Secretary to extend the coverage of the Walsh-Healey Act quick drenching standard to construction employers, Comm'n Briefing Notice at 1, has nothing to do with the APA.[2] Instead, the issue concerns the proper construction of the OSH Act, in particular of the scope of the Secretary's authority under section 6(a).

The Supreme Court has recently clarified that *Chevron* deference applies to an agency's construction of a jurisdictional provision of a statute it administers, i.e., to the agency's interpretation of the scope of its statutory authority. *City of Arlington, Texas v. FCC*, 133 S. Ct. 1863, 1871 (2013). The Acting Secretary argued in his opening brief that his interpretation that section 6(a) of the OSH Act authorized the Secretary to extend the scope of the Walsh-Healey

[1] The legislative history of section 6(a) is equally explicit in recording the Congressional intent to adopt established federal standards with expanded coverage as rapidly as possible, without notice-and-comment rule-making, to provide immediate protection to workers. *See* Acting Sec. Op. Br. at 4-5 (citing and quoting applicable passages of the legislative history).

[2] Kiewit's principal argument to the contrary rests on a misreading of what it calls the APA's anti-supersession provision, 5 U.S.C. § 559, which says that "[A] [s]ubsequent 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." The most natural reading of this provision is that a subsequent statute does not override the APA unless the statute does so explicitly, which section 6(a) of the OSH Act does. Kiewit, however, imports the additional requirement that the supersession is invalid unless it *expressly specifies the extent of its supersession*, i.e., in the case of section 6(a), expressly specifies the extent to which the Act is expanding the coverage of established federal standards. Kiewit's Op. Br. at 16-17. Kiewit cites no authority for such an interpretation, and it is contrary to the plain meaning of the provision.

Act quick drenching standard to construction work is reasonable and entitled to deference. Acting Sec. Op. Br. at 16 (citing *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)). Kiewit argues that the APA burdens of proof apply to the Secretary's interpretation of section 6(a), and that the Secretary's interpretation is not entitled to deference. Kiewit's Op. Br. at 16-17. Kiewit is mistaken because section 6(a) expressly exempted the Secretary from notice-and-comment rule-making requirements. Thus, the APA burdens of proof do not apply.

The Acting Secretary also pointed out that his interpretation was expressed in a regulation implementing section 6(a), 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. Acting Sec. Op. Br. at 16 (quoting § 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)). As the Acting Secretary noted, 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").

Kiewit and APA Watch also claim that the Acting Secretary fails at step one of the *Chevron* analysis because the OSH Act unambiguously forecloses his interpretation of the scope of section 6(a)'s expansion of coverage.[3] Kiewit Op. Br. at 15-23; APA Watch Br. at 5. Kiewit and APA Watch argue that the only expansion of the scope of Walsh-Healey Act standards adopted as OSH Act standards that the statute permits is from federally supported manufacturing work to all covered manufacturing work affecting interstate commerce, but not to construction work. Kiewit Op. Br. at 22-23; APA Watch Br. at 11.

Kiewit and APA Watch are wrong on all counts. First, contrary to APA Watch's assertion, the OSH Act is ambiguous about the scope of the authorized expanded coverage of established federal standards as shown by the fact that neither section 4(b)(2) nor section 6(a) specifies the extent of the expansion except to say that:

(1) the Secretary shall supersede these standards with OSH Act standards that he deems to be more effective, 29 U.S.C. § 653(b)(2); and

(2) the superseding standards shall be promulgated as soon as practicable, without notice-and-comment rule-making, unless the Secretary determines that the superseding standards would not result in improved safety or health for designated employees, 29 U.S.C. § 655(a).

[3] *Chevron* requires a reviewing court to conduct a two-step review of an agency's construction of a statute it administers. *Chevron*, 467 U.S. at 842-44. At step one, the court must consider whether Congress has directly spoken, through the text of the statute or its legislative history, to the precise question at issue. *Id*. at 842. If the answer is yes, the court must give effect to the unambiguously expressed intent of Congress. *Id*. at 842-43. If, however, the statute is silent or ambiguous with respect to the specific issue, the court proceeds to step two, consideration of the agency's interpretation of the statute, and must defer to that interpretation as long as it is reasonable. *Id*. at 843-44. It is not clear why APA Watch thinks that Congress directly spoke to the scope of the authorized expansion of the coverage of established federal standards, APA Watch Br. at 5, but, as shown below, the OSH Act is silent about this matter.

