



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 CO.,

Respondent.

OSHRC Docket No. 11-2395

REMAND ORDER

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

This case is on remand from the United States Court of Appeals for the D.C. Circuit. *Kiewit Power Constructors Co. v. Sec’y of Labor*, 959 F.3d 381 (D.C. Cir. 2020). Former Administrative Law Judge Stephen J. Simko, Jr., granted Respondent’s motion to dismiss and vacated a citation issued by the Occupational Safety and Health Administration, alleging a violation of the construction “quick-drenching” provision, 29 C.F.R. § 1926.50(g). The judge concluded that this provision, originally adopted pursuant to section 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(a), was later “improperly promulgated and added as a new [construction] standard” without notice-and-comment rulemaking. *Kiewit Power Constructors Co.*, No. 11-2395, 2018 WL 4861361, at *37 (OSHRC Dec. 24, 2012) (ALJ Decision & Order appended to Commission decision).

On review, the Commission concluded, on different grounds, that § 1926.50(g) “was invalidly promulgated as a construction standard” and therefore vacated the citation. *Kiewit Power Constructors Co.*, 27 BNA OSHC 1445, 1454 (No. 11-2395, 2018) (majority opinion). The D.C. Circuit reversed, ruling that the original adoption and subsequent application of the quick-drenching provision to the construction industry under section 6(a) of the OSH Act was

permissible. 959 F.3d at 385, 406. The court, therefore, remanded for adjudication on the merits of the citation.

The mandate in this case was issued on July 9, 2020. Accordingly, we remand to the Chief Administrative Law Judge for reassignment and further proceedings consistent with the court's opinion.

SO ORDERED.

/s/ _____
James J. Sullivan, Jr.
Chairman

/s/ _____
Cynthia L. Attwood
Commissioner

/s/ _____
Amanda Wood Laihow
Commissioner

Dated: July 23, 2020