

# OSHA's Emergency Eyewash Standard for Construction is Invalid, OSHRC Holds

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The quasi-judicial body overseeing enforcement actions by the Occupational Safety and Health Administration (OSHA) has determined that OSHA's emergency eyewash standard for construction (29 C.F.R. § 1926.50(g)) was not legally promulgated and has vacated a serious citation against an employer. The case, *Secretary of Labor v. Kiewit Power Constructors Co.*, OSHRC No. 11-2395, was decided on September 28, 2018. OSHA is appealing the decision to the U.S. Court of Appeals for the D.C. Circuit.

### Background

In 2011, the employer was issued a citation for allegedly failing to have emergency eyewash stations located in the vicinity of construction workers. OSHA alleged that the workers were exposed to an electrical insulating resin that was a corrosive substance and that the eyewash stations the company had on site were too far from the employees engaged in certain tasks.

In its defense, the company argued it provided adequate eyewash stations, but the company also made a procedural argument that OSHA did not properly promulgate the standard. It argued that when OSHA originally adopted the 1926.50(g) standard, OSHA did so unlawfully, because the agency did not have authority to apply the standard to the construction industry without proper notice-and-comment rulemaking since the standard originally applied only to general industry.

### Review Commission Decision

The Occupational Safety and Health Review Commission (OSHRC) agreed with the company's argument and concluded "section 6(a) did not authorize the Secretary to apply the quick-drenching standard to construction employers without notice-and-comment-rulemaking."

Despite prevailing at the OSHRC, Kiewit will continue to provide employees access to eyewash stations and showers as appropriate.

### Implications

What does this mean for construction employers? Currently, OSHA cannot issue citations to construction employers for failing to have emergency eyewash stations or showers pursuant to § 1926.50(g) or § 1910.151(c). However, because the case is being appealed, that could change. While OSHA cannot issue citations under these provisions at this time, employers are encouraged, as a best practice, to continue to provide construction employees with eyewash stations when corrosive materials are being used.

Please contact a Jackson Lewis attorney if you have any questions about the case or this topic.

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