UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union Petitioners, v. Occupational Safety and Health Administration, et. al. Respondents,	No. 19-3312
North America's Building Trades Unions Petitioners, v. Occupational Safety and Health Administration, et. al. Respondents,	No. 19-3401
Marine Specialty Painting, Inc. Petitioner, v. Occupational Safety and Health Administration, et. al. Respondents,	No. 19-3886
Mobile Abrasives, Inc. and Harsco Corporation, Petitioners, v. Occupational Safety and Health Administration, et. al. Respondents,	No. 19-3959
National Association of Home Builders of the United States, Mason Contractors Association of America, and Associated Builders and Contractors, Petitioners, v. Occupational Safety and Health Administration, et al., Respondents,	No. 19-3993

RESPONSE IN OPPOSITION TO INDUSTRY PETITIONERS' JOINT MOTION TO TRANSFER THEIR PETITIONS FOR REVIEW TO THE EIGHTH CIRCUIT OR, ALTERNATIVELY, TO STAY THEIR PETITIONS IN THIS COURT

Respondent Occupational Safety and Health Administration (OSHA) files this response to the February 20, 2020 joint motion filed by Petitioners Mobile Abrasives, Inc. and Harsco Corporation (No. 19-3959), Marine Specialty Painting, Inc. (No. 19-3886), and National Association of Home Builders of the United States, Mason Contractors of America, and Associated Builders and Contractors (No. 19-3993) (collectively "Industry Petitioners"). The motion requests that this Court sever Industry Petitioners' petitions for review from the two petitions filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union (No. 19-3312) and North America's Building Trades Unions (No. 19-3401) (collectively "Union Petitioners") and either transfer the industry petitions to the Eighth Circuit Court of Appeals or stay their petitions in this Court, pending completion of ongoing rulemaking by OSHA. If the Court denies the requested relief, the Industry Petitioners seek an additional thirty days to file their briefs.

For the reasons that follow, OSHA opposes the Industry Petitioners' motion to transfer or stay their petitions for review. OSHA supports the Industry Petitioners' alternative request for an extension of the briefing schedule.

Background

On January 9, 2017, OSHA published a final rule ("2017 Final Rule") creating three occupational health standards[1] to address occupational exposure to beryllium in general industry (29 C.F.R. § 1910.1026), the construction industry (29 C.F.R. § 1926.1124), and the shipyards industry (29 C.F.R. § 1915.1024). Occupational Exposure to Beryllium, 82 Fed. Reg. 2470 (January 9, 2017). The central feature of the 2017 Final Rule was to establish new Permissible Exposure Limits (PELs) for airborne beryllium in these industries. The standards also include a collection of additional or "ancillary" provisions meant to further reduce the risk of beryllium exposure and to help ensure exposures remain below the PELs. These provisions include requirements to perform exposure assessment and medical monitoring for exposed employees and requirements regarding housekeeping and hygiene, personal protective clothing, respiratory protection, hazard communication, and training.

Following publication of the 2017 Final Rule, a number of employers and industry groups filed several challenges to the rule, including the Industry

[1] The Occupational Safety and Health Act ("OSH Act") authorizes OSHA to promulgate "occupational safety or health standards," which are standards "which require[ ] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §§ 652(8), 655(b).

Petitioners in this case. On January 30, 2017, the Judicial Panel on Multidistrict Litigation consolidated all petitions and assigned them to the Court of Appeals for the Eighth Circuit.

On June 27, 2017, while the Eighth Circuit cases were pending, OSHA published a Notice of Proposed Rulemaking ("2017 Proposal") in which the agency proposed to revoke all of the ancillary provisions of the construction and shipyards beryllium standards while maintaining the lower PELs. Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors, 82 Fed. Reg. 29182 (June 27, 2017). The agency announced that it was reconsidering the need for these ancillary provisions in the construction and shipyards sectors because the two operations in these industries where beryllium exposure primarily occurs—abrasive blasting and welding—are covered by existing OSHA standards in ways that limit exposure to beryllium. The agency sought comment on whether these existing standards provide adequate protection to employees in these industries. *Id*. at 29221–22.

Additionally, in response to assertions that OSHA had failed to establish that beryllium exposure poses a significant risk of material health impairment to workers in these industries, the agency reopened the rulemaking record on this issue and invited additional comments and data. *Id*. at 29220-21. Finally, OSHA sought comment on whether it should delay the compliance date of the standards to

allow employers more time to come into compliance in light of the uncertainty created by the proposal. *Id*. at 29223.

In response to the 2017 Proposal, the Industry Petitioners and OSHA agreed to seek a stay of the Eight Circuit litigation pending completion of the rulemaking. This agreement rested on Industry Petitioners' assertion that revoking the ancillary provisions of the construction and shipyards standards would resolve many of their concerns. On September 11, 2017, the Eighth Circuit entered an order holding the cases in abeyance. Order, Mobile Abrasives Inc., et. al v. OSHA, et. al (Case No. 17-1270), ECF No. 4577752.

