



Do I Have To treat employees Like Kids? Uhh... Sometimes.

Insights

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I hope that this Post is of no surprise to anyone, but in my recent quest to review basic aspects of the wonderful world of OSHA, I realized that the question of “*do I have to make employees wear PPE*” made it all the way to the full OSHRC last year. In Custom Built Marine, the Commission strongly reminded us that under Construction standard 1926.102(a)(1) 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.

Of course, none of our readers have ever had to worry about employees not wearing safety glasses, hearing protection or foundry chaps.

Nevertheless, let’s stroll through the OSHRC’s reminder that employers must take to comply with PPE standards.

In Custom Built Marine Construction, Inc., the 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 jackhammer. OSHA issued a citation under 1926.102(a)(1), which provides that “*employees shall be provided with eye and face protection when 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 onsite if he felt that his working conditions were unsafe. The 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 Clarence M. Jones, the Commission held that 1926.102(a)(1) requires “*an employer to ensure the use of eye and face protection.*” The Commission further stated that this conclusion is clear when 1926.102(a)(1) is read together with the general safety and health provisions of 1926.20 and 21, which provide in part 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 this part indicates the need for using such equipment to reduce the hazards to the employees.*”

As an important side note, I am surprised that OSHA does not employ 1926.20 and 21 more frequently, which far more than a 5(a)(1) general duty citation, requires construction employers to inspect job sites, provide PPE and develop safety programs even when a specific standard may not be applicable.

We'll talk another day about defending against such claims by the increasingly hard to prove **"unpreventable employee misconduct defense,"** but I will tease you with a [link to another decision last year, where one of my partners prevailed with that affirmative defense.](#) We'll also talk about steps that could have blunted OSHA's prosecution in the case above.

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