No. 18-1282

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

KIEWIT POWER CONSTRUCTORS CO.,

PETITIONER,

v.

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR

RESPONDENT.

ON PETITION FOR REVIEW OF A FINAL ORDER OF
THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

PAGE PROOF BRIEF FOR THE SECRETARY OF LABOR CONSOLIDATED WITH NO. 18-1317

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February 7, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties before the Occupational Safety and Health Review Commission were the Secretary of Labor (Complainant), represented by M. Patricia Smith, Joseph M. Woodward, Charles F. James, and Scott Glabman, and Kiewit Power Constructors (Respondent), represented by Arthur G. Sapper and James A. Lastowska. APA Watch, represented by Lawrence J. Joseph, participated as an amicus curiae.

B. Rulings under Review

The Secretary's petition for review of the Commission's ruling that 29 C.F.R. § 1926.50(g) was invalidly promulgated as a construction standard. *Kiewit Power Constructors Co.*, 27 BNA OSHC 1445, ____ (No. 11-2395, 2018) (Chairman MacDougall and Commissioner Sullivan, majority; Commissioner Attwood, dissent), Comm'n Dec. at 16, Comm'n Certified List, Vol. 4, #97. Kiewit cross-petitions for review of the Commission's denial of the company's motion for a declaratory order affirming the invalidity of the cited standard. Comm'n Dec. at 2 n.1, Certified List, Vol. 4, #97.

C. Related Cases

The Secretary filed his petition for review of the Commission's ruling in the Tenth Circuit. *Dep't of Labor v. Kiewit Power*, No. 18-9576 (Nov. 19, 2018 10th Cir.). The Secretary's petition was transferred from the Tenth Circuit to this Court on November 26, 2018, pursuant to 28 U.S.C. § 2112(a), docketed as case no. 18-1317, and consolidated with case no. 18-1282 on November 29.

/s/Scott Glabman
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GLOSSARY

ALJ	Administrative Law Judge of the Occupational Safety and Health Review Commission
BNA OSHC	Bureau of National Affairs, Inc., Occupational Safety and Health Cases, reporter of Commission cases. The acronym is used in citations.
CF&I	Short form for the case *Martin v. OSHRC (CF&I Steel Corp.)*, 499 U.S. 144 (1991)
Commission	Occupational Safety and Health Review Commission
Mine Act	Mine Safety and Health Act
Mine Act Commission	Federal Mine Safety and Health Review Commission
MSHA	Mine Safety and Health Administration
OSHA	Occupational Safety and Health Administration
OSH Act	Occupational Safety and Health Act
OSHRC	Occupational Safety and Health Review Commission
Secretary	Secretary of Labor

JURISDICTIONAL STATEMENT

The Secretary of Labor seeks review of a September 28, 2018 final order of the Occupational Safety and Health Review Commission. Notice of Comm'n Dec. (Sept. 28, 2018), Certified List, Vol. 4, #96; *Kiewit Power Constructors Co.*, 27 BNA OSHC 1445 (No. 11-2395, 2018), 2018 O.S.H.D. (CCH) P 33689 (O.S.H.R.C.), 2018 WL 4861361, Certified List, Vol. 4, #97. The Commission had jurisdiction under section 10(c) of the Occupational Safety and Health Act of 1970 (OSH Act or Act), 29 U.S.C. § 659(c). The Commission's final order adjudicated all the claims, rights, and liabilities of the parties.

This Court has jurisdiction to review the Commission's September 28, 2018 final order because the Secretary's petition for review was filed in the Tenth Circuit on November 19, 2018, within the statutory sixty-day period from the date of the Commission's final order, 29 U.S.C. § 660(b), and transferred to this Court, pursuant to 28 U.S.C. § 2112(a), on November 26, 2018.[1]

[1] The OSH Act gives the Secretary the choice of appealing an unfavorable Commission decision to either the federal appeals court for the circuit in which the employer's alleged violation occurred, or where the employer has its principal office. 29 U.S.C. § 660(b). The Act also gives an aggrieved employer the same two options as well as the further option of appealing to the D.C. Circuit. *Id.*, § 660(a).

STATEMENT OF THE ISSUES

(1) Whether the Commission's holding that established federal standards adopted as OSH Act standards under section 6(a) of the OSH Act apply only to the industries covered by their federal source standards is arbitrary and capricious where the holding is contrary to Commission and court of appeals precedent in effect for over forty years, and the Commission failed to provide a reasoned explanation for its departure from prior precedent.

(2) Whether the Secretary's interpretation of his authority under section 6(a) to adopt established federal standards and apply them generally is reasonable and entitled to *Chevron* deference because that interpretation accords with the relevant statutory text, is explicitly stated in a contemporaneous interpretive rule, and furthers the Congressional interest in immediately providing a nationwide minimum level of occupational safety and health protection.

STATUTES AND REGULATIONS

Section 6(a) of the OSH Act, 29 U.S.C. § 655(a), 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. 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.

Section 1926.50(g) of title 29 of the Code of Federal Regulations provides:

> 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.

STATUTORY AND REGULATORY BACKGROUND

I. The OSH Act and the Separation of Enforcement and Adjudicatory Powers

The fundamental objective of the OSH Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve this purpose, the OSH Act imposes two duties on an employer: a "general duty" to provide to "each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees," 29 U.S.C. § 654(a)(1); and a specific duty "to comply with occupational safety and health standards promulgated under [the OSH Act]."[2] *Id*. § 654(a)(2).

The OSH Act separates rule-making and enforcement powers from adjudicative powers and assigns these respective functions to two different administrative actors: OSHA and the Commission. *Martin v. OSHRC (CF & I)*, 499 U.S. 144, 147, 151 (1991). OSHA is charged with promulgating and enforcing workplace health and safety standards, and the Commission is responsible for carrying out the Act's adjudicatory functions. *CF & I*, 499 U.S. at

[2] The Secretary's responsibilities under the OSH Act have been delegated to an Assistant Secretary who directs OSHA. *See Pub. Citizen Health Research Grp. v. U.S. Dep't of Labor*, 557 F.3d 165, 175 (3d Cir. 2009); Secretary of Labor's Order 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms "Secretary" and "OSHA" are used interchangeably in this brief.

