

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

**In re: American Federation of Labor and
Congress of Industrial Organizations
and United Food and Commercial Workers
International Union,**

Case No.

Petitioners.

PETITION FOR WRIT OF MANDAMUS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 54 national and international unions, and the United Food and Commercial Workers International Union (UFCW), a Change to Win-affiliated union, file this petition for a writ of mandamus seeking an order directing the Secretary of Labor (Secretary) to complete within 60 days of this Court's order a rulemaking on Employer Payment for Personal Protective Equipment first proposed by the Occupational Safety and Health Administration (OSHA) almost eight years ago.¹ 64 Fed. Reg. 15402 (March 31, 1999) (Exhibit A). The rule

¹ The AFL-CIO represents approximately 10 million working men and women in a wide range of sectors and industries in the United States, and the UFCW represents 1.3 million workers in a wide range of industries, including retail food, meatpacking, poultry and food processing, manufacturing, and retail stores. The AFL-CIO and UFCW, both headquartered in Washington, D.C., actively participated in the rulemaking challenged here. Both organizations formally

would require employers to pay the costs of lifelines, lanyards, faceshields, protective clothing, and other personal protective equipment (PPE) needed to protect workers from job hazards.² By OSHA's own estimates, working men and women have suffered almost 400,000 preventable injuries and more than 50 preventable fatalities in the time that the rule has languished. 64 Fed. Reg. 15422.

According to OSHA, establishing a requirement that employers have financial responsibility for PPE is "central to the effective implementation of the [Occupational Safety and Health (OSH)] Act." 64 Fed. Reg. 15408. That is so because the OSH Act imposes on employers the duty to protect workers from hazards. *Id.* at 15404. OSHA also believes that employers are in a better position than workers to select, maintain, and pay for the equipment appropriate to protect them from injury. *Id.* at 15409. Without the PPE rule, OSHA has no clear, enforceable policy on the issue of payment for PPE, and employers are able to shift these costs onto workers, which OSHA believes puts workers at risk.

OSHA publicly acknowledged the need to adopt a PPE rule in 1997, and formally proposed the rule in 1999. OSHA has repeatedly stated its intention to

petitioned the Secretary in 2003 for completion of the rule, and both organizations represent workers adversely affected by OSHA's failure to complete the rule.

² The PPE rule at issue would not impose new obligations on employers to *provide* safety equipment; it merely implements a requirement implicit in the Occupational Safety and Health Act that it is the employer's, and not individual employee's, responsibility to *pay* for it. 64 Fed. Reg. 15406.

complete the rule within months, only to see the deadline for final action come and go. The Secretary's failure to complete the PPE rulemaking is an egregious example of unreasonable delay. The Court should direct the Secretary to finish the rule within 60 days of its order.

STATEMENT OF FACTS

1. PPE in the Workplace

The OSH Act, 29 U.S.C. § 655, directs the Secretary to adopt occupational safety and health standards to protect workers from job hazards like toxic chemicals and dangerous machinery. OSHA standards typically rely on a “hierarchy of controls.” *See, e.g.*, 29 CFR § 1910.1000(e); 29 C.F.R. § 1910.134(a)(1); 63 Fed. Reg. 1195 (Jan. 8, 1998) (explaining the origin of OSHA's policy on the hierarchy of controls). Engineering controls such as ventilation systems or machine guards, and work practice controls such as restricted areas, are the preferred forms of protection because they control or remove hazards at their source. But when these controls are not feasible, do not provide adequate protection, or are not required, OSHA's rules direct employers to provide personal protective equipment (PPE) to create a barrier between the worker and potential job hazards.

OSHA's general rules require employers to provide whatever personal protective equipment, such as respirators, protective clothing, safety glasses and

face shields, is necessary to protect workers from harm. 29 CFR § 1910.132(a).³

These general rules apply to the many job hazards not covered by a more specific OSHA standard.

