STATE OF MICHIGAN
IN THE MICHIGAN COURT OF APPEALS

UNITED PARCEL SERVICE, INC., a Delaware corporation,
Appellant,

v.

BUREAU OF SAFETY AND REGULATION, GENERAL INDUSTRY SAFETY DIVISION,
Apellee.

Court of Appeals Case No.: 269720

Ingham County Circuit Court Case No.: 04-001141-AA-C30

Agency Case Nos.: NOA 2002-1050, NOA 2002-1051

NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA'S AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT

ON REVIEW FROM THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. RELEVANT FACTS 2

A. Background of the Michigan Occupational Safety and Health Act 2

B. The Department of Labor Concluded that the United Parcel Service, Inc., Violated Rule 408.13308(1) 2

C. The Board Affirmed the Citations 3

III. ARGUMENT 4

A. The Board Ignored the Plain Language of Rule 408.13308(1) by Mandating *How* and *The Means by Which* the Employer Must "Assess the Workplace." 4

B. An Employer Cannot Violate Rule 408.13308(1) Without Failing to Identify Specific Job Tasks that Require PPE 7

C. The Board Failed to Consider the Reasonableness of UPS's Representative Assessments 8

D. The Board Misconstrued Rule 408.13308(1) by Requiring Employers to Undertake Useless Acts 9

E. The Board's Determination Has Drastic Economic Consequences 10

V. CONCLUSION 10

TABLE OF AUTHORITIES

Case Law

Detroit Base Coalition for Human Rights of the Handicapped v Dep't of Social Servs
431 Mich 172, 185; 428 NW2d 335 (1988) 4

Fraser Twp v Linwood-Bay Sportsman's Club
270 Mich App 289, 296 (2006) 7-8

Koontz v Ameritech Servs, Inc
466 Mich 304, 312; 645 NW2d 34 (2002) 4

Mayor of City of Lansing v Michigan Pub Serv Comm
470 Mich 154, 157-58; 680 NW2d 840 (2004) 4

Modern Globe, Inc v 1425 Lake Drive Corp
340 Mich 663, 669; 66 NW2d 92 (1954) 9

People v. Schaefer
473 Mich 418, 432; 703 NW2d 774 (2005) 6

Sec'y of Labor v BF Goodrich Hilton Davis, Inc
OSHRC Docket No. 00-1401 p. 9 (Nov. 26, 2001) 5, 9

Sec'y of Labor v Gulf Hauling & Constr, Inc
OSHRC Docket No. 99-1193, p. 14 (Sept. 7, 2000) 5, 8

Sec'y of Labor v Jimerson Under-Ground, Inc
OSHRC Docket No. 04-0970, p. 13 (Aug. 8, 2005) 5, 8

Sec'y of Labor v Lourdes Hosp
OSHRC Docket No. 03-0641, p. 4 (Feb. 23, 2004) 5

Sec'y of Labor v Siemens Energy & Automation, Inc
OSHRC Docket No. 00-0152, pp. 3-4 (Dec. 14, 2001) 8

Sec'y of Labor v Tree of Life, Inc
OSHRC Docket No. 00-0433, p. 5 (May 21, 2001) 5

Sec'y of Labor v White Wave, Inc
OSHRC Docket No. 03-0962 p. 4 (Feb. 23, 2004) 7-8

Statutory Authority

MCL 408.1001 *et seq* 2
MCL 408.1004 4
MCL 408.1004(3) 3
MCL 408.1006(5)(a) 2
MCL 408.1011(b) 2
MCL 408.1013(1) 2
MCL 408.1016(1) 2
MCL 408.1033 2
MCL 408.1042 3
MCL 408.1044(1) 3
MCL 408.1046(1) 3
MCL 408.1046(6) 3, 7

Rules and Regulations

29 CFR 1910(d) 7
29 CFR 1910.132(d)(1) 2, 5, 6-7
1999 AC, R 408.13308(1) .... *passim*

I. INTRODUCTION

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), which is a nonprofit and public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners. The 600,000 members of NFIB (15,000 in Michigan) include many small manufacturers and service companies.