147. OSHA prosecutes violations of the Act and its standards by issuing citations requiring abatement of violations and assessing monetary penalties. 29 U.S.C. §§ 658-59, 666. The Commission is an independent agency that is intended to serve as a "neutral arbiter" of disputes between employers and OSHA that arise from those citations. *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7 (1985) (per curiam); *CF&I*, 499 U.S. at 147-48, 154-55.

An employer may contest a citation by filing a written notice of contest with OSHA within fifteen working days of receiving the citation. 29 U.S.C. § 659(a); *Martin v. Pav-Saver Mfg. Co.*, 933 F.2d 528 (7th Cir. 1991). A Commission ALJ provides an opportunity for a hearing and issues a decision on the contest. 29 U.S.C. §§ 659(c), 661(j). The Commission may review and modify the ALJ's decision, or may allow it to become a final order automatically by operation of law by not directing the decision for review. *Id*. §§ 659(c), 661(j). Either the Secretary or an aggrieved party may seek judicial review in a United States court of appeals of a Commission final order. *Id*. § 660(a)-(b).

II. Regulatory History

On May 29, 1971, the Secretary adopted the Walsh-Healey Act "quick drenching" standard, 41 C.F.R. § 50-204.6(c), an "established federal standard," [3]

[3] The Act defines "established Federal standard" to mean "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

as an OSH Act standard,[4] codified at 29 C.F.R. § 1910.151(c). OSHA, "Part 1910-Occupational Safety and Health Standards, National Consensus Standards and Established Federal Standards," 36 Fed. Reg. 10,466, 10,601 (1971). OSHA adopted this provision pursuant to the special authority granted by section 6(a) of the OSH Act, which allowed OSHA to adopt established federal standards and national consensus standards without notice-and-comment rule-making for the first two years after the Act became effective. 29 U.S.C. § 655(b). "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. Sec'y of Labor*, 511 F.2d 864, 869 (10th Cir. 1975). Section 1910.151(c) is textually identical to its Walsh-Healey Act source standard, 41 C.F.R. § 50–204.6(c).

The Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45, imposes safety and health standards on those holding public contracts for materials above $10,000.

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date of enactment of this Act." 29 U.S.C. § 652(10). The OSH Act was enacted on December 29, 1970. OSH Act, Pub.L. No. 91-596, § 34, 84 Stat. 1590, 1620 (1970).

[4] 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 1305,1312 & n.19 (Nos. 76-5162, 77-773, and 78-4478, 1982). 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.

Lee Way, 511 F.2d at 868. By contrast, the OSH Act applies to all employers engaged in a business affecting commerce. 29 U.S.C. § 652(5). The May 29, 1971 Part 1910 issuance codifying the quick drenching standard as section 1910.151(c) contained contradictory provisions on the intended scope of section 6(a) standards. Section 1910.11 extended the applicability of established federal standards adopted under section 6(a) "to every employer, employee and employment covered by the [OSH] Act." 36 Fed. Reg. 10468-69. However, section 1910.5(e) stated that section 6(a) standards adopted from established Walsh-Healey Act standards applied only to those manufacturing and supply operations covered by the Walsh-Healey Act. 36 Fed. Reg. 10468. Just over three months later, on September 9, 1971, the Secretary revoked section 1910.5(e) so that the Walsh-Healey Act-derived section 6(a) standards would apply to "every employment and place of employment exposed to the hazards covered by the standards." 36 Fed. Reg. 18,080, 18,081 (Sept. 9, 1971)), Certified List, Vol. 4, #97.

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 C.F.R. part 1926) are less comprehensive than the safety and . . . health standards for general industry employment (29 C.F.R. 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 he had identified as applicable to construction work. OSHA, Parts 1926, 1910, "Identification of General Industry Safety and Health Standards (29 C.F.R. 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 589. The Secretary also noted that the identification of these applicable general industry standards was the first step in his 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 also applicable to construction employment. "Incorporation of General Industry Standards," 58 Fed.

Reg. at 35,076, 35,084, 35,305 (1993). This codification of construction standards in one volume of the C.F.R. was intended to reduce 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). "Incorporation," 58 Fed. Reg. at 35,084, 35,305.

In codifying § 1926.50(g), the Secretary expressly made a good cause finding that he was exempt from the notice-and-comment rule-making requirements of section 4 of the 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 rulemaking 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*.

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings Below

This enforcement action arises under section 10 of the OSH Act, 29 U.S.C. § 659. After inspecting Kiewit's Rogersville, Tennessee work site on August 3, 2011, OSHA issued a citation alleging a serious violation of 29 C.F.R. § 1926.50(g), and proposing a penalty of $3400. Amended Complaint, Ex. A,

Certified List, Vol. 1, #10.

Kiewit timely contested the citation, and moved to dismiss the complaint on the ground that the cited provision was invalidly adopted without notice-and-comment rule-making. Kiewit also requested a declaratory order declaring 29 C.F.R. § 1926.50(g) invalid. The ALJ granted the motion to dismiss and vacated the citation; therefore, he found it unnecessary to decide the motion for a declaratory order. ALJ Dec. 1-2, 10, Certified List, Vol. 3, #51. The parties cross-petitioned for discretionary review by the Commission. The Commission directed the case for review, found that § 1926.50(g) was invalidly promulgated as a construction standard, and vacated the citation. Comm'n Dec. at 16, Certified List, Vol. 4, #97. The Commission also denied Kiewit's request for a declaratory order. Comm'n Dec. at 2 n.1, Certified List, Vol. 4, #97.

II. Statement of Facts

A. Kiewit's Operations and Its Employees' Exposure to Injurious Corrosive Materials.

Kiewit is a large construction company, engaged in building power plants and associated facilities, with a principal place of business in Lenexa, Kansas. Answer, § A, para. 3, Certified List, Vol. 1, #11; Kiewit's Motion to Dismiss to ALJ, Part 1 (Validity) at 64, Certified List, Vol. 1, #34; Kiewit Power's Corporate Disclosure Statement (D.C. Circuit Oct. 2018). Kiewit admits that its "operations often involve corrosive materials covered

by § 1926.50(g)." Kiewit's Motion to Dismiss to ALJ, Part 1 (Validity) at 64, Certified List, Vol. 1, #34. OSHA cited Kiewit for a serious violation of § 1926.50(g) on the ground that the company exposed its employees at its Rogersville, Tennessee work site to injurious corrosive electrical insulating resin on a daily basis without providing suitable quick-drenching facilities for emergency use. Comm'n Dec. at 2, 5 & n.5, Certified List, Vol. 4, #97. The citation proposed a penalty of $3400. Amended Complaint, Ex. A, Certified List, Vol. 1, #10.

