



Authors



Jayni A. Lanham
Principal
(410) 230-1333
jlanham@bdlaw.com



Mark N. Duvall
Principal
(202) 789-6090
mduvall@bdlaw.com



Michael F. Vitris
Associate
(512) 391-8035
mvitris@bdlaw.com

D.C. Circuit Rejects Industry Challenges to Silica Rule and Remands to OSHA for Further Consideration on Medical Removal Protections

The U.S. Court of Appeals for the District of Columbia rejected all industry challenges to an Obama-era rule on worker exposure to respirable crystalline silica in a December 22, 2017 ruling. In its written decision, the court held that OSHA's Final Rule for Exposure to Respirable Crystalline Silica (the "Silica Rule") was supported by substantial evidence and rejected the industry claims that the rule was too stringent. In response to a union challenge, the court agreed with the union claim that OSHA did not adequately explain its decision to omit medical removal protections from the final version of the Silica Rule, and remanded to OSHA to reconsider or further explain its decision on medical removal protections. As a result of the Court's ruling, construction employers must remain in compliance with all of the Silica Rule's requirements, and general industry and maritime employers must prepare to come into compliance by June 23, 2018.

Background

OSHA issued the Silica Rule on March 25, 2016, during the final year of the Obama administration.¹ The rule amended the standards for workplace exposure to respirable crystalline silica that OSHA had adopted in 1971 by significantly lowering the permissible exposure limit (PEL) to 50 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) of air as an eight-hour time-weighted average and requiring employers to implement additional protective measures. These include exposure assessment, exposure control, respiratory protection, medical surveillance, hazard communication, and recordkeeping. The Silica Rule took effect on June 23, 2016. Construction employers were originally required to be in compliance with the Silica Rule by June 23, 2017, but OSHA extended that deadline to September 23, 2017. General industry and maritime employers are required to come into compliance by June 23, 2018, though hydraulic fracturing employers have until June 23, 2021 to implement engineering controls. Our previous alert outlining the Silica Rule can be accessed [here](#).

Industry Challenges

Multiple industry groups challenged the Silica Rule on the basis that it was too

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¹ 81 Fed. Reg. 16286 (Mar. 25, 2016).

stringent. Principally, industry asserted that OSHA's decision to lower the PEL to 50 µg/m³ to reduce the risk of health impairment was not supported by substantial evidence and that the Silica Rule was technologically and economically infeasible. Industry also asserted that OSHA violated the Administrative Procedure Act and that OSHA lacked substantial evidence to support ancillary provisions of the rule relating to the confidentiality of medical examinations and the use of dry cleaning methods.

Union Challenges

Several unions and worker advocacy groups also challenged the Silica Rule, but on the basis that it was not stringent enough. Specifically, they challenged the rule's requirement that medical surveillance for construction workers be provided only if the employee has to wear a respirator for 30 days for one employer in a one-year period and OSHA's decision to omit medical removal protections for employees from the Final Rule.

The Court's Decision

The D.C. Circuit heard oral argument on the challenges to the rule on September 26, 2017 and issued a per curiam opinion on December 22, 2017.² In the written opinion, the court rejected all of the industry challenges to the Silica Rule, leaving in place the requirements that industry deemed to be too stringent. The court rejected the challenge by unions and worker advocacy groups pertaining to medical surveillance, but agreed that OSHA failed to adequately explain its decision to omit medical removal protections from the rule. Due to that finding, the court remanded the Silica Rule to OSHA to reconsider or further explain its decision on medical removal protections. The court's key findings are summarized below.

Permissible Exposure Limit

The court upheld OSHA's decision to lower the PEL to 50 µg/m³, rejecting the industry challenges to OSHA's risk assessment methodology, determination that long-term silica exposure above the PEL presents a significant risk of adverse health effects, and decision to include the brick industry within the scope of the rule (and thus subject to the lowered PEL).

With regard to OSHA's risk assessment methodology, the court held that OSHA's use of a no-threshold assumption (i.e., the assumption that if there is an exposure level at which workers would not be expected to develop adverse health effects, that level is below the PEL) was supported "with studies showing that risks of lung cancer exist at 36 µg/m³ and 10 µg/m³, levels lower than the PEL." While the court noted that industry "point[ed] to studies it claims not only show a threshold exists but also show a threshold exists above the PEL," it determined that "OSHA has explained why it rejected Industry's side of the debate, presented the other side of the debate, and supported it with evidence from which a reasonable conclusion could be made, as OSHA did here, that no threshold of safe exposure to silica exists." The court commented that it "cannot choose a particular side as the right one in a scientific dispute."

Similarly, the court held that OSHA's decision not to use a dose-rate effect in the model (meaning that OSHA assessed health risks based on the cumulative amount of silica exposure without accounting for the intensity of exposures) was reasonable. According to the court, OSHA "took competing evidence, favored one side, and explained the reasons for its decision."

With regard to OSHA's determination on adverse health effects, the court held that "OSHA's findings with respect to silicosis and NMRD [non-malignant respiratory disease] mortality, lung cancer mortality, and silicosis morbidity are sufficient to uphold the requisite threshold finding of a significant risk of material health impairment at the [prior] 100 µg/m³ PEL that will be reduced at the new PEL." The court did not address OSHA's findings with regard to renal disease, explaining that "OSHA, through its supported findings on the other three adverse health effects, has met its burden to show that the Silica Rule regulates a significant risk of material harm."

² *North America's Building Trades Unions v. Occupational Safety & Health Administration*, No. 16-1105 (D.C. Cir. Dec. 22, 2017). Slip opinion available [here](#).

