

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW**

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

SECRETARY OF LABOR,

Complainant,

v.

Kiewit Power Constructors, Co.,

Respondent.

OSHRC Docket No.11-2395

APPEARANCES:

Matt S. Shepherd, Esquire, U.S. Department of Labor, Office of the Solicitor
Nashville, Tennessee
For the Complainant.

Arthur G. Sapper, Esquire, McDermott, Will & Emery, LLP., Washington, D.C.
For the Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

This matter arose as a result of an inspection by the Occupational Safety and Health Administration (OSHA) of the worksite of Kiewit Power Constructors Company (Kiewit) in Rogersville, Tennessee on August 3, 2011. Respondent filed a timely notice contesting only Citation No. 1, Item 1, which alleged a violation of 29 C.F.R. § 1926.50(g).

Respondent filed a Motion to Dismiss or for Summary Judgment on the ground that 29 C.F.R. § 1926.50(g) is invalid. It also filed a Motion for Declaratory Order declaring 29 C.F.R. § 1926.50(g) is invalid. A hearing on Respondent's Motions was held in Decatur, Georgia on

November 20, 2012. All arguments and submissions of both parties have been given careful consideration. For the reasons that follow, Respondent's Motion to Dismiss the alleged violation of 29 C.F.R. § 1926.50(g) is granted. It is therefore unnecessary to decide the Motion for Summary Judgment or the Motion for Declaratory Order. Citation No. 1, Item 1 alleging a violation of 29 C.F.R. § 1926.50(g) is vacated.

The Occupational Safety and Health Act of 1970(Act) was signed into law on December 29, 1970 and became effective one hundred and twenty days later on April 28, 1971. Section 4(b)(2) of the Act provided certain established Federal Standards in effect on the effective date of the Act were deemed to be occupational safety and health standards under this Act. These included the standard at 41 C.F.R. § 50-204.6 promulgated under the Walsh-Healey Act (41 U.S.C. 35 et seq.) and 29 C.F.R. § 1518.50 promulgated pursuant to the Contract Work Hours and Safety Standards Act (40 U.S.C. 333).

The Standard at 41 C.F.R. § 50-204.6 promulgated on May 20, 1969, provides:

§ 50 – 204.6 Medical services and first aid.

- (a) The employer shall ensure the ready availability of medical personnel for advice and consultation on matter of plant health.
- (b) In the absence of an infirmary, clinic or hospital in near proximity to the work place which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. First aid supplies approved by the consulting physician shall be readily available.
- (c) Where 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.

The standard at 29 C.F.R. § 1518.50 promulgated on April 17, 1971, provides:

§ 1518.50 Medical services and first aid.

- (a) The employer shall ensure the availability of medical personnel for advice and consultation on matters of occupational health.
- (b) In the absence of an infirmary, clinic, or hospital in proximity to the worksite which is available for the treatment of injured employees, a person or persons who have a valid certificate in first aid training from the U.S. Bureau of Mines or the American Red Cross shall be available to render first aid.
- (c)(1) First aid supplies recommended by the consulting physician shall be easily accessible when required.
- (2) The first aid kit shall consist of materials recommended by the consulting physician in a weatherproof container with individual sealed packages for each

type of item. The contents of the first aid kit shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.

(d) Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.

(e) Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.

(f) The telephone numbers of the doctors, hospital and ambulances shall be conspicuously posted.

(g) There shall be at least one person, with a valid certificate in first aid training from the U.S. Bureau of Mines or the American Red Cross, to administer emergency first aid at any isolated location, or area of difficult access, and where medical treatment is not available.

It is important to note that this standard was promulgated eleven days before the effective date of the Act, arguably in anticipation of this standard being adopted by the Act as an Established Federal Standard. It is also noteworthy that this standard was issued two years after 41 C.F.R. § 50-204.6 and that both standards were issued by the Department of Labor.