B. The ALJ's Decision

Kiewit timely contested the citation, and moved to dismiss the complaint on the ground that § 1910.151(c), as promulgated in 1971 pursuant to section 6(a), did not apply to the construction industry because the Walsh-Healey Act standard from which it was adopted applies only to manufacturing and supply operations. Kiewit claimed that the Secretary could not apply § 1910.151(c) to construction industry employers without conducting notice-and-comment rulemaking, and since the Secretary did not use such procedures in codifying § 1926.50(g), he could not enforce that standard against Kiewit. Kiewit also sought a declaratory order affirming the invalidity of § 1926.50(g). The ALJ found that the codification of § 1926.50(g) in 1993 without notice-and-comment procedures rendered that standard

procedurally invalid, and vacated the citation.[5] The ALJ therefore found it unnecessary to decide Kiewit's motion for a declaratory order. ALJ Dec. at 1-2, 9, Certified List, Vol. 3, #51.

C. The Commission's Majority Opinion

Based on the language of section 6(a), its statutory context, and the legislative history, Chairman MacDougall and Commissioner Sullivan found that the Secretary lacked authority to apply § 1910.151(c) to the construction industry without notice-and-comment rule-making. Comm'n Dec. at 16, Certified List, Vol. 4, #97. Accordingly, the majority concluded that § 1926.50(g) was invalidly promulgated as a construction standard, and vacated the citation. Comm'n Dec. at 16, Certified List, Vol. 4, #97. The majority also denied Kiewit's request for a declaratory order, noting that such relief is granted only where its practical effect would be greater than that of the decision, and the order would serve a useful purpose. Comm'n Dec. at 2 n.1, Certified List, Vol. 4, #97.

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[5] The ALJ found that the 1993 codification of §1910.151(c) as a construction standard, § 1926.50(g), in Part 1926 required notice-and-comment procedures because the codification itself altered the rights and obligations of the parties. ALJ Dec. at 8-9, Certified List, Vol. 3, #51. The ALJ did not reach Kiewit's argument that § 1910.151(c) as adopted in 1971 under section 6(a) did not apply to construction employers. On review, the Commission rejected the ALJ's rationale as irrelevant, finding that the issue was whether the Secretary had authority under section 6(a) to forego notice-and-comment procedures in extending the coverage of the Walsh-Healey Act quick drenching standard to employers in the construction industry. Comm'n Dec. at 5-6 n.6, Certified List, Vol. 4, #97.

The majority found the language of section 6(a) silent with respect to whether the Secretary may expand the scope of the established federal standards adopted as OSH Act standards to industries beyond those the original source standards covered. Comm'n Dec. at 6, Certified List, Vol. 4, #97. The majority also found that the Secretary's interpretation of section 6(a) was unreasonable and therefore not entitled to *Chevron* deference. Comm'n Dec. at 7, Certified List, Vol. 4, #97.

The majority found that the Secretary's interpretation of section 6(a) was unreasonable because it was inconsistent with statements of legislators in the legislative history. Comm'n Dec. at 12-15, Certified List, Vol. 4, #97. The majority pointed to a Senate committee report stating that the purpose of the promulgation procedure authorized by section 6(a) was to establish as rapidly as possible national occupational safety and health standards with which industry is familiar. Comm'n Dec. at 12-13, Certified List, Vol. 4, #97. The majority further noted a statement in the Senate report acknowledging that established federal standards have already been subjected to the procedural scrutiny mandated by the law under which they were issued. Comm'n Dec. at 13; Certified List, Vol. 4, #97. The majority construed these statements as implying that Congress did not intend to apply established federal standards to industries that had not participated in such scrutiny. Comm'n Dec. at 13, Certified List, Vol. 4, #97.

As further support for its holding, the majority cited the Secretary's promulgation in 1971 of 29 C.F.R. § 1910.5(e), a provision limiting the application of section 6(a) standards adopted from the Walsh-Healey Act only to operations covered by that Act, and his revocation of this provision, without explanation, a few months later. Comm'n Dec. at 7-9, Certified List, Vol. 4, #97. The majority viewed the 1971 revocation of section 1910.5(e) as an unexplained change in the Secretary's interpretation of section 6(a), rendering the interpretation in the instant case undeserving of *Chevron* deference. Comm'n Dec. at 7-8, Certified List, Vol. 4, #97. The majority also asserted that the Secretary's interpretation could lead to the absurd result that maritime or shipbuilding standards could be applied to the manufacturing industry, or construction standards could be applied to the agricultural industry. Comm'n Dec. at 10-11, Certified List, Vol. 4, #97.

D. Commissioner Attwood's Dissent

Commissioner Attwood dissented from the majority's interpretation of section 6(a). She argued that the premise of Kiewit's argument that the coverage of section 6(a) standards was limited by the federal source statute's coverage scheme had been squarely rejected by the Commission and federal appellate courts in prior cases. This prior precedent established that in adopting federal standards under section 6(a), the Secretary could apply them to every employer and place of employment covered by the Act. Dissent Dec. at 36-42, Certified List, Vol. 4, #97.

Commissioner Attwood also argued that the majority erred in not giving *Chevron* deference to the Secretary's reasonable interpretation of section 6(a). Dissent Dec. at 17, Certified List, Vol. 4, #97.

The dissent rejected the majority's analysis of the legislative history, pointing to numerous statements indicating Congressional concern that millions of employees were not covered at all under existing safety and health statutes, and indicating the need for expanding federal protection to cover all American workers. Dissent Dec. at 32-36, Certified List, Vol. 4, #97. The dissent also took issue with the majority's contention that the Secretary forfeited any claim to *Chevron* deference by revoking § 1910.5(e) without a "reasoned explanation." Dissent Dec. at 27-31, Certified List, Vol. 4, #97. The dissent noted that the 1971 Federal Register notice that contained section 1910.5(e) also contained a provision, 29 C.F.R. 1910.5(c), that clearly contemplated the applicability of section 6(a) standards adopted from Walsh-Healey Act sources to employers beyond the reach of that Act. Dissent Dec. at 29-30, Vol. 4, #97. Because section 1910.5(e) was in direct conflict with other provisions of the same Part 1910 issuance, the dissent found that the prompt revocation of that section was not a change in interpretation but rather the correction of an "anomaly." Dissent Dec. at 30, Certified List, Vol. 4, #97.

