

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

MOBILE ABRASIVES,
HARSCO CORP.,
MARINE SPECIALTY PAINTING,
and ABRASIVES, INC.,

Petitioners,

v.

U.S. OCCUPATIONAL SAFETY &
HEALTH ADMINISTRATION and
U.S. DEPARTMENT OF LABOR,

Respondents,

and

UNITED STEELWORKERS,

Intervenor.

Civ. Nos. 17-1270, 17-1638,
20-2413, 20-2416, 20-2891,
20-3142, 20-3317, 20-3320

NOTICE OF SETTLEMENT AGREEMENT

Petitioners Mobile Abrasives, Harsco Corp., Marine Specialty Painting, and Abrasives, Inc. (Petitioners) and Respondent Occupational Safety and Health Administration (OSHA), United States Department of Labor, respectfully notify the Court that they have reached an agreement to settle the above-captioned matters.¹ The agreement is attached hereto as Appendix

¹ The following cases involving the same agency actions are also before the Court: Case Nos. 17-1124, 17-1448, and 17-1645. Petitioners in these related cases are not parties to this settlement agreement.

A. Pursuant to the agreement, Petitioners have agreed to file a motion to dismiss their petitions for review within thirty days of OSHA publishing certain specified guidance documents.

The parties will file the previously scheduled status report with the Court on June 7th, 2021, as required by the Court's May 12, 2021 letter, advising the Court of any further developments in the cases.

Dated: May 26, 2021

/s/ Joseph Gilliland

Joseph Gilliland
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., NW
Rm. S-4004
Washington, D.C. 20210
(202) 693-5636

*Counsel for the Respondents
Secretary of Labor, DOL, and
OSHA*

Respectfully submitted,

/s/ John J. Weinholtz

John J. Weinholtz, Esq.
Nixon Peabody LLP
40 Fountain Plaza, Suite 500
Buffalo, NY 14202-2224
Phone: (716) 853-8100

*Counsel for Petitioners
Mobile Abrasives, Harsco Corp.,
Marine Specialty Painting, and
Abrasives, Inc.*

Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

MOBILE ABRASIVES,
HARSCO CORP.,
MARINE SPECIALTY PAINTING,
and ABRASIVES, INC.,

Petitioners,

v.

U.S. OCCUPATIONAL SAFETY &
HEALTH ADMINISTRATION and
U.S. DEPARTMENT OF LABOR,

Respondents,

and

UNITED STEELWORKERS,

Intervenor.

Civ. Nos. 17-1270, 17-1638,
20-2413, 20-2416, 20-2891,
20-3142, 20-3317, 20-3320

SETTLEMENT AGREEMENT

The parties to this Settlement Agreement (“Agreement”) are the Occupational Safety and Health Administration, United States Department of Labor (“OSHA”) and Mobile Abrasives, Harsco Corp., Marine Specialty Painting, and Abrasives, Inc. (collectively “Abrasives Petitioners”).¹

WHEREAS, on January 9, 2017, OSHA promulgated and published in the Federal Register at 82 Fed. Reg. 2470 a final rule entitled “Occupational Exposure to Beryllium” (2017 final rule), establishing health standards for occupational exposure to beryllium in the construction industry

¹ The following cases involving the same agency actions are also before the Court: Case Nos. 17-1124, 17-1448, and 17-1645. Petitioners in these related cases are not parties to this settlement agreement.

(29 C.F.R. § 1926.1124), shipyards industry (29 C.F.R. § 1915.1024), and general industry (29 C.F.R. § 1910.1024).

WHEREAS, Petitioners Mobile Abrasives, Harsco Corp., and Marine Specialty Painting filed petitions for review of the 2017 final rule, which were docketed in this Court as case numbers 17-1270 and 17-1638.

WHEREAS, on September 30, 2019, OSHA published in the Federal Register at 84 Fed. Reg. 51377 a final rule entitled “Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors” (2019 final rule) in which OSHA declined to adopt certain revisions to the Beryllium Standards for the construction and shipyards industries that it had proposed in a Notice of Proposed Rulemaking issued on June 27, 2017.