The Chamber of Commerce of the United States of America ("Chamber of Commerce") is the world's largest business federation, representing an underlying membership of over three million businesses and organizations of all sizes. A principal function of the Chamber of Commerce is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

The regulatory issue before this Court is (1) an issue of first impression in Michigan and (2) an important issue to large and small businesses in Michigan. An affirmation of the Ingham County Circuit Court's decision will adversely economically affect Michigan businesses. However, those businesses' employees will not become any safer.

The workplace safety standard at issue, 1999 AC, R 408.13308(1), simply requires an employer to assess the workplace to identify specific job tasks that could be hazardous to an employee and, then, requires the employee to wear certain personal protective equipment ("PPE"). Rule 408.13308(1), by design, does not mandate *how* or *the means by which* the employer should assess the workplace. *How* and *the means by which* the employer assesses the workplace is left to the reasonable discretion of the employer. Nevertheless, in an act of judicial divination, the Board of Health and Safety Compliance and Appeals (the "Board") rewrote Rule

408.13308(1), defined precisely how and the means by which the employer must assess the workplace, and ignored from the calculus whether the employer acted reasonably or failed to protect the employees. The Board's order and the circuit court's affirmation must be reversed.

II. RELEVANT FACTS AND BACKGROUND

A. Background of the Michigan Occupational Safety and Health Act.

The Michigan Legislature has granted to the Michigan General Industry Safety Standards Commission (the "Commission") the authority to promulgate regulations that relate to occupational safety in accordance with the Michigan Occupational Safety and Health Act, MCL 408.1001 *et seq* ("MIOSHA"). MCL 408.1006(5)(a); MCL 408.1016(1). An employer must comply with a promulgated standard. MCL 408.1011(b). The Michigan Department of Labor enforces the standards and can issue a citation to an employer that violates MIOSHA or any regulation promulgated therefrom. MCL 408.1013(1); MCL 408.1033.

B. The Department of Labor Concluded that United Parcel Service, Inc. Violated Rule 408.13308(1).

Of importance here, the Commission promulgated Rule 408.13308(1), which states, in pertinent part: "An employer shall assess the workplace to determine if hazards that necessitate the use of personal protective equipment are present or are likely to be present." Rule 408.13308(1) is the Michigan *counterpart* to the federal regulation promulgated by the United States Occupational Safety and Health Administration, which states: "The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE)." 29 CFR 1910.132(d)(1).

United Parcel Service, Inc. ("UPS") hired a consultant to inspect UPS's aircraft facility workplaces to identify specific job tasks that require the implementation of PPE. PA at 271a. The consultant analyzed the specific job tasks that occur at UPS's central hub in Louisville,

Kentucky. PA at 273a-75a, 360a-444a. The consultant picked the Louisville location to analyze because every job task and associated hazard that occurs at the Louisville location also occur at all other UPS aircraft facilities, including the Romulus and Lansing facilities. PA at 275a-76a. The consultant identified ten specific job tasks that could require PPE. PA at 278a. UPS then updated its universal safety and health procedures to mandate particular PPE for all employees that perform those specific job tasks at any facility, including Romulus and Lansing facilities. *Id.* In other words, the consultant's inspection of the Louisville location led to the implementation of PPE at UPS's Lansing and Romulus locations. *Id.*

In June, 2001, the Department of Labor twice cited UPS for allegedly violating Rule 408.13308(1). PA at 604a, 606a. The Department of Labor did *not* find any potentially hazardous job task for which UPS did *not* require PPE. Rather, the Department of Labor explained the citations as follows: "Assessment conducted at central location and not validated at each worksite." PA at 269a, 281a.

C. The Board Affirmed the Citations.

An employer can appeal a citation to the Board, which can affirm, rescind, or modify the citation. MCL 408.1042; MCL 408.1044(1); *see also* MCL 408.1046(1) (creating the board); MCL 408.1004(3) (defining the "board"). However, the following caveat applies to an appeal:

> In construing or applying any state occupational safety or health standard which is identical to a federal occupational safety and health standard promulgated pursuant to 29 U.S.C. section 651 et seq., the board shall construe and apply the state standard in a manner which is consistent with any federal construction or application by the occupational safety and health review commission created pursuant to 29 U.S.C. section 661. [MCL 408.1046(6).]

The Board affirmed the citations. The Board concluded that UPS violated Rule 408.13308(1) because UPS did not physically enter UPS's Lansing and Romulus workplace premises. Specifically, the Board held that the Rule "requires a hazard assessment at each

workplace[] and is not satisfied by hazard assessments at representative workplaces." (ALJ decision 12-13.) The circuit court affirmed the Board's decision.