SUMMARY OF ARGUMENT

The Commission's holding that established federal standards adopted as OSHA standards under section 6(a) of the OSH Act apply only to employers in the industries covered by their source standards is contrary to Commission and court of appeals precedent in effect for over forty years. Commission and court of appeals case law establishes that section 6(a) standards are applicable in accordance with their terms to all employers and workplaces subject to the Act, regardless of the coverage of the antecedent federal standard under its source statute. Thus, when the Walsh-Healey Act quick drenching standard was adopted as an OSHA standard, it became applicable, in accordance with its terms, to all workplaces in all industries "where the eyes or body of any person may be exposed to injurious corrosive materials."

The Commission plainly departed from its precedent in ruling that section 6(a) standards apply only to those industries already covered by the established federal source standards. Yet the majority gave no principled justification for this departure. The majority's assertion that prior Commission precedent did not apply established federal standards to new industries is incorrect as both the *Bechtel* and *Lee Way* decisions did precisely that. Moreover, the majority's purported distinction is irrelevant since the prior cases established the broader principle that section 6(a) standards apply to all employers subject to the OSH Act regardless of

the coverage limitations of the antecedent federal standard. The majority's failure to explain its departure from directly on point precedent renders its decision arbitrary, capricious and contrary to law.

The majority also acted contrary to law in rejecting the Secretary's interpretation, embodied in the Secretary's citation and litigating position, that section 6(a) authorized him to apply the quick drenching standard to employers in the construction industry. The Secretary's interpretation is reasonable, and therefore entitled to *Chevron* deference; it is consistent with the statutory text; it is expressly included in an interpretive rule promulgated at the same time as the adoption of the quick drenching standard as an OSHA standard; and it furthers Congress's interest in immediately providing a nationwide minimum level of occupational safety and health protection. The majority's reasons for rejecting the Secretary's interpretation are wholly unpersuasive, and do not permit the majority to substitute its own reading of the statute for the Secretary's.

STANDING

The Secretary has standing because he was a litigant in this OSHA enforcement proceeding and is adversely affected by the Commission's order invalidating an occupational safety standard promulgated under the OSH Act.

ARGUMENT

I. Standard of Review

This Court may set aside the Commission's final order if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *A.J. McNulty & Co. v. Sec'y of Labor*, 283 F.3d 328, 331-32 (D.C. Cir. 2002). The Commission's decision is arbitrary and capricious if it departed from its own prior precedent without providing a reasoned explanation. *Graphic Commc'ns Int'l Union Local 554 v. Salem-Gravure Div. of World Color Press, Inc.* 843 F.2d 1490,1493 (D.C. Cir. 1988).

To the extent that this case concerns the meaning of section 6(a) of the OSH Act, the Secretary's interpretation embodied in his citation and litigating position before the Commission "is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard." *CF & I*, 499 U.S. at 157. Accordingly, the Secretary's interpretation in the instant case is entitled to the deference described in *Chevron U.S.A., Inc. v. Nat. Res. Def. Council,* 467 U.S. 837, 844 (1984). *Sec'y of Labor, Mine Safety and Health Admin.* (MSHA) *v. Nat'l Cement Co. of Cal.* 494 F.3d 1066, 1073 (D.C. Cir. 2007) (construing parallel statutory scheme under Mine Safety and Health Act); *accord Sec'y of Labor v. Cranesville Aggregate Cos., Inc.* 878 F.3d 25, 32-33 (2d Cir. 2017). Under *Chevron*, the Commission and this Court must defer to the

Secretary's reasonable interpretation of the scope of his authority under section 6(a) because Congress has not directly spoken to the precise question at issue. *Chevron*, 467 U.S. at 843-44.

II. The Commission's Decision Is Arbitrary and Capricious Because It Departs From Long-Settled Precedent Without Providing a Reasoned Explanation.

As with other administrative bodies, the Commission may not depart from established precedent without providing a reasoned explanation. *Graphic Commc'ns*, 843 F.2d at 1493 (reversing Commission ruling that changed its long-standing policy on enforceability of protective orders without reasoned explanation); *Int'l Union UAW v. General Dynamics Land Sys. Div.*, 815 F2d. 1570, 1578-79 (D.C. Cir. 1978) (vacating Commission decision that, in turn, vacated an OSHA citation because the Commission gave no reasoned explanation for departing from precedent); *see also Sec'y of Labor, MSHA v. Consolidation Coal Co.*, 895 F.3d 113, 119 (D.C. Cir. 2018) (vacating Mine Act Commision decision that MSHA violation was not "significant and substantial" because the ALJ gave no reasoned explanation for departing from "directly on point" Commission precedent). This basic principle of administrative law "is intended to eliminate the appearance as well as the reality of arbitrariness" and thus maintain the public's faith in its administrative agencies. *Columbia Broad. Sys., Inc. v.*

FCC, 454 F2d. 1018, 1027 (D.C. Cir. 1971). As demonstrated in the following sections, the majority opinion in the instant case departed from established precedent without providing a reasoned explanation.

A. Prior Commission and Appellate Court Rulings Establish That Section 6(a) of the OSH Act Authorized the Secretary to Expand the Coverage of Established Federal Standards to Every Employer, Employee, and Employment.

In the early years after the OSH Act's passage in 1970, the Commission and the federal appellate courts resolved the question of whether, and to what extent, the Secretary could apply established federal standards summarily adopted as OSHA standards under section 6(a) beyond the federal source standard's scope limitations. As demonstrated below, the case law establishes that section 6(a) standards are applicable in accordance with their terms to all employers and workplaces subject to the Act, regardless of the coverage of the antecedent federal standard under its source statute. This principle controls this case: when the Walsh-Healey Act quick drenching standard was adopted as an OSHA standard it became applicable, in accordance with its terms, to all workplaces in all industries "where the eyes or body of any person may be exposed to injurious corrosive materials." *See* 41 C.F.R. § 50-204.6(c) (Walsh-Healey Act source standard); 29 C.F.R. § 1910.151(c) (OSHA general industry "quick drenching" standard adopted under section 6(a)).