PPE comes in many forms. In its proposal to require employers to pay for PPE, OSHA estimated that up to 20 million workers use one or more types of PPE on the job, 64 Fed. Reg. 15417, including:

- Personal fall arrest systems (safety belts, body belts, lifelines, lanyards, harnesses, pole climbing systems, climbing spikes, ladder safety device belts, window cleaners' safety straps), used by 1.4 million employees;
- Face and eye protection (side shields, goggles, face shields/masks, safety glasses, welding goggles), used by more than 13 million employees;
- Hand protection and arm protection (disposable, fabric, leather mesh, aluminized, and chemical resistant gloves, rubber sleeves, hand shields), used by more than 10 million employees;

³ OSHA's general PPE rule provides, in relevant part: "Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards . . . capable of causing injury or impairment through absorption, inhalation, or physical contact." 29 C.F.R. § 1910.132(a).

- Head protection (headgear, helmets, hard hats, welding helmets), used by 10 million employees;
- Foot protection (safety shoes, safety boots, logging boots, shin covers, shoe covers, logging chaps, kevlar pants, metatarsal protection); and
- Protective clothing (aprons, encapsulating chemical protective suits, flame resistant jackets and pants), used by 700,000 employees.

64 Fed. Reg. 15408, 15418.

In some jobs, including many low-wage jobs dominated by immigrant workers, PPE is a worker's principal protection from harm. Poultry workers wear protective gear such as wire mesh gloves to protect their bodies from cuts and rubber boots to prevent them from slipping on wet floors. Welders wear face shields, welding aprons and gloves to protect them from hazards of the welding arc. Construction workers wear hard hats and steel-toed shoes to prevent injury from heavy objects falling on them. They rely on lifelines or lanyards to prevent falls from roofs and other high places. Other workers wear gloves, goggles, face shields, protective clothes and shoes, and other PPE. 64 Fed. Reg. 15408.

2. OSHA's Policy on Payment for PPE

Many hazard-specific OSHA rules include language specifically requiring that all PPE required by the rule must be provided "at no cost to employees."

OSHA's rules on lead, benzene, noise, respiratory protection, bloodborne

pathogens, confined spaces, asbestos, and laboratory safety, among others, specify that PPE must be provided “at no cost to employees.”⁴ OSHA has included this requirement in every health standard addressing a toxic substance that the agency has adopted since 1978 because OSHA believes that requiring employers to pay for PPE effectuates the purposes of the OSH Act and increases worker protection. 64 Fed. Reg. 15405.

The general PPE rule, in contrast, is silent on the issue of payment. Shortly after the general PPE rule was amended in 1994, OSHA formally interpreted the PPE rule “to require employers to provide and to pay for personal protective equipment required by the company for the worker to do his or her job safely and in compliance with OSHA standards.” Memorandum for Heads of Directorates from James W. Stanley, Deputy Assistant Secretary (Oct. 18, 1994) (Exhibit B). Under this interpretation, “[f]ailure of the employer to pay for PPE that is not personal and not used away from the job is a violation and shall be cited.” *Id.* OSHA restated this interpretation in a formal compliance directive that was issued in June 1995. (Exhibit C). At the time OSHA issued this interpretation, the Occupational Safety and Health Review Commission (OSHRC) had ruled that the

⁴ See 29 CFR § 1910.1025 (lead); 29 CFR § 1910.1028 (benzene); 29 CFR § 1910.95 (occupational noise exposure); 29 CFR § 1910.134 (respiratory protection); 29 CFR § 1910.1030 (bloodborne pathogens); 29 CFR § 1910.146 (permit-required confined spaces); 29 CFR § 1910.1001 (asbestos); 29 CFR § 1910.1450 (occupational exposure to hazardous chemicals in laboratories).

Secretary reasonably interpreted a requirement in OSHA's coke oven emissions standard for employers to "provide" PPE as also requiring employers to pay for PPE. *Secretary of Labor v. Erie Coke Corp.*, 15 OSHC (BNA) 1561 (Rev. Comm. 1992), *aff'd on other grounds*, 998 F.2d 134 (3d Cir. 1993).