III. ARGUMENT

A. The Board Ignored the Plain Language of Rule 408.13308(1) by Mandating *How* and *The Means by Which* the Employer Must "Assess the Workplace."

The Board erred as a matter of law because it misinterpreted the plain language of Rule 408.13308(1). Specifically, the board read into the Rule a requirement of *how* or *the means by which* an employer must "assess the workplace."

The general rules of statutory interpretation apply to a court's interpretation of an administrative rule. *Mayor of City of Lansing v Michigan Pub Serv Comm*, 470 Mich 154, 157-58; 680 NW2d 840 (2004); *Detroit Base Coalition for Human Rights of the Handicapped v Dep't of Social Servs*, 431 Mich 172, 185; 428 NW2d 335 (1988). In this regard, a court must effectuate the legislature's intent, which the plain language of an unambiguous statute provides. *Mayor of City of Lansing*, *supra* at 157. In other words, a court must enforce an unambiguous statute as the statute is written. *Id.* For a word that the legislature has not specifically defined, the court must apply the word's plain and ordinary meaning, which a dictionary can provide. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

Rule 408.13308(1) states: "An employer shall assess the workplace to determine if hazards that necessitate the use of personal protective equipment are present or are likely to be present." The plain language of the Rule does not set forth *how* or *the means by which* the employer must "assess" the workplace. Similarly, neither the Commission nor the legislature has defined "assess." *See* 1999 AC, R 408.13302 (definitions for words that begin with "A" through "E"); MCL 408.1004 (definitions for words that begin with "A" through "M").

The legislature's and the Commission's silence is purposeful. The federal Occupational Health and Safety Review Commission (the "OSHRC") has repeatedly stressed that the federal equivalent to Rule 408.13308(1), *i.e.*, 29 CFR 1910.132(d)(1), "is a *performance*-oriented provision which simply requires employers to use their awareness of workplace hazards to enable them to select the appropriate PPE for the work being performed." *Sec'y of Labor v Jimerson Under-Ground, Inc*, OSHRC Docket No. 04-0970, p 13 (Aug. 8, 2005) (emphasis added) (Exhibit 1); *accord Sec'y of Labor v Tree of Life, Inc*, OSHRC Docket No. 00-0433, p 5 (May 21, 2001) (stating that the entire Subpart I of 29 CFR 1910 is "performance oriented and contains guidance for the selection and use of PPE") (Exhibit 2). In other words, the purpose of Rule 408.13308(1) is to identify "specific job task hazards" that could necessitate the implementation of personal protective equipment. *Sec'y of Labor v Gulf Hauling & Constr, Inc*, OSHRC Docket No. 99-1193, p 14 (Sept. 7, 2000), (Exhibit 3); *accord Sec'y of Labor v BF Goodrich Hilton Davis, Inc*, OSHRC Docket No. 00-1401 p 9 (Nov. 26, 2001) ("The hazard assessment identifies the specific job task hazards which require appropriate PPE.") (Exhibit 4).

Performance-oriented provisions, such as Rule 408.13308(1), are designed to provide the employer with flexibility, as OSHRC explained in *Tree of Life, Inc*, *supra*, at note 12:

> A performance-oriented standard sets out the criteria to be met through safe workplace performance-oriented goals. As such, specific requirements are not always addressed; rather, the goals of what is meant to be accomplished are addressed. A performance-oriented standard gives employers the flexibility to adapt the rule to the needs of the workplace situation, instead of having to follow specific rigid requirements.

In other words, a performance-oriented standard, as opposed to a specification standard, simply "state[s] the required result without specifically mandating how that result is to be achieved." *Sec'y of Labor v Lourdes Hosp*, OSHRC Docket No. 03-0641, p 4 (Feb. 23, 2004) (Exhibit 5).

UPS met Rule 408.13308(1)'s required result of identifying the specific hazardous job tasks at UPS's Romulus and Lansing facilities that require the use of PPE. Indeed, the Department of Labor failed to identify any hazard for which UPS did not require the use of PPE.