Section 6 (a) of the Act provides:

Sec. 6. (a) Without regard to chapter 5 of title 5, United States Code, 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. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(29 U.S.C. 655)

Pursuant to the authority in sections 6 (a) and 8 (g) of the Act, on May 29, 1971, the Secretary of Labor promulgated 29 C.F.R. Part 1910, which in part, adopted and extended certain Established Federal Standards in effect on April 28, 1971. The Standards in part 1910 became effective August 27, 1971. The provisions of 41 C.F.R. § 50-204.6 were promulgated as an occupational safety and health standard and designated as 29 C.F.R. § 1910.151.

The provisions in Part 1910 relating to the applicability of Part 1910 standards, including 29 C.F.R. § 1910.151, are found in 29 C.F.R. § 1910.5. On May 29, 1971, this section included the limitation language of 29 C.F.R. § 1910.5 (e) as follows:

(e) Whenever the source of a standard prescribed in this Part 1910 is indicated to be an established Federal standard published in 41 C.F.R. Part 50-204, the standard so prescribed is applicable only to plants, factories, buildings, or other places of employment where materials, supplies, articles, or equipment are manufactured or furnished. That is, the standard is intended to apply to manufacturing or supply operations which would be subject to the Walsh-Healey Public Contracts Act if there were a Federal contract (41 U.S.C. 35-45) for the procurement of the materials, supplies, articles, or equipment involved.

The Secretary revoked 29 C.F.R. § 1910.5 (e) by publication in the Federal Register at 36 Fed. Reg. 18080 on September 9, 1971. That revocation provides:

Paragraph (a) of 29 C.F.R. 1910.5 (36 F.R. 10468) limits the application of established Federal standards derived from 41 C.F.R. Part 50-204 to plants, factories, buildings, or other places of employment where materials, supplies, articles, or equipment are manufactured or furnished. The purpose of this amendment is to remove the limitation to the application of the standards so that they may apply to every employment and place of employment exposed to the hazards covered by the standards.

The provisions of 5 U.S.C. 553 concerning notice of proposed rulemaking, public participation therein, and delay in effective date are inapplicable by virtue of the exception to 5 U.S.C. Ch. 5 provided in section 6(a) of the Williams-Steiger Occupational Safety and Health Act of 1970. Accordingly pursuant to authority in sections 6(a) and 8(g) of the Williams-Steiger Occupational Safety and Health Act of 1970 (84 Stat. 1593, 1600; 29 U.S.C. 655, 657) and in 29 C.F.R. 1910.4, § 1910.5 of Title 29 of the Code of Federal Regulations is hereby amended by revoking paragraph (e). As amended, § 1910.5 reads as follows:

§ 1910.5 Applicability of standards.

* * * *

(e) [Revoked]

* * * *

Effective date. This amendment shall become effective immediately upon publication in the Federal Register (9-9-71).

On December 30, 1971, Part 1518, containing safety and health regulations for construction, was transferred from Chapter XIII to Chapter XVII of Title 29 of the Code of

Federal Regulations and was designated as 29 C.F.R., Part 1926. The standard at 29 C.F.R. § 1518.50 was changed to the current designation of 29 C.F.R. § 1926.50 on that date.

All of the above actions by the Secretary of Labor on or after April 28, 1971, the effective date of the Act, were taken pursuant to Section 6(a) of the Act without regard to Chapter 5 of Title 5 of the United States Code. Specifically, the promulgation, adoption and extension of established Federal Standards, and the revocation were all done without notice and comment. All of these promulgations, modifications and revocations were completed in accordance with Section 6(a) of the Act before April 28, 1973, two years after the effective date of the Act.

The Secretary published in the Federal Register on February 9, 1979 a Notice of Enforcement Policy and Republication of Standards (44 Fed. Reg. 8577). This notice listed the entire text of 29 C.F.R. Part 1926 plus certain general industry standards the Secretary had identified as applicable to construction work. This list included 29 C.F.R. § 1910.151(c). The Secretary characterized this notice as an effort to provide a better understanding of OSHA's enforcement policy regarding hazards in construction. This notice is merely a policy statement by OSHA. It is not a notice of proposed rulemaking allowing for comment by interested members of the public. This is not a substitute for a proposed rule under the Act or the APA.