The leading case establishing the principle that section 6(a) standards apply, according to their terms, to all industries is *Lee Way Motor Freight, Inc.*, 1 BNA OSHC 1689 (No. 1105, 1974), *aff'd,* 511 F.2d 864 (10th Cir. 1975). In *Lee Way*, the employer was cited for violating a section 6(a) standard requiring covers or guardrails to protect personnel from open pits. *Lee Way*, 1 BNA OSHC at 1690-91. Lee Way argued the OSHA standard did not apply to it because the Walsh-Healey Act source standard applied to material handling and storage, whereas Lee Way was a transportation company engaged in servicing operations at a truck terminal. *Id*. at 1691. The Commission rejected this argument, holding that in enacting section 6(a), Congress specifically intended that established federal standards adopted as OSHA standards would apply "to industry in general." *Id.* at 1691 (citing legislative history). On appeal, the Tenth Circuit affirmed, holding 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, 511 F.2d at 869.

The Commission re-affirmed the principle that the coverage limitations applicable to established federal standards under their source statutes do not apply to standards adopted under section 6(a) of the OSH Act in *Bechtel Power Corp.*, 4 BNA OSHC 1005 (No. 5064, 1976), *aff'd*, 548 F.2d 248 (8th Cir. 1977). The issue in *Bechtel* was whether a construction management firm that had no craft workers and no responsibility for performing construction work could be subject, without notice-and-comment rule-making, to an OSHA construction standard adopted under section 6(a) as an established federal standard under the Contract Work Hours and Safety Standards Act (Construction Safety Act). Construction management is excluded from coverage under the Construction Safety Act, which applies only to contractors and subcontractors who employ laborers and mechanics. In language particularly apt here, the Commission rejected Bechtel's argument that rule-making was required to expand coverage of the section 6(a) standard to the company's engineering and management functions:

> The legislative history of the Act makes clear that in adopting Construction Safety Act standards as established federal standards under OSHA, the Secretary was empowered by sections 4(b)(2) and 6(a) to extend their coverage, without resort to formal rulemaking procedures . . . to *every* employer, employee, and employment covered by the [OSH] Act.

Id. at 1008 (Commission's emphasis).[6]

B. The Majority Opinion Provides No Reasoned Explanation for Departing from Prior Precedent.

The Commission ruled here that established federal standards summarily adopted as OSHA standards under section 6(a) may be applied "only to those industries already covered by [source standards]." Comm'n Dec. at 12, Certified List, Vol. 4, #97. Therefore, the Secretary could not apply the section 6(a) "quick drenching" standard to Kiewit, an employer in an industry - construction - not covered by the Walsh-Healey Act. Comm'n Dec. at 16, Certified List, Vol. 4, #97. This "restrictive application" of section 6(a), indisputably conflicts with the Commission's holdings in *Lee Way* and *Bechte*l that section 6(a) standards apply to all employers covered

[6] As an adjunct to its rulings in *Lee Way* and *Bechtel* that section 6(a) standards apply to all industries covered by the OSH Act, the Commission later held that in adopting established federal standards as OSHA standards under section 6(a), the Secretary was not required to carry over the federal source standard's scope and application provisions. *Am. Can Co.*, 10 BNA OSHC 1305, 1310-1313 (Nos. 76-5162, 77-773, and 78-4478, 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 federal standard under section 6(a) of the OSH Act. The omission of the federal source standard's scope and application language did not render the OSHA standard invalid, the Commission held, because Congress did not intend to adopt the established federal standards' coverage limitations. *Id.* at 1312 ("As a practical matter, Congress' purpose was to supersede rather than perpetuate statutory schemes such as the Walsh-Healey Act's").

by the OSH Act. *Lee Way*, 1 BNA OSHC at 1691 (quoted *supra* p. 21); *Bechtel*, 4 BNA OSHC at 1008 (quoted *supra* pp. 22-23).

The majority asserted that prior Commission and federal appellate decisions were not controlling because they did not involve the application of a section 6(a) standard to an employer in an industry not covered by the former established federal standard. Comm'n Dec. at 16 (discussing the Tenth Circuit *Lee Way* decision), Comm'n Dec. at 15 (asserting that "in *Bechtel*, the Secretary did not apply an established federal standard to a new industry, rather, he applied a former CSA standard to a construction manager"), Certified List, Vol. 4, #97. However, the majority's assertion is both factually incorrect and legally irrelevant.

Contrary to the majority's statement, both the Commission and Tenth Circuit decisions in *Lee Way* applied a section 6(a) standard adopted from an established Walsh-Healey Act standard to an employer in an industry - transportation - not covered by the Walsh-Healey Act. 1 BNA OSHC at 1691; 511 F.2d at 868. Similarly, in *Bechtel*, the Secretary applied a section 6(a) Construction Safety Act standard to an employer in an industry - construction management - not covered by the Construction Safety Act. *Bechtel*, 4 BNA OSHC at 1006-08. The employers in both cases argued that, in adopting established federal standards under section

6(a), the Secretary could not expand coverage to employers performing different work activities, i.e., employers in different industries, from those covered by the federal source standard. There is no principled distinction whatsoever between Lee Way's and Bechtel's rejected arguments and Kiewit's arguments here for restrictive application of section 6(a).

More importantly, even if relevant factual differences between the prior cases and the instant case could be discerned, the Commission's holding in *Bechtel* that Congress's intent in enacting section 6(a) was to extend coverage of established federal standards to "*every* employer and employment" covered by the Act is dispositive here: there can be no doubt that "every employer and employment" encompasses all employers in all industries. Thus, under *Lee Way* and its progeny *any* limitation upon the coverage of an established federal standard that is rooted in the federal source statute's particular coverage scheme is simply irrelevant under section 6(a).

Federal appellate court precedent is in accord with this view of section 6(a). The Tenth Circuit squarely rejected the employer's argument that because coverage under the Walsh-Healey Act is limited to activities related to the handling and storage of materials, section 6(a) standards adopted from established Walsh-Healey Act standards are similarly limited

in scope. *Lee Way*, 511 F.2d at 868-69. The court explained that in adopting Walsh-Healey Act and other established federal standards as OSHA standards, Congress's "principal purpose" was to extend safety and health protections to the many workers who had not been covered by these previous standards. *Id*. at 869. The Sixth Circuit also noted its agreement with the principle that the Secretary has authority under section 6(a) to extend the coverage of established federal standards to additional employers and employees so long as the extension does not create new kinds of protection not authorized by the source. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1332, n.6 (6th Cir. 1978).

