NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

Complainant,

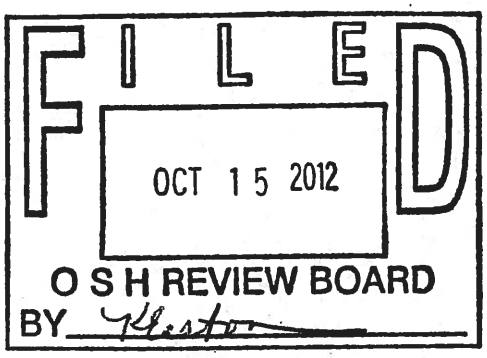
vs.

MARTIN IRON WORKS, INC.

Respondent.

_____/

Docket No. RNO 12-1576



DECISION

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 13th day of September 2012, in furtherance of notice duly provided according to law, MR. MICHAEL TANCHEK, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations** (OSHA); and MR. JOHN MOORE, ESQ., appearing on behalf of Respondent, **MARTIN IRON WORKS, INC.**, the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

Jurisdiction in this matter has been conferred in accordance with Chapter 618 of the Nevada Revised Statutes.

The complaint filed by Nevada OSHA sets forth allegations of violation of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto.

Citation 1, Item 1, charges a violation of 29 CFR 1910.134(e)(1). The complainant alleged the respondent employer failed to provide a respirator medical evaluation to determine the employee's ability to use

a tight fitting respirator in the workplace. The violation was classified as "Serious". The proposed penalty for the alleged violation is in the amount of TWO THOUSAND SIX HUNDRED EIGHTEEN DOLLARS ($2,618.00).

Citation 1, Item 2, charges a violation of 29 CFR 1910.134(f)(2). The complainant alleged the employer did not provide respirator fit test for an employee utilizing a respirator. The alleged violation was classified as "Serious". The proposed penalty for the alleged violation is in the amount of TWO THOUSAND SIX HUNDRED EIGHTEEN DOLLARS ($2,618.00).

Counsel stipulated to the admission of evidence as complainant's Exhibits 1 and 2 and respondent's A, B, C and D.

Complainant presented testimony and documentary evidence with regard to the alleged violations. Mr. Ee F. Lee, an OSHA Industrial Hygienist ("IH"), testified as to his inspection and the citations issued to the employer.

Mr. Lee conducted an inspection of respondent's worksite in Reno, Nevada. The employer engages in steel fabrication and steel erection. IH Lee was assigned an inspection designated as a "comprehensive planned inspection and not generated by a complaint or accident." He described employees working in buildings 1, 2 and 3 performing welding, grinding, chipping, cutting, fitting and other steel fabrication work. An employee in building 1 was observed spray painting gray and red rust inhibitive primer on a steel beam. The painter identified as Employee number 1 in Exhibit 1, the inspection report and narrative, was Mr. Phuoc Nguyen. He was observed wearing a north negative air half-mask tight fitting respirator with OV cartridges. Mr. Lee interviewed the employee and was informed that he had not received a respirator medical

evaluation nor a fit test as required by applicable OSHA standards.

Mr. Lee testified that the employer has an established written respiratory protection and communication program. Based upon his inspection and interviews with the employer representative CFO Ms. Patricia (Trish) Bullentini, CSHO Lee determined that Mr. Nguyen had never been sent by respondent for a respirator medical evaluation nor fit test. Ms. Bullentini also reported that she did not know how many times Mr. Nguyen actually wore the respirator because painting work is very limited in the steel fabrication operation, so he performed the work only occasionally. He was the sole employee assigned painting work. Mr. Lee testified the respondent promptly abated the violation and now conducts respirator evaluations.

On cross-examination by respondent counsel Mr. Lee testified that he detected no toxic fumes in the plant area nor did he conduct any air quality sampling examinations to determine whether the materials being sprayed or other conditions created a hazardous environment from which the employee would be protected by use of a respirator. Mr. Lee stated that, in his personal opinion, it is appropriate to wear a mask when spray painting regardless of toxicity because hydrocarbon products in aerosols can cause respiratory damage. When questioned as to whether there is an OSHA requirement to cite anyone spray painting without a mask, Mr. Lee responded in the negative. He explained that respondent was not cited for **exposure** but solely for use of a tight fitting respirator **without a medical evaluation and fit test.** Mr. Lee testified he had no evidence that the primer paint being sprayed by the employee was hazardous, nor did he check the MSDS for information on the type of material and/or toxicity of the product being utilized. He stated that during his interview, employee Mr. Phuoc Nguyen told him that he

sometimes uses a simple dust mask and not the "tight fit type" which requires evaluation but elected to use the respirator mask because it eliminated some of the odor from the paint products. Mr. Lee testified that Superintendent Bob Ferguson told him that he was not aware of any medical evaluation having been performed for Mr. Nguyen, nor are any company employees required to use a respirator for the subject work. Mr. Lee also testified the written respiratory program maintained by the respondent was OSHA compliant and he found no deficiencies other than those cited.