The Board disregarded the plain language of Rule 408.13308(1) because it imposed a limitation on *how* or *the means by which* an employer could "assess the workplace." By holding that Rule 408.13308(1) "requires a hazard assessment at each workplace[] and is not satisfied by hazard assessments at representative workplaces," the Board imposed a limitation on the meaning of the word "assess" that the legislature and the Commission purposely left undefined. In other words, and in contradiction to federal interpretation of 29 CFR 1910.132(d)(1), the Board transformed Rule 408.13308(1) from a performance-oriented standard into a specification standard. The Board failed to consider the rule's intent – to identify specific job tasks that require PPE. Instead, it focused on *how* or *the means by which* UPS satisfied that goal. In doing so, the Board completely ignored the fact that UPS had identified the specific job task hazards that required appropriate PPE. Moreover, the Board ignored the Commission's directive that provided the employer with flexibility to determine a reasonable method to assess whether its employees perform certain job tasks that could require PPE. The Board replaced the plain language of the statute with an opinion on how an employer should assess the workplace, which is improper. Consequently, the Board erred as a matter of law. *Cf. People v. Schaefer*, 473 Mich 418, 432; 703 NW2d 774 (2005) (warning against "extra-textual judicial divinations").

Realizing the critical distinction between a *performance-oriented* standard and a *specification* standard, the Appellee contends that Rule 408.13308(1) is actually the latter. *Appellee's Br* 16-20 (Jan. 5, 2007). Without citation to any authority and as a "boot-strap"

argument, Appellee reasons that the first six words of the Rule require "[a]n employer [to] assess the workplace" and, therefore, the "standard is specific." *Id.* 17.

Appellee's contention is misplaced. As stated above, the Commission has repeatedly interpreted the federal counterpart to Rule 408.13308(1) as a performance-oriented standard and not a specification standard. The Legislature requires the same interpretation of the Rule. MCL 408.1046(6). Appellee's argument contradicts the Legislature's mandate. Moreover, Appellee's circular reasoning improperly focuses solely on first six words of the Rule, rather than the Rule as a whole, *see Fraser Twp v Linwood-Bay Sportsman's Club*, 270 Mich App 289, 296 (2006) (court must read the statute as a whole and not assign meaning to isolated portions thereof), the purpose of which is the implementation of PPE. Appellee's contention is misplaced.

B. <u>An Employer Cannot Violate Rule 408.13308(1) Without Failing to Identify Specific Job Tasks that Require PPE.</u>

The Board additionally erred as a matter of law by affirming citations although the Department of Labor failed to locate a hazard for which UPS did not implement PPE.

The well settled interpretation of the analogous federal regulation is that, "there can be no violation of [29 CFR 1910.132(d)] if the Secretary fails to show the existence of such a hazard by a preponderance of the evidence." *Sec'y of Labor v White Wave, Inc*, OSHRC Docket No. 03-0962 p 4 (Feb. 23, 2004) (Exhibit 6).

Here, the Department of Labor found no hazard for which UPS did not require the use of PPE. UPS's assessment of the Lansing and Romulus workplaces, regardless of *how* or the *means by which* UPS assessed those workplaces, accomplished exactly what the assessment was intended to achieve. UPS implemented PPE at the Lansing and Romulus workplaces after it reviewed identical job tasks at the Louisville workplace and discovered identical hazards. UPS's representative assessment plan, which identified tasks that required PPE at the Lansing and

Romulus workplaces, satisfied the Department of Labor's substantive inspection for PPE. Consequently, the means by which UPS assessed those workplaces *per se* satisfy the Rule.

Appellee contends that the Commission's holding in *White Wave* is inapplicable to this dispute. *Appellee's Br* 19. Appellee reasons that, in *White Wave*, "the parties disagreed over whether there was a hazard that needed to be recorded as part of the assessment, not whether an assessment was required." *Id.* Appellee's distinction is irrelevant. Again, Appellee improperly focuses on solely the first six words of the Rule rather than the whole Rule. *See Fraser Twp, supra* at 296. The point of the Rule, as a performance-oriented standard, is that an employer must implement PPE for job tasks that require PPE. *Jimerson Under-Ground, Inc, supra* at 13. Consequently, unless the employer fails to do so, the employer cannot be found to have violated the rule. *White Wave, Inc, supra* at 4. To focus on the first six words of the Rule, as Appellee does, elevates form over substance and misses the whole point of the Rule.

