

DO I HAVE TO TREAT MY EMPLOYEES LIKE KIDS? UH... SOMETIMES

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The question of “do I have to actually *make* my employees wear PPE” made it all the way to the full Occupational Safety and Health Review Commission (OSHRC) last year.

In the case of [*Custom Built Marine Construction, Inc.*](#), the Commission strongly reminded us that under the construction standard governing eye protection, employers must ensure that employees actually use the eye protection and not simply make the eye protection available.

The Commission commented that a 1983 OSHRC decision made this point clear, but neither the parties nor the ALJ meaningfully addressed this authority. Instead the Commission engaged in a more generalized analysis that may affect other personal protective equipment (PPE) standards.

“SO PUT IN YOUR EAR PLUGS, PUT ON YOUR EYESHADES....” TOMMY (THE WHO)

Let’s stroll through the OSHRC’s reminder that employers must take specific steps to comply with PPE standards.

In *Custom Built Marine*, a compliance officer observed an employee using a jackhammer on a concrete bulkhead without eye protection. The compliance officer claimed that he saw pieces of concrete flying into the air while the employee was operating the equipment. OSHA issued a citation under the regulation that provides that “employees shall be provided with eye and face protection when

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machines or operations present potential eye or face injury from physical, chemical, or radiation agents."

The employee admitted that he knew that PPE was available on site if he felt that his working conditions were unsafe. An administrative law judge (ALJ) vacated the citation, holding that because the standard only required the employer to "furnish" or "make available" such protective equipment, the employer was in compliance with the standard.

The Commission disagreed, noting that this issue had been addressed 30 years earlier in [Clarence M. Jones](#), (1983). In the *Clarence M. Jones* case, the Commission held that the regulations require an employer "to ensure the use of eye and face protection."

And, in the Commission's view, the law's general safety and health provision only bolsters this conclusion since it proves that "the employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions and where [there is a] need for using such equipment to reduce the hazards to the employees." The Commission reversed the ALJ's decision to vacate the citation and assessed a penalty of \$2,400.

It's actually surprising that OSHA does not employ this reasoning more frequently, since it requires construction employers to inspect job sites, provide PPE, and develop safety programs – even when a specific standard may not be applicable.

The Commission reversed the ALJ's decision to vacate the citation and assessed a penalty of \$2,400.

In a future issue, we'll talk about steps that could have blunted OSHA's prosecution in the case above.

The author also writes our Firm's blog on safety and health, which can be found [here](#). For more information he may be contacted at HMavity@fisherphillips.com or (404) 231-1400.