In June, 1993, immediately prior to the Secretary's regulatory action published in the Federal Register at 58 Fed. Reg. 35075 on June 30, 1993, the standard at 29 C.F.R. § 1926.50 provided:

§ 1926.50 Medical services and first aid.

- (a) The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.
- (b) Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.
- (c) In the absence of an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U.S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.
- (d)(1) First-aid supplies approved by the consulting physician shall be easily accessible when required.
- (2) The first-aid kit shall consist of materials approved by the consulting physician in a weatherproof container with individual sealed packages for each

type of item. The contents of the first-aid kit shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.

(e) Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.

(f) The telephone numbers of the physicians, hospitals, or ambulances shall be conspicuously posted.

On July 1, 1993, immediately after the Secretary's action, 29 C.F.R. § 1926.50 provided:

§ 1926.50 Medical services and first aid.

(a) The employer shall insure the availability of medical personnel for advice and consultation on matters of occupational health.

(b) Provisions shall be made prior to commencement of the project for prompt medical attention in case of serious injury.

(c) In the absence of an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U.S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.

(d)(1) First-aid supplies approved by the consulting physician shall be easily accessible when required.

(2) The first-aid kit shall consist of materials approved by the consulting physician in a weatherproof container with individual sealed packages for each type of item. The contents of the first-aid kit shall be checked by the employer before being sent out on each job and at least weekly on each job to ensure that the expended items are replaced.

(e) Proper equipment for prompt transportation of the injured person to a physician or hospital, or a communication system for contacting necessary ambulance service, shall be provided.

(f) The telephone numbers of the physicians, hospitals, or ambulances shall be conspicuously posted.

(g) Where 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.

In its notice in the Federal Register at 58 Fed.Reg. 35076 on June 30, 1993, the Department of Labor, Occupational Safety and Health Administration (OSHA) published a final rule incorporating the regulatory text of Part 1910 standards that OSHA identified as applicable to construction work into various Part 1926 standards. OSHA "determined that it is not required to follow procedures for public notice and comment rulemaking under either Section 4 of the

Administrative Procedure Act or under Section 6(b) of the Occupational Safety and Health Act,” reasoning that, “this action does not affect the substantive requirements or coverage of the standards.” In this notice, OSHA further asserted that, “incorporation does not modify or revoke existing rights or obligations nor does it establish new ones.” The basis for these assertions appears to be that OSHA was accommodating “elements of both labor and management within the construction industry” that “have requested the Agency to develop a single set of OSHA regulations for the exclusive use of that industry.” (58 Fed. Reg. 35076-35077).

As part of this notice, OSHA added a new standard to 29 C.F.R. § 1926.50 as follows:

Subpart D-Occupational Health and Environmental Control

6. New § 1926.50(g) is added to read as follows:

§ 1926.50 Medical services and first aid.

* * * *

(g) Where 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.

The notice clearly adds § 1926.50(g) as a new standard. Prior to the June 30, 1993 Federal Register Final Rule publication, the standard at 29 C.F.R. § 1926.50 did not contain a Section (g). It did not provide a requirement for a quick drenching facility where the eyes or body of any person may be exposed to injurious corrosive materials. With the publication of this notice, a new section (g) was added requiring such facilities specifically in construction work.

Section 6(a) of the Act sets forth the requirements for promulgation of standards for two years after the effective date of the Act without regard to the Administrative Procedure Act. Section 6(b) of the Act sets forth specific procedures for the Secretary to promulgate, modify or revoke any standard under the Act after April 28, 1973. That section requires a proposed rule to be published in the Federal Register allowing interested persons to submit written data or comments. A final rule may be promulgated, modified or revoked only after receipt of comments under Section 6(b)(2) or the completion of a hearing under Section 6 (b) (3).

Consistent with Section 6(b) of the Act, 29 C.F.R. § 1911.10 sets forth specific mandatory procedures for commencement of rulemaking for standards applicable to construction work. An exception to this procedure is allowed by 29 C.F.R. § 1911.5 for minor changes in standards where the public is not particularly interested. In such cases, the Secretary must

incorporate a finding of good cause for not providing notice and public procedure. These changes include interpretive and procedural changes to regulations and standards as allowed under the Administrative Procedure Act (APA), 5 U.S.C. § 550 et seq.