In 1997, OSHRC rejected OSHA's interpretation of the general PPE rule as requiring employers to pay for PPE, on grounds that the agency had issued differing interpretations of the general PPE rule in the past. *Secretary of Labor v. Union Tank Car Co.*, 18 OSHC (BNA) 1067 (Rev. Comm. 1997) (vacating citation against Union Tank under the general PPE rules for Union Tank's failure to pay for metatarsal safety boots).⁵ OSHA was faced with a choice. It could petition the court of appeals to review *Union Tank*, or it could amend the PPE rule to add a clear statement that employers must pay for PPE. OSHA chose the latter course. In December 1997, shortly before the deadline for seeking judicial review, OSHA announced that it would not appeal *Union Tank* and would instead "proceed as quickly as possible to amend our [PPE] standard so there will be no further question from OSHRC on the subject." News Release, OSHA Decides Not to

⁵ In *Union Tank*, there was evidence that employees taped or wrapped wire around their damaged metatarsal safety boots in order to avoid having to pay up to \$130 per pair to replace them. 64 Fed. Reg. 15407.

Appeal Review Commission Ruling on Union Tank Personal Protective Equipment Case (Dec. 12, 1997) (Exhibit D).⁶

3. The PPE Rulemaking

Fifteen months later, OSHA published a proposed rule on Employer Payment for Personal Protective Equipment (PPE Rule). 64 Fed. Reg. 15402 (March 31, 1999) (Exhibit A). OSHA proposed to codify its earlier interpretation of the general PPE rule to clearly require employers to pay for PPE employees must wear on the job to protect them from hazards.⁷ OSHA estimated that the PPE rule would prevent nearly 48,000 injuries and seven fatalities each year, including nearly 7,000 eye injuries, more than 25,000 injuries to the hand and fingers, and 8,000 injuries to the head and neck. 64 Fed. Reg. 15422.

OSHA did not view the proposed PPE rule as breaking new ground or imposing new requirements; rather, the agency viewed the rule as “simply clarif[ying] the employer’s preexisting obligations under the personal protective

⁶ Due to an apparent typographical error, OSHA’s news release is dated December 12, 1998. The statement was issued in 1997, shortly before the expiration of the 60-day time period for the government to appeal the *Union Tank* decision.

⁷ The proposed rule excused employers from having to pay for safety-toe protective footwear and prescription safety eyewear if the employer permitted the equipment to be worn off the job, if the equipment was not used at work in a manner that made it unsuitable for use off the job-site (for example, if it was contaminated with a toxic substance), and if the footwear or eyewear was not designed for special use on the job. 64 Fed. Reg. 15441. OSHA’s interpretive policy statements had included similar exceptions.

equipment standards.” 64 Fed. Reg. 15406. OSHA explained that it had included the “at no cost to employees” requirement in numerous other standards because such a requirement is most consistent with the OSH Act, which requires employers to provide safe working conditions to their employees. *Id.* Thus, the PPE proposal merely “conform[ed] the [PPE] standard to the requirements of the statute and to the position the Agency has consistently adopted in rulemaking proceedings for more than twenty years.” *Id.*

OSHA went on to explain that PPE is a hazard control measure just like ventilation systems and regulated areas or danger zones, and that “[t]here has never been any doubt that employers pay for these controls.” 64 Fed. Reg. 15408. OSHA expressed concern that allowing employers to shift the cost of PPE onto workers “could also lead to perverse incentives for employers. Given a choice between engineering controls that the employer must pay for, and PPE that would be paid for by employees, employers would have a strong incentive to use PPE even though engineering controls would be more protective and might even be cheaper.” *Id.* at 15406.

OSHA explained that requiring employers to bear the cost of PPE better protects worker safety and health. OSHA observed that “[e]mployers are in a better position to identify and select the correct equipment and to maintain it properly.” 64 Fed. Reg. 15403. Employees, in contrast, “often do not have the

expertise to select the correct type of PPE.” *Id.* at 15409. Employers “have the financial resources to purchase PPE of necessary quality and to pay for replacements as necessary.” *Id.* at 15403. OSHA further explained that “employers are in the best position to keep the PPE in repair. . . [E]mployers can maintain better control over the inventory of PPE by periodically inspecting the PPE and, when necessary, repairing or replacing it due to damage or normal wear and tear.” *Id.* at 15409.