WHEREAS, Petitioners Mobile Abrasives, Harsco Corp., and Marine Specialty Painting filed petitions for review of the 2019 final rule, which were docketed in this Court as case numbers 20-2413 and 20-2416, and consolidated with the challenges to the 2017 final rule.

WHEREAS, on August 31, 2020, OSHA published in the Federal Register at 85 Fed. Reg. 53910 a final rule entitled “Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors” (2020 final rule), making various changes to the Beryllium Standards for the construction and shipyards industries.

WHEREAS, Abrasives Petitioners filed petitions for review of the 2020 final rule, which were docketed in this Court as case numbers 20-2891, 20-3142, 20-3317, and 20-3320, and consolidated with the challenges to the 2017 and 2019 final rules.

WHEREAS, OSHA and Abrasives Petitioners have diligently engaged in complex settlement discussions to resolve Petitioners’ concerns regarding each of the final rules;

NOW, THEREFORE, in light of the complexity of the issues raised by this matter and to avoid the expense and uncertainty of litigation, the parties have reached a mutually agreeable settlement of the litigation, and do hereby agree to the following terms:

1. **Guidance Documents.** (a) Within sixty (60) days of the execution of this Agreement, OSHA agrees to publish the material in Appendix A (“Guidance Material”) as indicated therein.

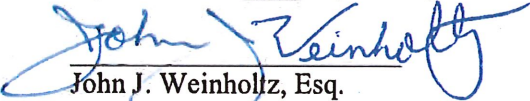
(b) After publication of the Guidance Material, OSHA shall not amend, modify, rescind, or change any language specified in Appendix A within seven (7) years of the execution of this Agreement except pursuant to the following procedure:
 - (1) OSHA shall notify Abrasives Petitioners in writing at least thirty (30) days before OSHA adopts any contemplated change; and
 - (2) OSHA shall meet with Abrasives Petitioners upon request to discuss the contemplated changes before any changes are adopted.

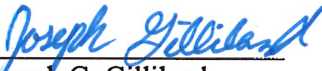
2. **Dismissal of Petitions for Review.** Abrasives Petitioners agree to file a motion to dismiss with prejudice their petitions for review of the 2017 final rule (case nos. 17-1270 and 17-1638), the 2019 final rule (case no. 20-2413 and 20-2416), and the 2020 final rule (case no. 20-2891, 20-3142, 20-3317, and 20-3320) within thirty (30) days of publication of items 1 through 9 of the Guidance Material.
3. **Effect of Agreement.** Notwithstanding anything in this Agreement to the contrary, nothing in this Agreement constitutes an admission of law or fact by any of the parties hereto for purposes of this litigation or in any other legal proceeding. By entering into this Agreement, the parties do not concede the validity or invalidity of any claim or argument that any party could have raised in this litigation.
4. **Scope and Amendment of Agreement.** Appendix A is incorporated by reference in this Agreement, which contains the full and complete agreement between OSHA and Abrasives Petitioners with respect to the matters covered herein. Any prior conversations, meetings, discussions, drafts, and writings of any kind with respect to the matters covered herein are specifically superseded by this Agreement. No modification of this Agreement shall be effective unless it is in writing and signed by OSHA and Abrasive Petitioners.
5. **Attorneys' Fees and Costs.** Each party agrees to bear its own attorneys' fees, costs, and other expenses that have been incurred in connection with the filing of the petitions for review and the negotiation of this Agreement.
6. **Execution.** (a) This Agreement is effective upon completion of the signing of the Agreement by OSHA and Abrasives Petitioners. Each person who signs this Agreement in a representative capacity warrants that he or she is duly authorized to do so.

(b) This Agreement may be executed in any number of counterparts, each of which when executed shall be deemed an original. All counterparts together shall constitute a single original agreement.

IN WITNESS WHEREOF, OSHA and Abrasives Petitioners have executed the foregoing Settlement Agreement or counterparts thereof, intending to be legally bound.

Agreed to this 26th day of May 2021.


