

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Association of Home Builders; Chamber of
Commerce of the United States of America; and The
National Association of Manufacturers,
Petitioners,

v.

Occupational Safety and Health Administration, U.S.
Department of Labor,
Respondent.

No. 09-1053

Statement of Issues to Be Raised

The petitioners, National Association of Home Builders; Chamber of
Commerce of the United States of America; and The National Association of
Manufacturers, respectfully state they expect to raise the following issues:

Whether a final rule adopted by the Occupational Safety and Health
Administration (“OSHA”), entitled “Clarification of Employer Duty To Provide
Personal Protective Equipment and Train Each Employee,” 73 Fed. Reg. 75568
(Dec. 12, 2008), is invalid because it is not authorized by law. Essentially, the
Petitioners expect to argue that OSHA has no authority to alter the wording of its
occupational safety and health standards solely to indicate or change the unit of
violation – *i.e.*, the number of penalties that may be assessed for a single violative
act. In the final rule, OSHA did just that, amending or adopting numerous

substantive rules (occupational safety and health standards) so as to permit or compel the imposition of a penalty as to each affected employee. Petitioners expect that their brief will likely raise the following issues:

1. Whether the final rule is a substantive rather than an interpretive rule.

The Petitioners expect to argue that, among other things –

a. The final rule is a substantive rule because its mere existence, not its correctness, would affect penalty assessment. OSHA amended numerous standards in direct response to what it saw as a series of holdings by courts and the Occupational Safety and Health Review Commission that a penalty could not be assessed as to each employee exposed to a violation of a standard unless the standard indicates that the unit of violation is an affected employee. Inasmuch as the effect of the final rule depends not on its correctness but on its mere existence, the final rule is substantive, not interpretive.

b. The regulations amended or adopted by the final rule use “the language of command.” *Am. Bus Ass’n v. United States*, 627 F.2d 525, 531 (D.C. Cir. 1980) (*quoting Columbia Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942)). For example, the final rule adopts 29 C.F.R. § 1910.9 (entitled, “Compliance duties owed to each employee”), which states that “[t]he employer must provide PPE to each employee required to use the [personal protective

equipment]” and “must train each affected employee in the manner required by the standard[.]”

c. The final rule amends or adopts OSHA’s standards – substantive regulations that govern workplace safety and health conditions and for which monetary penalties can be imposed for their violation.

2. Whether the final rule is authorized by any provision in the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“OSH Act”). Section 6 of the OSH Act permits OSHA to adopt “occupational safety and health standards,” defined by section 3(8) as standards that “require[] conditions, or the adoption or use of one or more practices ... reasonably necessary or appropriate to provide safe or healthful employment” This definition substantively limits OSHA’s rulemaking authority. *Industrial Union Dept. v. American Petrol. Inst.*, 448 U.S. 607 (1980). Although the final rule amends or adopts numerous standards, it does not require or impose any new safety or health requirements. Instead, OSHA’s final rule changed the wording of the standards solely to affect the number of penalties that may be assessed for their violation, and specifically by permitting or compelling the imposition of a penalty as to each affected employee. Neither section 6 nor any other provision of the OSH Act authorizes OSHA to amend or adopt standards for the sole purpose of permitting or causing the multiplication of penalties.

3. Whether the final rule violates the Administrative Procedure Act, 5 U.S.C. § 558(b), which requires that, before an agency can adopt regulations affecting the imposition of sanctions, it have an affirmative grant of authority to do so. *See American Bus Ass'n v. Slater*, 231 F.3d 1, 6-7 (D.C. Cir. 2000). The sole purpose of the final rule was to affect the number of penalties that may or must be assessed. Nothing in the OSH Act affirmatively authorizes OSHA to adopt regulations having such an effect.

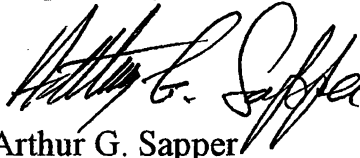
Of counsel:

Duane J. Desiderio, Esq.
David S. Jaffe, Esq.
National Association of Home Builders
1201 15th Street, N.W.
Washington, D.C. 20005-2800

Robin S. Conrad, Esq.
Shane B. Kawka, Esq.
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Quentin Riegel, Esq.
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Respectfully submitted,



Arthur G. Sapper
Counsel of Record

Robert C. Gombar
McDermott Will & Emery LLP
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8246

Counsel for Petitioners, National
Association of Home Builders; Chamber of
Commerce of the United States of America;
and The National Association of
Manufacturers