Furthermore, although the legislative history of section 6(a) explicitly calls for extension of coverage of the established federal standards "to additional employees who are not under the protection of such other Federal laws," S. Rep. No. 91-1282, at 6 (1970), *reprinted in Legislative History of the OSH Act of 1970*, 141, 146, that legislative history does not specify the scope of the expansion. Thus, the OSH Act does not address the precise question at issue here, whether the scope of coverage of Walsh-Healy Act standards adopted as OSH Act standards under section 6(a) is expanded to include construction.

Next, contrary to Kiewit and APA Watch's assertions and as the Acting Secretary argued, Acting Sec. Op. Br. at 15, 17, 20, both the OSH Act and the legislative history of section 6(a) support the Secretary's interpretation of that section. As discussed above, the legislative history reveals Congress's intent to extend the coverage of the established federal standards to unprotected workers immediately and without notice-and-comment rule-making. The legislative history also shows that Congress noted that "the heaviest losses are in construction work." 116 Cong. Rec. at 37,345, *Legislative History*, at 444. Moreover, as shown above, sections 4(b)(2) and 6(a) required the Secretary to supersede the established federal standards with OSH Act standards she deemed to be more effective. Therefore, the Secretary reasonably concluded that the OSH Act authorized him to extend the coverage of Walsh-Healey Act standards to construction, without notice-and-comment rule-making, where the superseding OSH Act standards provided protection from hazards to which construction workers were exposed but which were not covered by existing construction standards.[4]

[4] By the same authority, in particular, under section 6(a), the Secretary properly revoked 29 C.F.R. § 1910.5(e), which limited the scope of standards derived from Walsh-Healey Act standards to manufacturing or supply operations. OSHA, "Applicability of Some Established Federal Standards," 36 Fed. Reg. 18,080, 18,080-81 (1971). The revocation appropriately implemented the OSH Act's command to supersede established federal standards with OSH Act

Finally, the Acting Secretary showed in her opening brief that the courts of appeals and the Commission have long held that, in adopting established federal standards as OSH Act standards, the Secretary was not required to adopt the source standards' scope and application limits. Acting Sec. Op. Br. at 12-14. Kiewit attempts to distinguish some of these cases on the grounds that they did not consider whether Walsh-Healey Act standards could be validly applied to construction work and because they did not consider the APA anti-supersession provision, 5 U.S.C. § 559. Kiewit Op. Br. at 24-27.

These distinctions are invalid because all of the cited cases held that section 6(a) of the OSH Act authorized the Secretary extend coverage of the established federal standards beyond the scope limits of these standards because Congress ordered the Secretary to supersede these standards with more effective ones. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332 n.6 (6th Cir. 1976); *Lee Way Motor Freight, Inc. v. Secretary*, 511 F.2d 864, 869 (10th Cir. 1975); *Am. Can Co.*, 10 BNA OSHC 1305, 1310-1313 (No. 76-5162, 1982); *Bechtel Power Corp.*, 4 BNA OSHC 1005, 1008 (No. 5064, 1976), aff'd, 548 F.2d 248 (8th Cir. 1977); *Brown & Root, Inc.*, 9 BNA OSHC 1407-09 (No. 77-805, 1981); *Lee Way Motor Freight, Inc.*, 1 BNA OSHC 1689, 1691 (No. 1105, 1974), *aff'd*, 511 F.2d 864, 869 (10th Cir. 1975); *Coughlan Constr. Co.*, 3 OSHC 1636, 1637-38 (Nos. 5303, 5304, 1975). Because it covers more workers, 29 C.F.R. § 1926.50(g) is a more effective standard than its Walsh-Healey Act source standard, 41 C.F.R. §

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standards that the Secretary determined to be more effective as soon as possible and without notice-and-comment rule-making. 29 U.S.C. §§ 653(b)(2), 655(a). The revocation also obeyed section 6(a)'s command to promulgate a standard only if the Secretary determined that it would improve the safety and health of workers. Since promulgation of the former Walsh-Healey Act standard with the original Walsh-Healey Act scope limitations would not have met this statutory improvement requirement, revocation of these limitations was appropriate for this reason as well. Because the revocation fulfilled these statutory commands and facilitated the promulgation of OSH Act standards that section 6(a) expressly exempted from notice-and-comment rule-making requirements, Kiewit's objection that the revocation required such rule-making, Kiewit Op. Br. at 10-11, 28-30, is without merit.