C. <u>The Board Failed to Consider the Reasonableness of UPS's Representative Assessments.</u>

Pursuant to federal interpretation, as long as the employer acts reasonably, then the employer has satisfied a performance-oriented standard. *Sec'y of Labor v Siemens Energy & Automation, Inc*, OSHRC Docket No. 00-0152, pp 3-4 (Dec. 14, 2001) (Exhibit 7). The Board additionally erred as a matter of law because the Board failed to consider whether UPS's method of assessing the Romulus and Lansing workplaces, *i.e.*, via an assessment of the duplicative Louisville facility, was reasonable.

It is entirely reasonable for an employer to assess one physical workplace, discover specific job tasks that could require PPE, and implement the PPE at every other physical workplace wherein that specific job task occurs. An assessment should identify hazards that accompany "specific job tasks" that occur at the workplace. *Gulf Hauling & Constr, Inc, supra*,

p 14; *BF Goodrich Hilton Davis, Inc*, *supra*, p 9. If a "specific job task" that occurs at physical workplace 'A' is identical to a "specific job task" that occurs at physical workplaces 'B' and 'C', then any hazard that the employer identifies at physical workplace 'A' as associated with that "specific job task" will necessarily apply to the same "specific job task" at physical workplaces 'B' and 'C'. The same job tasks employ the same hazards and, therefore, require the same personal protective equipment. This simple syllogism and the facts of the present case demonstrate that such an assessment program is reasonable pursuant to Rule 408.13308(1).

The best indicia that such a program is reasonable is the present case; the Michigan Department of Labor's inspection of UPS's Romulus and Lansing facilities *uncovered no hazard for which UPS failed to implement personal protective equipment*. This fact renders Appellee's suggestion that there is only one way to assess "the" workplace misguided. *See Appellee's Br* 12-14. In other words, UPS's program *did* assess "the" Romulus and Lansing workplaces because UPS identified all the job tasks at those Michigan workplaces that require PPE and implemented PPE at those workplaces accordingly.

D. The Board Misconstrued the Rule by Requiring Employers to Undertake Useless Acts.

It is well settled that "[t]he law does not require the doing of a useless act." *See Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 669; 66 NW2d 92 (1954). Referring to the syllogism above, an employer should not have to incur the expense and time of specifically reassessing physical workplaces 'B' and 'C' to rediscover what the employer already learned by assessing physical workplace 'A.' As applied here, the Board affirmed the purported violations of the Rule, although it is undisputed that duplicative reassessments of the Lansing and Romulus facilities would not have identified any additional job tasks that could require PPE. The Board should not have misinterpreted the Rule as to require an employer to perform such a useless act.

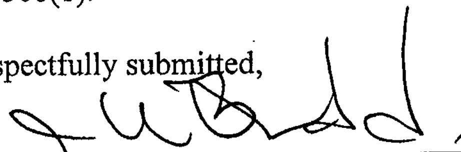
E. The Board's Determination Has Drastic Economic Consequences.

This Court's decision will drastically affect Michigan businesses. While *amici curiae* strongly support the goals and objectives of the federal Occupational Safety and Health Act and MIOSHA, the *amici* believe that the Board's determination, as affirmed by the circuit court, has cast an overly broad net that will have a harsh, unfair, and ultimately counterproductive result on business. At least fourteen percent of small employers have multiple business locations. NFIB National Small Business Poll, Vol 4, Iss. 7, Business Structure 12 (2004), available at http://www.nfib.com/object/sbPolls. The Board's interpretation of Rule 408.13308(1), if affirmed, would require such Michigan businesses to spend money without improving employee safety. Moreover, under a broad reading, the Board's decision effectively impacts every employer in Michigan. No workplace would be exempt even where no hazards requiring personal protective equipment could possibly be present (i.e., in an office setting). Clearly, the Rule should not be needlessly interpreted in a way that will further harm Michigan businesses without providing any benefit to Michigan employees.

IV. CONCLUSION

For the foregoing reasons, the NFIB Legal Foundation and the Chamber of Commerce, as *amici curiae*, respectfully request this Court to reverse the decisions of the Ingham County Circuit Court and the Board and to hold that a representative assessment program, such as that which UPS implemented, is not contrary to Rule 408.13308(1).

Respectfully submitted,



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