John J. Weinholtz, Esq.
Nixon Peabody LLP
40 Fountain Plaza, Suite 500
Buffalo, NY 14202-2224
(716) 853-8100


Joseph G. Gilliland
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., NW
Room S-4004
Washington, D.C. 20210

*Counsel for Petitioners Mobile
Abrasives, Harsco Corp.,
Marine Specialty Painting,
and Abrasives, Inc.*

(202) 693-5636

Counsel for DOL and OSHA

Appendix A

1. OSHA agrees to revise the last sentence in the FAQ: “*What is beryllium?*” to state:

Fly ash (a byproduct of coal-fired power plants) and various abrasive blasting materials, such as slags, garnet, silica sand, and crushed glass, may also contain trace amounts of beryllium (considerably <0.1% by weight).

2. OSHA agrees to include the following language in the FAQ: “*Who is at risk from exposure to beryllium?*”

“Additionally, in the construction and shipyard industries, abrasive blasters and support personnel may be exposed to beryllium present in trace amounts in abrasive blasting materials and/or in the surfaces being blasted. In these operations, beryllium exposure may occur as a result of high dust levels generated despite the low beryllium content of the blasting materials or the surfaces.”

3. OSHA agrees to revise the FAQ: “*What industries will be affected by the rule?*” to remove the phrase “with slags” from “Construction and Shipyards (Abrasive blasting with slags)”.
4. OSHA agrees to revise the first sentence in the second paragraph of the FAQ: “*Are materials with trace amounts of beryllium included in the construction and shipyards standards?*” to state:

For example, for an abrasive blasting material that contains 2 ppm (0.0002%) beryllium by weight, the final action level of beryllium of 0.1 µg/m³ would be exceeded in a blasting operation only when total dust concentrations exceed 50 mg/m³, a level that is over 3 times higher than the current PEL of 15 mg/m³ for PNOCs (particles not otherwise classified) as listed in 29 CFR 1910.1000 (Table Z-1- Limits for Air Contaminants).

5. OSHA agrees to revise the OSHA Fact Sheet – *Protecting Workers from Exposure to Beryllium and Beryllium Compounds: Final Rule Overview*, found at <https://www.osha.gov/sites/default/files/publications/OSHA3821.pdf>, at p. 1, in the right column, to read:

“In construction and shipyards, exposure to beryllium primarily occurs when abrasive materials that contain trace amounts of beryllium (<1% by weight) are used in abrasive blasting operations.”

6. OSHA agrees to revise the last sentence of the second paragraph on the webpage www.osha.gov/beryllium to read:

Fly ash (a byproduct of coal-fired power plants) and various abrasive blasting materials, such as slags, garnet, silica sand, and crushed glass, may also contain trace amounts of beryllium (considerably <0.1% by weight).

7. OSHA agrees to revise the language under the subheading “Who is exposed to beryllium in the workplace?” on the webpage www.osha.gov/beryllium to remove the word “(slags)” from “Abrasive Blasters (slags)”.
8. OSHA agrees to revise the paragraph immediately preceding the subheading “Where is beryllium used?” on the webpage www.osha.gov/beryllium to read as follows:

Certain types of abrasive materials used in abrasive blasting operations may contain trace amounts of beryllium (<0.1% by weight), as may the surfaces being blasted. Due to the high dust conditions inherent in abrasive blasting operations, workers involved in these activities may be exposed to beryllium above its action level, in some cases.

9. OSHA agrees to revise the fourth paragraph on the webpage entitled “*OSHA’s Rulemaking to Protect Workers from Beryllium Exposure*” at www.osha.gov/beryllium/rulemaking to replace the word “slags” with “abrasive materials”.
10. If OSHA publishes an enforcement directive (CPL) for beryllium that discusses abrasive blasting media, it shall include the following:

Various types of abrasive blasting media may contain trace amounts of beryllium (<0.1% by weight), including slags, garnet, silica sand, and crushed glass. Also, the surfaces being blasted may contain trace amounts of beryllium. Enforcement of the Beryllium standards for abrasive blasting operations should address all sources of potential exposure, and should also address the employer’s engineering controls, work practices, and personal protective equipment. *See also* OSHA’s Fact Sheet on [Protecting Workers from the Hazards of Abrasive Blasting Materials.](#)”