50-204.6(c). Moreover, the fact that these cases did not discuss 5 U.S.C. § 559 is immaterial because section 6(a) expressly ordered the Secretary to adopt the OSH Act standards superseding the established federal standards without regard to notice-and-comment rule-making requirements.

II. *The Secretary's Codification of the Construction "Quick Drenching" Provision, 29 C.F.R. § 1926.50(g), Was Not a Substantive Change Requiring Notice-and-Comment Rule-Making*.

The Acting Secretary showed in his opening brief that the Walsh-Healey Act "quick drenching" standard, 41 C.F.R. § 50.204.6(c), an established federal standard, was adopted as an OSHA standard of general application under section 6(a) of the Act, codified at 29 C.F.R. § 1910.151(c). Sec. Op. Br. at 21. 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, from its effective date as an OSH Act standard. Sec. Op. Br. at 21. 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. Sec. Op. Br. at 21.

Kiewit and APA Watch assert that § 1926.50(g) is invalid because the Secretary did not demonstrate good cause for dispensing with the notice and comment procedures of the APA, 5 U.S.C. § 553, and the OSH Act, 29 U.S.C. § 655(b). Kiewit Op. Br. at 33-35; APA Watch Br. at 13-14. In particular, Kiewit claims that the APA "good cause" exception, 5 U.S.C. § 553(b)(B),[5] that the Secretary invoked in adopting § 1926.50(g),

[5] This provision states: "Except when notice or hearing is required by statute, this subsection does not apply—

. . .

"Incorporation of General Industry Safety and Health Standards Applicable to Construction Work," 58 Fed. Reg. 35,076, 35,077 (1993), did not apply to the promulgation of that standard because section 6(b) requires notice and, when requested, a hearing for rules adopted under its provisions. Kiewit Op. Br. at 45-46. Furthermore, Kiewit contends that, even if the exception did apply, the Secretary's statement of good cause, 58 Fed. Reg. at 35,077, was insufficient. Kiewit Op. Br. at 34.

Kiewit and APA Watch are incorrect. The notice-and-comment requirements of the APA and the OSH Act apply only to substantive rules, 5 U.S.C. § 553(d), and OSH Act standards, 29 U.S.C. § 655(b), not to mere codifications of existing requirements. The 1993 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 (1993). Thus, the incorporation of the "quick drenching" provision did not change the rights and obligations of construction employers in any way, and therefore was not subject to notice-and-comment rule-making requirements.

For the same reason, the limitation on the "good cause" exception ("except when notice or hearing is required by statute, this subsection does not apply") that Kiewit claims makes the exception inapplicable here is itself inapplicable because the notice-and-comment rule-making requirements of the APA, 5 U.S.C. § 553, and section 6(b) of the OSH Act did not apply. These requirements apply only to the promulgation of

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(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

5 U.S.C. § 553(b)(B).

substantive rules or standards, and not to mere codifications of existing requirements. Since neither statute required notice-and-comment rule-making for the codification of the "quick drenching" provision in the construction standard (part 1926), the APA "good cause" exception applied here.[6]

III. *Kiewit's Merits Arguments Are Not Properly Before the Commission.*

Kiewit argues on review that if the Commission finds that the quick drencing standard is valid, it should nevertheless vacate the citation because the Secretary did not provide sufficient evidence to survive the company's motion for summary judgment.[7] Kiewit Op. Br. at 46-48. As shown below, the merits of the citation were not directed for review and are not properly before the Commission. Furthermore, since the ALJ never decided Kiewit's motion for summary judgment, and, contrary to Kiewit's assertion, the Secretary did submit sufficient evidence to defeat the company's summary judgment motion, this case should be remanded for a hearing on the merits if the Commission upholds the validity of § 1926.50(g).

[6] Kiewit's assertion that the Secretary's statement of good cause, "Incorporation," 58 Fed. Reg. at 35,077, was insufficient because it did not explain why the promulgation of § 1926.50(g) was not a substantive change, Kiewit Op. Br. at 34, is not well-founded. Kiewit improperly takes the statement out of the context of the immediately preceding "Background" section, which explained that the Secretary had long applied certain general industry standards, including the quick-drenching provision, to construction. 58 Fed. Reg. at 35,076, 35,084, 35,305. Thus, the preamble as a whole explains that the incorporation of § 1910.151(c) into part 1926 was purely ministerial because the incorporation merely codified an existing requirement. Accordingly, the statement of good cause properly concluded that the incorporation did "not affect the substantive requirements or coverage of the standard[] [itself] . . . or modify or revoke existing rights or obligations . . .[or] establish new ones." *Id*. at 35,077. Thus, the statement met the APA requirement that it be "incorporate[d] . . . in the rule[] issued." APA, 5 U.S.C. § 553(b)(B), quoted *supra* p.7-8 n.5.