On September 30, 2019, OSHA issued a final rule ("2019 Final Rule")—the rule at issue in this litigation—in which the agency declined to adopt its proposed revocation of the ancillary provisions of the construction and shipyards standards, reaffirmed its significant risk finding, and extended the compliance dates for the ancillary provisions for one year. 84 FR 51377. Based on the record and comments received, OSHA determined that existing standards do not duplicate all of the protections provided by the ancillary provisions of the beryllium standards. The agency therefore determined that revoking all of the ancillary provisions "would be inconsistent with OSHA's statutory mandate to protect workers from the demonstrated significant risks of material impairment of health resulting from exposure to beryllium and beryllium compounds." *Id*.

While OSHA found that it would not be appropriate to revoke all of the ancillary provisions, the agency acknowledged that some more discrete revisions to the beryllium standards for construction and shipyards might be appropriate and announced that it would publish a separate proposal to address these issues. *Id*. at 51397. In light of its decision not to revoke all of the ancillary provisions and to propose new revisions to the standards instead, OSHA determined it was appropriate to extend the compliance dates by one year, until September 30, 2020. *Id*. at 51399.

One week later, on October 8, 2019, OSHA published a new Notice of Proposed Rulemaking proposing more modest revisions to the construction and shipyards standards. 84 Fed. Reg. 53902. A few of these proposed revisions address partial overlap between particular ancillary provisions and existing OSHA standards. Other proposed revisions are unrelated to the subject of the 2019 Final Rule. This rulemaking is ongoing.

ARGUMENT

I) The 2019 Final Rule Is Distinct from and Raises Different Issues than the 2017 Final Rule Under Review in the Eighth Circuit and Transfer is Unwarranted.

In evaluating whether transfer pursuant to 28 U.S.C. § 2112(a)(5) is "in the interest of justice," this Court may consider "the desirability of concentrating litigation over closely related issues in the same forum so as to avoid duplication of

judicial effort." *United Steelworkers of Am., AFL-CIO CLC v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979). Here, the Industry Petitioners overstate the connection between the 2019 Final Rule—the rule at issue in this case—and the existing litigation in the Eighth Circuit challenging the 2017 Final Rule. Properly viewed, these two final rules raise very few overlapping issues. As such, transfer would not avoid duplication of judicial effort or otherwise promote judicial economy and would not be in the interest of justice.

In the 2017 Final Rule, OSHA promulgated three comprehensive health standards that had not previously existed. To promulgate a new health standard, the OSH Act requires OSHA to make numerous factual findings based on the best available evidence. For example, the agency had to demonstrate (1) that beryllium exposure presents a significant risk of material health impairment to workers, (2) that this risk would be materially reduced by the lower PELs, and (3) that the requirements of the standard were both economically and technologically feasible. *See* 82 Fed. Reg. 2473–77. Moreover, the agency was required to adhere to numerous procedural requirements, including the requirement to hold a public hearing and to submit its proposal to a panel of small business representatives under the Small Business Regulatory Enforcement Fairness Act (SBREFA).

By contrast, the 2019 Final Rule involved revisions to the previously promulgated standards and addressed only three issues: (1) the extent of overlap

between the ancillary provisions of the beryllium standards and other OSHA standards applicable to construction and shipyards, (2) OSHA's significant risk finding in light of the reopened and updated record, and (3) the propriety of extending the compliance date. The Industry Petitioners' assertion that these two rulemakings "are based on essentially the same substantive issues" is simply incorrect. Petitioners' Mot. at 3–4.

Rather than simplifying the proceedings or conserving judicial resources, consolidating the Industry Petitioners' challenges to the 2017 and 2019 Final Rules will confuse the issues relevant to each rule. By asserting that they intend to challenge "each of the substantive standards in the OSHA rule as lacking legal and scientific justification required by the Occupational Safety and Health Act," Petitioners' Mot. at 3, the Industry Petitioners signal that they intend to raise issues that were not within the scope of, and therefore have no bearing on, the 2019 Final Rule.

Indeed, the OSH Act precludes this Court—or any court reviewing the 2019 Final Rule—from entertaining any challenge to the beryllium standards that is not directly related to the 2019 Final Rule. Section 6(f) of the OSH Act requires challengers to an OSHA standard to file their challenges within fifty-nine days of promulgation of the standard. 29 U.S.C. § 655(f); *see National Ass'n of Manuf. v. OSHA*, 485 F.3d 1201, 1205 (D.C. Cir. 2007). Accordingly, a petitioner may not

bootstrap such challenges (such as those to the 2017 Final Rule) to a different rule issued two years later simply because the subsequent rule touches on the same subject matter.