OSHA solicited written comments on its PPE proposal and held four days of informal public hearings in August 1999. Unlike some OSHA rules, there was little employer opposition to the proposed PPE rule. The National Institute for Occupational Safety and Health (NIOSH) and many private professional organizations all strongly supported the rule. The AFL-CIO and the UFCW, along with other labor organizations, urged OSHA to adopt a rule requiring employers to pay for PPE.

The PPE rulemaking record closed at the end of 1999 and, at that time, OSHA predicted that a final rule would be issued in July 2000 – a target date that the agency reaffirmed in April 2000. 64 Fed. Reg. 63999 (Nov. 22, 1999); 65 Fed. Reg. 23070 (April 24, 2000).

But OSHA missed its self-imposed July 2000 deadline. It missed several subsequent self-imposed deadlines, as well. By April 2001, OSHA stopped listing

a target date for completing the PPE rule, listing it on its regulatory agenda only as a long-term action with the next action “undetermined.”⁸

By 2003, the AFL-CIO and UFCW became concerned that OSHA would not ever finish the PPE rule, so they and a number of other labor organizations filed a petition asking the Secretary to finish the rule within 60 days. (Exhibit F). The petition emphasized the adverse impact on low-wage and immigrant workers of OSHA’s failure to issue the PPE rule.

OSHA did not respond to the petition for more than a year. When it finally responded, in July 2004, OSHA said it expected to take final action on the rule by the end of 2004. (Exhibit G). OSHA said it would first re-open the record on what it described as “one limited issue,” *i.e.*, how the final PPE rule should address equipment that is considered “tools of the trade.” It did so, and the record closed, for the second time, in August 2004.

But OSHA failed to issue the final rule by December 2004 as promised. Instead, OSHA announced another delay of several months, predicting a final rule in March 2005. 69 Fed. Reg. 73477 (Dec. 13, 2004). It missed that deadline too. In fact, since 2005, OSHA has set – and then ignored – several more deadlines for finishing the PPE rulemaking. Despite telling Congress that final action would be

⁸ A summary of OSHA’s entries on its semi-annual Regulatory Agenda concerning the status of the Employer Payment for Personal Protective Equipment rule is attached for the Court’s convenience as Exhibit E.

taken on the PPE rule in 2006, OSHA has now announced yet another delay, predicting in its most recent regulatory agenda that final action will be taken by May 2007 – a target likely to prove as illusory as the agency’s earlier projected deadlines. *U.S. Dep’t of Labor FY 2007 Budget Justification of Appropriation Estimates for Committee on Appropriations*, Vol. II at pp. 18-19 (Exhibit H); 71 Fed. Reg. 73571.

ARGUMENT

The Administrative Procedure Act (APA) directs agencies to conclude matters presented to them “within a reasonable time,” 5 U.S.C. § 555(b) and authorizes courts to “compel agency action . . . unreasonably delayed.” 5 U.S.C. §706(1). OSHA’s failure to complete the PPE rule almost eight years after it was first proposed represents an egregious instance of unreasonable delay. This is an uncomplicated rulemaking on a straightforward, but significant, issue of importance to worker safety and health. This Court should direct OSHA to complete the PPE rule within 60 days after the Court’s order.

This Court has recognized the need for judicial intervention to protect worker safety and health when OSHA has persistently and unreasonably failed timely to complete regulatory action. These earlier cases, read together, demonstrate that the Court should step in and order OSHA to complete rulemaking where, as here, OSHA has acknowledged the need for prompt regulatory action, it

has repeatedly missed self-imposed deadlines for rulemaking activities, and no other special circumstances excuse the delay. *See In re: International Chemical Workers Union*, 958 F.2d 1144 (D.C. Cir. 1992) (ordering OSHA to issue a cadmium standard when it admitted the need to reduce exposures and OSHA had missed several self-imposed deadlines) and *Public Citizen Health Research Group v. Chao*, 314 F.3d 143 (3d Cir. 2002) (directing OSHA to issue a chromium standard where scientific evidence showed substantial risks and OSHA had missed several self-imposed deadlines).