[7] The ALJ did not reach Kiewit's motion for summary judgment because he disposed of the case by granting the company's motion to dismiss on the ground that § 1926.50(g) was invalid. ALJ Dec. 1-2.

It is well settled that the Commission has discretion not to consider arguments on issues which were not included in the direction for review or the briefing order. Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of the initial [judge's] decision, the agency . . . may limit the issues on notice or by rule"); *A.J. McNulty & Co.*, 19 BNA OSHC 1121, 1122 n.1 (No. 94-1758, 2000); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2204 & n.6 (No. 87-2059, 1993); *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1535 n.4 (Nos. 86-360, 86-469, 1992). This policy of considering only issues that the Commission asks the parties to brief avoids needlessly complicating and lengthening the review of the case, and allows the Commission to apply its limited resources only to matters that it deems to merit review. *McNulty*, 19 BNA OSHC at 1122 n.1; *Tampa Shipyards Inc.*, 15 BNA OSHC at 1535 n.4. Since neither the direction for review nor the briefing order in this case included any merits issues, the Commission should decline Kiewit's invitation to decide its motion for summary judgment, and remand the case to the ALJ for a decision on the merits.

If the Commission should reach the summary judgment motion, however, it should find that the Secretary designated sufficient evidence to show that there was a genuine issue of material fact, and remand the case for hearing. Summary judgment is appropriate only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The movant has the burden of pointing out the absence of evidence supporting the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). As shown below, Kiewit failed to carry its burden and its motion should be denied.

Kiewit first claims that the Secretary failed to present sufficient evidence that the Scotchgard Resin used on Kiewit's work site was an "injurious corrosive material" within the

meaning of § 1926.50(g). Kiewit Op. Br. at 47. But the Secretary submitted a declaration from Compliance Officer Michelle Sotak that said that this material was stored in buckets that were labeled "corrosive," that the material safety data sheet for Scotchgard Resin classified it as corrosive, and warned that it could cause eye and skin burns. Sotak Decl., paras. 3, 6. The data sheet also instructed workers who get Scotchgard Resin in their eyes to flush them immediately with a large amount of water for at least fifteen minutes and seek immediate medical attention. *Id*., para 3. Furthermore, the data sheet reported that Scotchgard Resin has a Hazardous Material Identification System health hazard rating of three on a scale of zero to four. *Id*., para. 7. This rating means that exposure to Scotchgard Resin is likely to result in a major injury unless prompt action is taken and medical treatment is received. *Id*. This evidence is sufficient to establish at least a genuine issue of material fact about whether Scotchgard Resin is injuriously corrosive.

Kiewit also asserts that the Secretary failed to submit evidence:

(1) that the distance to the nearest flushing facility was too far away;

(2) showing how far the cited operation was from the closest water hose;

(3) refuting Kiewit's evidence that water hoses were common throughout the work site, usually as close together as every twenty feet; and

(4) refuting Kiewit's evidence that an employee could easily walk to a hose in a few seconds.

Kiewit Op. Br. at 48.

Kiewit overlooks the fact that its motion must be denied if there is evidence in "the record taken as whole" of a genuine dispute of material fact. *Matsushita*, 475 U.S. at 587; Fed. R. Civ. P. 56(a). Here, evidence submitted either by the Secretary or Kiewit

established such genuine disputes. Kiewit's witness, employee G.H. Perry, declared that break trailers containing eyewash flush bottles were about thirty-five to seventy yards away from the places where he would use Scotchgard Resin. Perry Decl., para. 13. In *Conagra Flour Milling Co.*, 16 BNA OSHC 1137, 1139 (No. 88-1250, 1993), the Commission noted the compliance officer's testimony that a quick-drenching facility would have to be located within twenty-five feet, or about eight yards, of the cited work station to be suitable under § 1910.151(c), the identical general industry counterpart of §1926.50(g). Kiewit's eyewash stations were considerably farther away here. Moreover, Compliance Officer Sotak declared here that a Kiewit employee told her that he and other employees used Scotchgard Resin "in areas of the job site where there were not eyewashes nearby." Sotak Decl., para. 5. Thus, there is a genuine dispute of material fact about whether Kiewit's flushing facilities were too far away (item (1) above).