Amending 29 C.F.R. § 1926.50 to add a new standard in § 1926.50 (g) is not a minor change involving interpretation or procedure. Rather, it is clearly a substantive change requiring, at the very least, informal rulemaking in the form of notice and public comment.

OSHA recognized this was a substantive change by considering requests from elements of labor and management within the construction industry for the agency to develop a single set of OSHA regulations for the exclusive use of that industry. The Agency, in accordance with section 6(b)(2) of the Act, also considered recommendations of its Advisory Committee on Construction Safety and Health relating to consolidation of regulations applicable to construction. See 58 Fed. Reg. 35076, June 30, 1993.

To that point, OSHA followed the requirements of the Act, the regulations and the APA. These actions were consistent with informal and formal procedures for promulgation and modification of substantive rules. Rather than publishing proposed rule changes, allowing for public procedure involving comment or a hearing, however, OSHA chose to issue a final rule adding a new standard at § 1926.50 (g).

The Agency determined it was exempt from following required procedures of notice and comment, reasoning the action did not affect substantive requirements or coverage of the standard. This bare assertion is internally inconsistent with OSHA's official action in the final rule published in the same notice entitled "6. New § 1926.50 (g) is added to read as follows:" (58 Fed.Reg. 35084).

It is clear that OSHA made a substantive change to 29 C.F.R. § 1926.50 by adding a new section (g) with new requirements for quick drenching facilities for employees doing construction work that may be exposed to injurious corrosive materials. This standard had no such requirement prior to this change. No other construction standard had this requirement.

On September 9, 1971, the Secretary of Labor extended and expanded the application of Established Federal Standards promulgated under the Walsh-Healey Act. This included the standard at 41 C.F.R. § 50-204.6 which was recodified as an OSHA standard on May 29, 1971 as 29 C.F.R. § 1910.151. The standards in Part 1910 are often referred to as general industry

standards which by their terms are broadly worded standards that may or may not be applicable to working conditions in various industries.

Standards in Part 1926 are vertical standards. These are detailed specific standards applicable to specific working conditions. The vertical standards in Part 1926 apply to employment and places of employment of every employee engaged in construction work as described and defined in 29 C.F.R. § 1910.12.

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. At an enforcement hearing the burden to establish applicability of this general industry standard to working conditions on a construction jobsite rests squarely on the Secretary. By sliding the terms of § 1910.151(c) into a construction standard specifically applicable to construction work, the burden on the Secretary to prove the applicability of the standard is lessened or even eliminated. By moving the 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. Once these 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.

This alone shows that the action of OSHA was a substantive change and created a substantial impact on private parties engaged in construction activity. This substantive change required a proposed rule subject to notice and comment.

OSHA failed to follow procedures required by Section 6(b) of the Act, its own regulations in 29 C.F.R. Part 11 and the APA. The Agency's statement that these changes are minor and do not affect substantive requirements or coverage of the standards is internally inconsistent with its notice of final rule. This assertion is unconvincing and, therefore, rejected.

Conclusion

Complainant did not comply with the requirements of Section 6(b) of the Act, its own regulations at 29 C.F.R. Part 1911 or the Administrative Procedure Act in the promulgation of 29 C.F.R. §1926.50(g). This action substantively changed employer duties and obligations under 29 C.F.R. §1926.50 without notice and comment, as required for informal rulemaking, or a hearing under formal rulemaking procedures. Since this standard at 29 C.F.R. § 1926.50(g) was

improperly promulgated and added as a new standard, the Secretary cannot now enforce an alleged violation of that standard. The alleged serious violation of 29 C.F.R. § 1926.50(g) in Citation No. 1, Item 1 is vacated.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED, Respondent's Motion to Dismiss is granted, and Item 1 of Citation No. 1 is vacated and no penalty is assessed.

/s/
STEPHEN J. SIMKO, JR.
Judge

Date: December 24, 2012
Atlanta, Georgia