As an example, in determining whether the 2019 Final Rule is supported by substantial evidence in the record, this Court lacks jurisdiction over any arguments related to OSHA's feasibility analysis in the 2017 Final Rule. Such arguments would be relevant only to the question of whether the 2017 Final Rule is supported by substantial evidence in the 2017 record. OSHA did not reopen the record nor reconsider its 2017 findings on this issue in the subsequent proposal and 2019 Final Rule. Rather, the agency specifically noted that nothing in the 2019 Final Rule affected that analysis. *See* 84 Fed. Reg. 51381–82.

In fact, the only finding in the 2019 Final Rule that overlaps with the Eighth Circuit challenges is OSHA's reaffirmation that beryllium exposure presents a significant risk of material health impairment to workers. To the extent the Industry Petitioners wish to challenge that finding, the appropriate vehicle is through this Third Circuit litigation, as the agency's 2019 finding was based on a reopened and updated record.

Finally, granting the Industry Petitioners' request to separate their petitions for review from the union petitions would require OSHA to litigate the validity of the 2019 Final Rule in multiple circuits. This would contravene the purpose of the

multidistrict litigation statute. This Court has recognized that section 2112 "contemplates judicial review of particular agency action by the same court," so "the parties are spared simultaneous participation in proceedings in more than one circuit, and forum shopping is discouraged." *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 766 (3rd Cir. 1979). Requiring OSHA to defend the 2019 Final Rule on multiple fronts would plainly not serve this purpose and would not be in the interest of justice.

II) The Outcome of Pending Rulemaking on the Beryllium Standards Will Have No Effect on the Validity of the 2019 Final Rule, Making a Stay Inappropriate.

The Industry Petitioners base their alternative request for a stay on the proposition that ongoing rulemaking "may well change the substance of the workplace standards that are the subject of the Industry Petitioners' petitions for review." Petitioners' Mot. at 11. This statement is true, but is irrelevant. Whether OSHA adopts the revisions proposed in the October 8, 2019 proposal will in no way effect whether the 2019 Final Rule is supported by substantial evidence. Given OSHA's interest in resolving all challenges to the 2019 Final Rule, a stay of these proceedings is unnecessary and inappropriate.

OSHA and the Industry Petitioners jointly agreed to stay the Eighth Circuit litigation pending the outcome of the 2017 Proposal based on the Industry Petitioners' representation that the rulemaking could resolve many of their

concerns. OSHA continues to consent to the stay in the Eighth Circuit while the Industry Petitioners evaluate the ongoing rulemaking. A final rule modifying the beryllium standards might well effect the Industry Petitioners' desire to pursue their broad challenges to the 2017 Final Rule, but it would have no bearing on the legal validity of the 2019 Final Rule.

Petitioners' challenges to the 2019 Final Rule can readily be disposed of without regard to the Eighth Circuit challenge or to the ongoing rulemaking and the Court should therefore allow this litigation to proceed.

Conclusion

For these reasons, OSHA respectfully requests that the Court deny the Industry Petitioners' motion to the extent it requests that the Court transfer or stay their petitions for review. OSHA supports the Industry Petitioners' alternative request to extend the briefing schedule to allow the parties sufficient time to prepare their briefs.

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/s/ Joseph Gilliland
Joseph Gilliland
Attorney
U.S. Department of Labor
200 Constitution Ave., NW
Rm. S-4004
Washington, DC 20210
(202) 693-5636

(202) 693-5466 (fax)
Gilliland.Joseph.G@dol.gov
Counsel for OSHA

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2020, the foregoing Response to Industry Petitioners' motion was electronically filed and served through the Court's CM/ECF system on the following counsel of record:

John J. Weinholtz
Nixon Peabody, LLP
40 Fountain Plaza, Suite 500
Buffalo, New York 14202
Phone: (716) 853-8100
jweinholtz@nixonpeabody.com

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

Bradford T. Hammock
Littler Mendelson, P.C.
1650 Tysons Blvd., Suite 700
Tysons Corner, VA 22102
Phone: (703) 286-3124
BHammock@littler.com

Counsel for Petitioners National Association of Home Builders of the United States, Mason Contractors of America, and Associated Builders and Contractors

Victoria L. Bor
Sherman Dunn, P.C.
900 Seventh Street, N.W., Suite 1000
Washington, D.C. 20001
Phone: 202-785-9300
bor@shermandunn.com

Counsel for Petitioner North America's Building Trades Unions

Andrew D. Roth
Bredhoff & Kaiser, P.L.L.C.
805 15th Street, N.W., Suite 1000
Washington, D.C. 20005
Telephone: (202) 842-2600
Facsimile: (202) 842-1888
aroth@bredhoff.com

Randy S. Rabinowitz
OSH Law Project
P.O. Box 3769
Washington, D.C. 20027
Telephone: (202) 256-4080
randy@oshlaw.org

Counsel for Petitioner Steelworkers Union

/s/ Joseph Gilliland