This Court has identified several factors it weighs to determine whether to compel the Secretary to complete rulemaking. “First, the court should ascertain the length of time that has elapsed since the agency came under a duty to act.” *Chemical Workers*, 958 F.2d at 1149 (internal citations omitted). “Second, the reasonableness of the delay must be judged in the context of the statute which authorizes the agency’s action.” *Id.* “Third, the court must examine the consequences of the agency’s delay.” *Id.* “Finally, the court should give due consideration in the balance to any plea of administrative error, administrative convenience, practical difficulty in carrying out a legislative mandate, or need to prioritize in the face of limited resources.” *Id.* *See also Telecommunications Research & Action Center (TRAC) v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

OSHA's failure to complete the PPE rule, when evaluated in light of these factors, demands intervention by this Court.

It has been almost eight years since OSHA recognized the need for a clear policy on payment for PPE to prevent widespread harm to workers. Having initiated rulemaking to prevent these unnecessary injuries and deaths, the APA requires that OSHA complete the rulemaking process within a reasonable time. 5 U.S.C. § 555(b). This Court has recognized that the OSH Act imposes a similar duty. "Where the Secretary deems a problem significant enough to warrant initiation of the standard setting process, the Act requires that [s]he have a plan to shepherd through the development of the standard – that [s]he take pains, regardless of the press of other priorities, to ensure that the standard is not inadvertently lost in the process." *National Congress of Hispanic American Citizens v. Marshall*, 626 F.2d 882, 890-91 (D.C. Cir. 1979).

Eight years is an unreasonable amount of time for OSHA to complete rulemaking on a straightforward policy issue. The rule is not complicated. OSHA itself has described the PPE rule as simply codifying a legal requirement that is implicit in the OSH Act. 64 Fed. Reg. 15406. The rule and its rationale mirror a requirement that OSHA has included in numerous standards over the years. Unlike many OSHA rules, the PPE rule does not require OSHA to evaluate complex epidemiology and animal studies to identify health effects, develop biostatistical

models to estimate risks, or project technological developments and their costs. The record has closed, it is relatively small, and OSHA has told Congress that it has been analyzed. *See* Exhibit H. There is simply no excuse for allowing this effort to drag on any longer.

Even in complicated rulemakings presenting difficult scientific issues, courts have found lesser delays to be unreasonable. *See Chemical Workers*, 958 F.2d 1144 (six-year delay in completing rule on cadmium was unreasonable); *Public Citizen Health Research Group v. Chao*, 314 F.3d at 153 (finding nine-year delay since announcing the need for rulemaking on hexavalent chromium to be “extreme” and unreasonable); *see also Public Citizen v. Brock*, 823 F.2d 626 (D.C. Cir 1987) (five-year delay in publishing short term exposure limit for ethylene oxide was “at the very lip of the abyss of unreasonable delay”). The eight-year delay in adopting the PPE rule is unreasonable in the extreme.

Congress enacted the OSH Act “to assure so far as possible every working man and women in the Nation safe and healthful working conditions.” 29 U.S.C. § 652(a). “[S]peed in achieving protection for workers was of paramount importance to Congress.” *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 631 (D.C. Cir. 1987). OSHA’s failure to complete the PPE rule frustrates Congress’s intent and is all the more unreasonable because human lives and well-being are at stake. *See Chemical Workers*, 958 F.2d at 1149 (“Delays that might

be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake.”) The impact of OSHA’s delay – almost 400,000 preventable injuries and 50 avoidable deaths since the PPE rule was first proposed – especially when viewed in light of the purposes of the OSH Act, militates strongly in favor of judicial intervention.

In addition, OSHA’s failure to issue the PPE rule undermines OSH Act enforcement. As it explained in a 2004 letter, OSHA believes it cannot enforce its “at no cost to employees” policy for its general PPE rule until it finishes the PPE rulemaking. *See* Letter from Richard E. Fairfax to Brad Milleson (August 2004) (Exhibit I). This means, as a practical matter, that employers may shift the cost of PPE onto employees, an outcome OSHA believes endangers workers and is incompatible with the OSH Act.