There are also genuine disputes of fact about whether the water hoses were too far from the cited operation (items (2) and (3) above). Although Kiewit presented evidence that water hoses were common at the work site and usually about twenty feet apart, Perry Decl., para. 15, that evidence did not say how far away the hoses were from the areas where employees used Scotchgard Resin. Furthermore, since the hoses could be used to wash chemicals out of employees' eyes, *id*., the employee statement that Compliance Officer Sotak reported, that there were no eyewashes near areas where some employees used Scotchgard Resin, Sotak Decl., para. 5, may have also applied to hoses.

Finally, there is a genuine dispute of material fact about whether an employee could easily walk to a water hose in a few seconds (item (4) above). Although Kiewit's witness, Mr. Perry, so declared, his declaration did not say that an employee could do so with Scotchgard

Resin in his eyes. Perry Decl., para. 15. The Secretary presented evidence that Scotchgard Resin could cause eye burns requiring flushing with a large amount of water for at least fifteen minutes and immediate medical attention. Sotak Decl., para. 6. It is at least arguable that an employee with such an injury, and possibly difficulty seeing, could not easily walk to a water hose in a few seconds. Furthermore, the employee statement that Compliance Officer Sotak reported concerning the absence of eyewashes near areas where some employees used Scotchgard Resin, Sotak Decl., para. 5, implies that at least some employees using Scotchgard resin were too far away to walk to a water hose in a few seconds.

Thus, the record as a whole does not support summary judgment. This case should be remanded for a hearing on the merits of the citation.

## IV. *If the Commission Should Find § 1926.50(g) Invalid, Declaratory Relief Would Be Superfluous and Should Be Denied.*

Although Kiewit requests declaratory relief in the conclusion of its opening brief, Kiewit Op. Br. at 48, according to both D.C. Circuit and Commission precedent, the company waived its claim for such relief by not arguing the merits of the claim in its brief. *Salazar v. Washington Metro. Transit Auth.*, 401 F.3d 504, 507-08 (D.C. Cir. 2005) (argument not raised in party's briefs is waived) (citing *Ark Las Vegas Restaurant Corp. v. NLRB*, 334 F.3d 99, 108 n.4 (D.C. Cir. 2003); *Altor Inc.*, 23 BNA OSHC 1458, 1460 n.3 (No. 99-0958, 2011) (claims not addressed in a party's brief are abandoned). Kiewit's request for declaratory relief in the conclusion of its brief, without discussing the merits, was not enough to preserve the argument. *Alabama Power Co. v. Gorsuch*, 672 F.2d 1, 7 n.34 (D.C. Cir. 1982) (court will not decide a claim mentioned in a brief that does not discuss the claim's merits) (citing *Kemlon Prods. & Dev. Co. v. United States*, 646 F.2d 223, 224 (5th Cir. 1981)). Accordingly, Kiewit has abandoned its request for declaratory relief, and the Commission should not consider it.

If, however, the Commission should find § 1926.50(g) invalid and decide that Kiewit has not abandoned its claim for declaratory relief, the Commission should reject the claim as superfluous. As the Secretary showed in her opening brief, declaratory relief would serve no useful purpose that would not be served by a judgment that the cited standard is invalid. Acting Sec. Op. Br. at 25. Every purpose that Kiewit earlier claimed, Kiewit's Motion to Dismiss at 64, would be achieved by a declaratory order – resolution of this controversy, removal of uncertainty about the company's future obligations, and clarification of the status of a frequently cited standard – would also be achieved by a judgment that § 1926.50(g) is invalid.[8] The Commission has rejected claims for declaratory relief as moot where the judgment on the merits achieved all the purposes that the winner sought in requesting a declaratory order. *Granite City Terminals Corp.*, 12 BNA OSHC 1741, 1748 (No. 83-882-S, 1986) (declining declaratory relief where vacation of the alleged violation resolved the employer's uncertainty about its method of compliance); *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. Alternatively, such relief would not be warranted if the provision is upheld. Accordingly, declaratory relief would serve no useful purpose and should be denied.

[8] APA Watch was also unable to specify a useful purpose that declaratory relief would serve here that would not be achieved by a judgment finding the cited standard invalid. APA Watch Br. at 20-22.

## CONCLUSION

For these reasons and the reasons stated in the Acting Secretary's Opening Brief, 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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June 24, 2013

## CERTIFICATE OF SERVICE

I hereby certify that, on this 24th day of June 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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