The majority's failure to meaningfully confront its own "directly on point precedent" renders its decision in the instant case patently arbitrary. *Consolidation Coal Co.*, 895 F.3d at 119 (quoting *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013). The majority's error was all the more egregious since it upended long-settled expectations about the enforcement of section 6(a) standards. Consistent with established Commission precedent, these standards were routinely enforced in Commission proceedings for over forty years prior to the ruling in the instant case. The majority's ruling here abruptly changed the law not only with respect to the quick drenching construction standard

but to all OSHA construction standards adopted under section 6(a) from established Walsh-Healey Act standards.

By logical implication, the majority's ruling also brings into question the continuing validity of a host of other section 6(a) standards that have been applied to employers in industries not covered by the antecedent federal standard. The majority made this sweeping change without even acknowledging it was doing so and without any explanation of the precedents under which all affected parties had operated for the previous forty-plus years. For all of these reasons, the Commission's decision should be reversed as arbitrary and capricious and the Secretary's citation reinstated.

III. The Commission's Decision Is Contrary to Law Because It Rejects the Secretary's Reasonable Interpretation of His Authority Under Section 6(a).

The Commission's decision in this case is also contrary to law because the majority refused to defer to the Secretary's reasonable interpretation that section 6(a) authorized him to extend the coverage of the Walsh-Healey Act's quick drenching standard to construction employers without notice-and-comment rulemaking. The Secretary's interpretation was embodied in the citation to Kiewit and the agency's litigating position before the Commission. *See* Acting Sec. Comm'n Brf. at 10-20, Certified List, Vol. 4, #65. Accordingly, the Secretary's

interpretation is entitled to *Chevron* deference by the Commission and this Court. *Nat'l Cement*, 494 F.3d at 1073 (citing *CF & I*, 494 U.S. 144); *accord Cranesville*, 878 F.3d at 32-34, 36. Under *Chevron*, the Commission and a reviewing court must determine whether Congress has "directly spoken to the precise question at issue," and if so, they must give effect to Congress's "unambiguously expressed intent." *Nat'l Cement*, 494 F.3d at 1073-74 (quoting *Chevron*, 467 U.S at 842-43). If, however, the statute is silent or ambiguous with respect to the specific issue, the Secretary's interpretation is entitled to deference if it is based on a permissible construction of the statute. *Nat'l Cement*, 494 F.3d at 1074.

Congress has not explicitly addressed the precise issue of whether established Walsh-Healey Act standards adopted under section 6(a) of the OSH Act may be applied to employers in the construction industry. However, the Secretary's interpretation that section 6(a) authorized him to extend the coverage of established federal standards to employers in industries that were not previously subject to these standards is plainly reasonable and therefore controlling. The Secretary's interpretation is reasonable for three primary reasons. First, it is consistent with the text of section 6(a) and other relevant statutory language; second, it is expressly included in an interpretive rule promulgated at the same time as the adoption of the quick drenching standard as an OSHA standard; and third, it furthers Congress's interest in immediately

providing a nationwide minimum level of occupational safety and health protection.

A. The Secretary's Interpretation Is Consistent with the Relevant Statutory Text.

The Secretary's interpretation is certainly a plausible reading of the text of section 6(a), even if other readings are also possible. That section provides, in relevant part: "Without regard to chapter 5 of title 5 United States Code, or to the other subsections of this section," during the two-year period following the OSH Act's effective date the Secretary "shall promulgate as an occupational safety or health standard" 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). In the event of conflict among such standards, the Secretary "shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees." *Id*.

The Secretary's interpretation that he was authorized to expand the coverage of the quick drenching standard to new industries follows logically from his adoption of that provision as an "occupational safety and health standard." OSHA standards have general application, and this broader coverage clearly distinguishes them from other federal safety and health standards. *See Lee Way,* 511 F.2d at 868. The OSH Act covers all employers with employees engaged in a business affecting commerce, and expressly directs that "each employer shall comply with

occupational safety and health standards promulgated under this Act." 29 U.S.C. §§ 652(5), 654(a) (2). By virtue of its adoption as an OSHA standard, the Walsh-Healey quick drenching provision became applicable to all industries. "Congress itself adopted the Walsh-Healey standards as occupational safety and health standards of general application." *Lee Way*, 511 F.2d at 869 (citing 29 U.S.C. § 653(b)(2)).[7]

The Secretary's interpretation that he could apply section 6(a) standards to industries not covered by the antecedent established federal standard without notice-and-comment rulemaking also flows naturally from the text of the Act. First, section 6(a) itself dispenses with notice-and-comment procedures in the clearest possible language: "Without regard to chapter 5 of title 5 United States Code or to the other subsections of this section . . . ." 29 U.S.C. § 655(a). Thus, in promulgating the quick drenching standard as an OSHA standard of general application under section 6(a), the Secretary was expressly directed not to use notice-and-comment procedures. Second, as noted in *Lee Way*, Congress itself

[7] 29 U.S.C. § 653(b) (2) (section 4(b)(2) of the OSH Act) provides, in relevant part, that the safety and health standards promulgated under the Walsh-Healey Act and other enumerated statutes "and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts." Thus, there is overlap between sections 4(b)(2) and 6(a) with respect to established federal standards issued under the statutes enumerated in section 4(b)(2). However, Section 6(a) is broader than section 4(b)(2) in that it applies to "any established federal standard" and to "any national consensus standard." 29 U.S.C. § 655(a).

adopted Walsh-Healey Act standards as OSHA standards of general application under section 29 U.S.C. § 653(b), so there can be no question that notice-and-comment was not required to apply the quick drenching standard to employers in the construction industry.

Section 6(a)'s two express limitations further underscore the scope of the Secretary's authority to expand the coverage of established federal standards. As the dissent points out, section 6(a)'s constraint on the Secretary's authority to promulgate an established federal standard as an OSHA standard if it would *not* result in improved safety or health, and the direction to choose among conflicting standards the standard providing the greatest degree of safety or health protection, "signal that Congress intended to grant sweeping authority to the Secretary to make certain that standards adopted under section 6(a) were as protective as possible." Comm'n Dec. at 22, Certified List, Vol. 4, #97. Thus, a natural reading of the text of section 6(a) in the context of related statutory provisions supports the Secretary's interpretation.