OSHA’s failure to finish the PPE rule has also created an inconsistent and confusing enforcement landscape. “[G]reater consistency among OSHA standards” is an important goal of the PPE rulemaking, according to OSHA. 64 Fed. Reg. 15403. But OSHA’s delay in finishing the rule has had the opposite effect. Workers covered by many specific OSHA standards like asbestos and benzene receive PPE to protect them from these hazards at no cost, but workers who are exposed to hazards that are not covered by a specific rule can be required to pay for their own PPE. Thus, workers on the production line in a battery plant

who are exposed to lead are provided protective clothing that is paid for by the employer, 29 CFR § 1910.1025(g)(1). But workers in the same facility on the charging line, who are filling batteries with sulfuric acid, can be required to pay for their own protective clothing, because sulfuric acid exposures are covered by the general PPE rule.

Similarly, if workers in a chemical plant are exposed to the toxic chemical benzene, their employers must provide and pay for protective clothing to prevent skin exposure and absorption under OSHA's benzene standard, 29 CFR § 1910.1028(h). But if these same workers have dermal exposure to the chemical toluene, their employers can require them to pay for their own protective clothing, because those exposures are covered by the general PPE rule.

OSHA has already invested the staff resources necessary to develop the PPE rule, and to solicit and evaluate public comments on it. Very few other regulatory initiatives are this far along on the agency's regulatory agenda. 71 Fed. Reg. 73570. No rules awaiting final action by OSHA require as few resources to be completed as the PPE rule.

OSHA has a statutory obligation to complete the PPE rule. By its own admission, OSHA's failure to finish the rule puts workers at risk of harm and undermines enforcement of the OSH Act. The agency's predicted deadlines for finishing the rule have repeatedly come and gone. Nothing is standing in the way

of OSHA's issuance of a final PPE rule except the will to do so. The court should step in and "let [OSHA] know, in no uncertain terms, that enough is enough."

Brock, 823 F.2d at 627. OSHA should be ordered to complete the PPE rule within 60 days of the Court's order.

WHEREFORE, petitioners AFL-CIO and UFCW respectfully request that this Court issue a writ of mandamus directing the Secretary of Labor to complete the PPE rule within 60 days of its order.

Respectfully submitted,

Jonathan P. Hiatt
Lynn K. Rhinehart
815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5155

Counsel for the AFL-CIO

Edward P. Wendel
Lisa D. Pedersen
1775 K Street, N.W.
Washington, D.C. 20006
(202) 466-1539

Randy S. Rabinowitz
3426 Meridian Ave. N.
Seattle, WA 98103
(206) 632-3211

January 3, 2007

Counsel for the UFCW

CERTIFICATE OF SERVICE

I, Lynn Rhinehart, certify that on this 3rd day of January, 2007, I caused a copy of this Petition for Writ of Mandamus to be served on the Secretary of Labor by hand delivery as follows:

Howard Radzely, Solicitor of Labor
Joseph Woodward, Associate Solicitor for OSH
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

Lynn Rhinehart

RULE 28 CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

This petition for writ of mandamus challenges the Secretary of Labor's failure to complete a rulemaking. As such, there were no parties below. The parties in this Court are the American Federation of Labor and Congress of Industrial Organizations and the United Food and Commercial Workers International Union. The petition asks the Court to issue a writ of mandamus directing the Secretary of Labor to complete a rulemaking by no later than 60 days from the date of the Court's order.

(B) Rulings Under Review

This petition does not challenge an agency rule, but instead the agency's failure to issue a rule. The Secretary of Labor proposed amendments to the Occupational Safety and Health Administration's personal protective equipment standard, 64 Fed. Reg. 15402 (March 31, 1999), but has not finished that rulemaking.

(C) Related Cases

This case has not previously been before this or any other Court. To the best of counsel's knowledge no related cases are pending in any court.