As to including the brick industry in the scope of the Silica Rule and making it subject to the lower PEL, the court found that OSHA “explained its rationale” for relying on a single study that supported that decision. Accordingly, the court upheld the inclusion of that industry in the Silica Rule.

Technological Feasibility

The court held that OSHA’s determination that “there was a reasonable possibility that the new standard could be achieved by the typical employer in most operations and was thus feasible” was supported by substantial evidence. It rejected the industry’s contention that the rule was infeasible in foundries, hydraulic fracturing, and construction. The court noted that “[the industry] objections do not collectively undermine OSHA’s overall finding of feasibility for the typical firm in most operations nor do they meaningfully call into question the evidence on which OSHA relied.”

With respect to foundries, the court found that “OSHA has shown that the typical firm can meet the standard in most operations,” because OSHA relied on over 1,000 data points from nearly 100 foundries and a study by the American Foundry Society showing “that the new PEL is being met in most foundry job categories.” The court explained that “Industry’s evidence suggests, at most, that compliance will be infeasible for some foundries or in some operations,” and “[e]ven assuming that industry is correct . . . such isolated examples of infeasibility are, under our standard of review, insufficient to defeat OSHA’s finding of feasibility for the typical foundry in most . . . operations.”

With respect to hydraulic fracturing, the court held that the industry challenge to OSHA’s feasibility finding failed, “even if sufficient controls do not yet exist” to reduce exposures below the PEL in that industry. The court explained that “[b]ecause the OSH Act is a technology-forcing statute, OSHA can also force industry to develop and diffuse new technology to meet its standard.” Further, the court noted that “OSHA [has] identified controls, some currently available and others under development, that promise to sufficiently reduce exposure.”

With respect to construction, the court upheld OSHA’s determination of feasibility on the basis that construction employers can comply with the standard by implementing the controls listed in Table 1 of the standard and OSHA’s finding that “most employers would follow Table 1 for most tasks” and “that it would be technologically feasible for them to do so given the ready availability of Table 1 controls.” The court also upheld OSHA’s determination that compliance was feasible for tasks not appearing on Table 1. As with the other industries, the court held that “Industry’s insistence that compliance is infeasible for some firms in some operations some of the time cannot upend our deference to OSHA’s well-supported finding that compliance is feasible for the typical firm in most operations.”

Economic Feasibility

The court held that OSHA’s finding of feasibility was supported by substantial evidence because OSHA had determined that the annualized costs of compliance were less than one percent of revenue or ten percent of profit within each industry. As with the issue of technological feasibility, the court rejected the industry contentions that the rule was infeasible in foundries, hydraulic fracturing, and construction.

In particular, the court rejected the industry contentions that OSHA’s finding of economic feasibility for foundries was flawed because OSHA assumed an even apportionment of costs between those required for compliance with the prior PEL and those required to further reduce exposure from the prior PEL to the new PEL; it used a per-worker assessment of costs instead of looking at costs on a per-facility basis; it excluded the cost of certain controls mentioned in its technology feasibility analysis; and it did not reflect the best available evidence. The court determined that “OSHA’s well-supported estimates and considered rejection of alternative evidence are sufficient to justify its finding of economic feasibility.”

The court also rejected the industry contentions that for hydraulic fracturing, OSHA failed to appropriately consider declining oil prices and excluded the costs of some of the controls discussed in the technological feasibility analysis. The court determined that “[g]iven the inherent uncertainty in forecasting future economic conditions, OSHA’s thorough consideration of industry’s concerns, and the delayed implementation timeline, OSHA’s finding that the rule is

economically feasible in hydraulic fracturing finds ample support in the record.” The court also explained that “OSHA estimated only the *typical* cost of compliance and need not consider every single control discussed.”

Finally, the court rejected the industry contentions that in construction, the costs estimated for certain industry subgroups were too low, the assumption of a 150-day working year was too short and understated costs, and that the assumption of costs ignored that employers will not be able to follow Table 1 all of the time. The court held that “OSHA’s ultimate conclusion was well supported” and that OSHA appropriately considered the “typical compliance costs for the ‘typical’ employer.”

Medical Removal Protection

With respect to the union challenge on medical removal protections, the court held that “OSHA was arbitrary and capricious in declining to require MRP [medical removal protection] for some period when a medical professional recommends permanent removal, when a medical professional recommends temporary removal to alleviate COPD symptoms, and when a medical professional recommends temporary removal pending a specialist’s determination.” In reaching this decision, the court emphasized that “OSHA has not explained why MRP – critical in some standards to protect workers from having to decide between learning about their health and avoiding economic loss – is not equally critical to protect workers from having to choose between disclosing their health issues (and thus preserving their health) and avoiding economic loss.” Accordingly, the court remanded to OSHA to reconsider or further explain its decision to omit medical removal protections in the aforementioned circumstances.

The court did, however, reject the union claim that OSHA should have included medical removal protections for employees who are unable to wear a respirator. According to the court, the unions failed to meet “their burden to show that MRP would provide more than a *de minimis* benefit in this circumstance.”

Conclusion

Because the court rejected the industry challenges to the Silica Rule in their entirety, the rule remains in effect. This means that the obligations of construction employers, who were required to be in compliance by September 23, 2017, remain unchanged and that general industry and maritime employers must continue to work toward the June 23, 2018 compliance deadline. Additionally, because the court remanded the Silica Rule for further consideration on medical removal protection, employers should be prepared for future OSHA rulemaking notices on this issue.

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