B. The Secretary's Interpretation Is Supported by a Contemporaneous Interpretive Rule.

The Secretary's interpretation is also expressly reflected in an interpretive rule promulgated at the same time as the promulgation of the quick drenching provision as an OSHA standard in Part 1910. 36 Fed. Reg. 10466 (May 29, 1971)

codified at 29 C.F.R. Part 1910. The quick drenching standard was included in the 1971 rule as section 1910.151(c). Section 1910.11(a) of the 1971 rule states that the substantive safety and health standards in Part 1910 "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." 29 C.F.R. § 1910.11(a). Section 1910.5(c)(2) further clarifies the Secretary's intent that "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 the particular standards applies." 29 C.F.R. § 1910.5(c) (2). Thus, employers were aware at the very outset of the OSH Act that established federal standards adopted as OSHA standards would apply to every employer in every industry unless another industry standard applied.[8] The Secretary's promulgation of contemporaneous interpretive

[8] The majority asserted that acceptance of the principle that standards apply by their terms to any industry could produce the absurd result that maritime and shipbuilding standards could apply to manufacturing, and construction standards could apply to agriculture. Comm'n Dec. at 10-11, Certified List, Vol. 4, #97. This assertion reflects a fundamental misunderstanding of OSHA's regulatory scheme. To say that standards apply by their terms to every workplace means that they apply wherever the working conditions and hazards addressed by the standard exist. Where the same hazardous condition may exist in different industries, such as exposure to corrosive materials, it is hardly absurd to apply a standard addressing corrosive materials across industry lines. Many standards, however, address hazardous conditions unique to a specific industry and will not, by their terms, apply to other industries. Shipyard standards

regulations bolsters the reasonableness of the interpretation embodied in the citation. *C F &* I , 499 U.S. at 157.

C. The Secretary's Interpretation Furthers Congress's Intent to Establish a Minimum Nationwide Level of Occupational Safety and Health Protection.

The Secretary's construction is also reasonable because it is consistent with Congress's intent in enacting section 6(a) to expand the coverage of established federal standards to immediately provide a nationwide minimum level of safety and health protection. The Congressional debate revealed legislators' concerns that millions of workers were not protected by federal statutes or standards, and many more were under-protected, 116 Cong. Rec. 38,366, 38,388 (1970) (statement of Rep. Gaydos), *reprinted in Legislative History of the OSH Act of 1970*, at 977, 1036.[9]

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covering work on a ship's boilers will not apply to work on an assembly line in a factory. Moreover, as § 1910.5(c)(2) indicates, standards not denominated as applicable to a specific industry will not apply to that industry unless no specific industry standard applies. Thus, general industry standards will not apply to the maritime industry unless no maritime industry standard addresses the hazard.

[9] *See also* 116 Cong. Rec. S 18248-49 (daily ed. Nov. 16, 1970) (statement of Sen. Williams) ("The crisis in the workplace environment . . . is . . . as urgent as any confronting the Nation today"); 116 Cong. Rec. H10642 (daily ed. Nov. 23, 1970) (statement of Rep. Broomfield) ("[E]very year 14,000 workers are killed on the job . . . . [T]here is . . . [a] self-evident need for ... health and safety standards for all American workers."); 116 Cong. Rec. H10635 (daily ed. Nov. 23, 1970) (Statement of Rep. Gaydos, quoting President Richard Nixon) ("The Federal role

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, 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 Secretary's interpretation fosters Congress's goal of immediately expanding the protections under existing federal safety and health laws to all employees. *See Diebold*, 585 F.2d at 1330 (noting Congressional interest in immediately providing a nationwide minimum level of health and safety).

D. Nothing in the Majority Decision Demonstrates That the Secretary's Interpretation Is Unreasonable, and the Majority Therefore Could Not Substitute Its Reading of the Statute for the Secretary's.

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in occupation[al] safety and health has thus far been limited. A few specific industries have been made subject to special Federal laws and limited regulations have been applied to workers in companies who hold certain government contracts"). Senator Williams also noted that "the heaviest losses are in construction work." *Legislative History,* at 444.

The majority rejected the Secretary's interpretation as unreasonable and therefore not entitled to deference for two main reasons. Comm'n Dec. at 7-14, Certified List, Vol. 4. #97. First, the majority inferred from the legislative history that Congress did not intend section 6(a) to subject employers to established federal standards unless they had the opportunity to participate in the underlying rule-makings from which those federal standards emerged. Comm'n Dec. at 10-14, Certified List, Vol. 4, #97. Thus, the majority found, in effect, that section 6(a) standards have an *implied* term limiting their coverage only to those industries covered by the federal source standard – as only those industries would have had an interest in the original rule-makings. Comm'n Dec. at 12, Certified List, Vol. 4, #97.

Second, the majority rejected the Secretary's interpretation as representing an allegedly unexplained departure from a prior interpretation of section 6(a). Comm'n Dec. at 7, Certified List, Vol. 4, #97. Neither of these contentions demonstrates that the Secretary's interpretation is unreasonable; therefore, the majority's substitution of its own reading of section 6(a) for the Secretary's was legal error.

The majority found the Secretary's interpretation to be inconsistent with the legislative history based primarily on two statements in

Congressional reports: one saying that the standards to be adopted under section 6(a) would be those with which industry was already familiar, and the other expressing the intent that the Secretary develop healt0h and safety standards for construction workers pursuant to the provisions and mechanisms of the Construction Safety Act. Comm'n Dec. 12-13, Certified List, Vol. 4, #97. The majority inferred from these statements that the drafters did not intend that industries, including the construction industry, would be subject to established federal standards on which they had no opportunity to comment. Comm'n Dec. 12, Certified List, Vol. 4, #97.

The majority's inference as to congressional intent is unreasonable. First, the Commission drew virtually the polar opposite inference from the legislative history of section 6(a) in its *Lee Way* and *Bechtel* decisions. In *Lee Way,* the Commission found that in promulgating Walsh-Healey Act and other established federal standards as OSHA standards, Congress "intended the standards to apply to industry in general." 1 BNA OSHC at 1691 (citing legislative history). In *Bechtel*, the Commission likewise found that the Act's legislative history "makes clear" that in adopting Construction Safety Act standards as OSHA standards under section 6(a), the Secretary was not required to use formal rulemaking to expand their coverage to every

employer, employee and employment covered by the Act. 4 BNA OSHC at 1008.

Plainly, the conclusion drawn by the Commission in *Lee Way* and *Bechtel* that Congress intended to extend the application of established federal standards to every industry and employer subject to the Act directly conflicts with the majority's finding here that "Congress intended that such [established federal] standards be applied only to those industries already covered by them." Comm'n Dec. at 12, Certified List, Vol. 4, #97. These two divergent views of congressional intent expressed by the Commission cannot both be valid; one or the other is wrong. In the absence of any attempt to reconcile the conflict, the majority's finding in the instant case concerning Congressional intent is entirely arbitrary and entitled to no weight by this Court.

In any event, the Congressional statements relied upon by the majority do not conclusively rule out the Secretary's interpretation. The statements themselves are vague and subject to different interpretations.[10] As to the statement that section 6(a) standards would be those with which industry would already be familiar, nothing in the statement itself or the

[10] In contrast, as noted above, *supra* pp. 33-34, Congressional statements supporting expansion of federal source standards to all industries as OSHA standards are clear and precise.

report indicates 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 could be applied to it under section 6(a). *See* Comm'n Dec. at 34 (Dissent), Certified List, Vol. 4, # 97.

The other statement, reflecting concern that the Secretary develop standards for construction workers using procedures like those prescribed in the Construction Safety Act, is arguably unrelated to the adoption of established federal standards already in effect, but refers to development of future standards. Comm'n Dec. at 35 (Dissent), Certified List, Vol . 4, # 97. Congress addressed this concern by including in the OSH Act section 6(b), which prescribes notice-and-comment procedures for the promulgation of new standards, as distinguished from section 6(a), which provides for the adoption of existing standards, without such procedures, from established federal standards.[11] 29 U.S.C. § 655(b).

[11] The majority also asserted that the absence from the OSH Act of a provision in the Daniels Bill, not limiting any established federal standard "to its present area of application," shows that Congress never intended Walsh-Healey Act standards to apply to construction employers. Comm'n Dec. at 13, Certified List, Vol. 4, #97 (quoting H.R. 16785, 91st Cong. § 6 (2d. Sess. 1970)). But the absence of this provision from the Act shows nothing of the kind because, as the dissent points

The majority also deemed the Secretary's interpretation unreasonable, and therefore undeserving of *Chevron* deference, because the Secretary's May 29, 1971 *Federal Register* notice contained a provision (section 1910.5(e)) limiting the application of Walsh-Healey Act standards adopted as OSHA standards under section 6(a) only to those manufacturing and supply operations covered by the Walsh-Healey Act. Comm'n Dec. at 7 (citing 36 Fed. Reg. 10466, 10468 (May 29, 1971) (section 1910.5(e)), Certified List, Vol. 4, #97. The Secretary, however, revoked section 1910.5(e) on September 9, 1971 "so that [the Walsh-Healey Act-derived section 6(a) standards] may apply to every employment and place of employment exposed to the hazards covered by the standards." 36 Fed. Reg. 18,080, 18,081 (Sept. 9, 1971)), Certified List, Vol. 4, #97. The majority asserted that the September 9, 1971 revocation of §1910.5(e) was an unexplained change in the Secretary's interpretation of section 6(a), not entitled to *Chevro*n deference. Comm'n Dec. at 8. Certified List, Vol. 4, #97. This assertion misstates the case.

The May 29, 1971 Federal Register document establishing Part 1910 contained *both* §1910.11 and §1910.5(e). As previously noted, §1910.11

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out, the House never voted on the provision, and the Senate never even considered it. Comm'n Dec. at 33 (Dissent), Certified List, Vol. 4, #97.

adopted and extended the scope of established federal standards to "every employer, employee and employment covered by the Act." 36 Fed. Reg. at 10,468-69. Section 1910.5(e) was therefore in clear conflict with § 1910.11. Section 1910.5(e) was also in conflict with §1910.5(c), which states that "any standard shall apply according to its terms to any employment and place of employment in any industry . . . to the extent that no particular [industry] standards apply." 36 Fed. Reg. at 10,468.

As the dissent found, the Part 1910 standard, as promulgated on May 29, 1971, was simply anomalous and required correction. Comm'n Dec. at 30 (Dissent), Certified List, Vol. 4, #97. The Secretary's prompt revocation of section 1910.5(e) - leaving in place §§ 1910.11 and 1910.5(e) - was not a change in the Secretary's prior interpretation of section 6(a); it was a clarification as to which of two contemporaneous, facially conflicting provisions *was* the Secretary's interpretation. Accordingly, the revocation of section 1910.5(e) does not demonstrate that the Secretary's interpretation that the quick drenching standard applied to construction employers is unreasonable.[12]

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[12] The majority also claimed that the Act's definition of "established federal standard" as "any operative occupational safety or health standard adopted by any agency" and "presently in effect" supports its interpretation that section 6(a) did not expand the scope of established federal standards. Comm'n Dec. at 9, Certified List, Vol. 4, #97. The majority based its claim on the fact that the Walsh-

CONCLUSION

For the above reasons, this Court should reverse the Commission's September 28, 2018 final order, reinstate Secretary's citation to Kiewit

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Healey Act quick drenching standard in effect in 1971 did not apply to construction, and therefore was not "operative" with respect to construction on the OSH Act's effective date. Comm'n Dec. at 9 & n.11, Certified List, Vol. 4, #97. As the dissent pointed out, however, the "presently in effect" requirement simply means that the standard must have been in effect, i.e., "on the books," on or after the effective date of the OSH Act; the requirement has nothing to do with the scope of the source standard. Comm'n Dec. at 22 (Dissent), Certified List, Vol. 4, #97.

alleging a violation of the construction "quick drenching" standard, 29 C.F.R. § 1926.50(g), and remand the case to the Commission for decision on the merits of the citation.

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February 7, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of February, 2019, a copy of the foregoing brief was filed electronically, and all counsel of record were served, via the Court's CM/ECF Electronic Filing System.

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CERTIFICATE OF COMPLIANCE

I certify that this brief is produced using Microsoft Word, 14-point typeface, and complies with the type volume limitation prescribed in Fed. R. App. P. 32(a)(7)(B), because it contains 9,249 words, excluding the material referenced in Fed. R. App. P. 32(f).

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