On redirect examination, IH Lee testified as to the reasons for medical evaluation and fit testing under OSHA standards. He explained that when an employee puts on a mask there is a change to the body physiology such that a person must work harder to breathe. It must first be established that an employee is in a sufficiently healthy condition to utilize a respirator. Fit tests are required because the facial structure of an employee must match the various sizes of standard form masks to qualify the employee for use of same.

The photographic exhibit at Exhibit 2 was identified as taken by Mr. Lee and depicted employee Mr. Phuoc Nguyen actually spray painting the beam as observed by Mr. Lee. He testified the **serious** classification was based upon there being a substantial probability of serious physical injury or death should there be leakage of hazardous material through the mask and inhaled by the employee. He provided all credits and adjustments to which the respondent was entitled in accordance with the operations manual and assessed his penalty accordingly.

Upon conclusion of the complainant's case, respondent presented testimony and documentary evidence. Ms. Patricia Bullentini identified

herself as the respondent CFO and responsible for company safety oversight. She testified the Sherman Williams Paint Company informed her that a tight fit respirator device is required for use in a paint booth but not in an open facility; and there would be no need for any respirator use with the type of rust inhibitor paint product being utilized. She referenced respondent's Exhibit B, page 4, the MSDS and the documentation at Exhibit C. Her testimony confirmed the MSDS product identification as non harmful and designated "2" under the health section. The painter was working approximately 12 feet from an open ended building which was well ventilated and included openings at both ends as well as an open roof structure. She testified that after the inspection, employee Nguyen was sent to a doctor for medical evaluation and he was approved for use of a respirator. Ms. Bullentini testified that notwithstanding the MSDS and the paint manufacturer opinion supporting no compliance requirement with the referenced cited standards, the company provides respirators for employees who may simply elect to use them. It is not a company requirement but available for voluntary use. Mr. Nguyen voluntarily chose to use the tight fit respirator because of his personal preference. She testified the previous company policy was to obtain medical evaluations and fit tests for all employees who could be involved in any of the rust inhibitor painting operation. However because the work was very limited, only one employee ever assigned to paint, she ceased the requirement after examination of the MSDS and advisories from the paint manufacturer as to the lack of any toxicity or harmful aspects in the paint product. She reaffirmed no employee has a primary job of painting, including the subject employee, and that most company employees sometimes choose to wear a dust mask which requires no medical evaluation or fit testing.

At the conclusion of respondent's case both counsel presented closing arguments.

Complainant referenced photographic Exhibit 2 arguing the photo depicted an employee utilizing a tight fit respirator at the employer worksite, and the undisputed testimony of all witnesses demonstrated there had been no medical evaluation or fit test. Counsel argued that it is use of a respirator itself, not whether there is toxicity or harmful vapors in the environment that determines the basis for the citations and a finding of violations.

Respondent argued the employer has an outstanding safety record and there were no other violations found in the workplace after a full comprehensive planned inspection by IH Lee and his associate. He argued this was a simple case of voluntary use based on preference of a respirator for which there should be no requirement to obtain a valuation or fit test. There is no employer requirement to utilize same in the workplace. He argued there was no burden of proof met to show that a violation qualified for a serious classification due to there being no evidence that there was a **substantial probability of serious injury or death** from use of a respirator in an environment where there was no toxicity found nor supported by the MSDS which established the product to have very little harmful affect. Counsel urged that based upon a voluntary program and lack of any evidence of hazard exposure the case should be dismissed or at best reclassified to an "other than serious" violation. Counsel argued that since there was no exposure to serious injury or death, the entire purpose of medical evaluation and fit test standards have no **applicability**. Further, with no contaminants found in the air, and no sampling or other evidence obtained, there was no **exposure** to satisfy the complainant's burden of proof. Counsel cited

Federal OSHA case precedent in support of reclassifications from serious to "other" on a training citation when there was no underlying health hazard shown and therefor no basis for violation for lack of a fit test.

In reviewing the testimony, exhibits, and arguments of counsel, the board is required to measure same against the elements to establish violations under Occupational Safety & Health Law based upon the statutory burden of proof and competence of evidence.

> In all proceedings commenced by the filing of a notice of contest, the burden of proof rests with the Administrator. (See NAC 618.788(1).
>
> All facts forming the basis of a complaint must be proved by a preponderance of the evidence. See Armor Elevator Co., 1 OSHC 1409, 1973-1974 OSHD ¶16,958 (1973).
>
> To prove a violation of a standard, the Secretary must establish (1) the **applicability** of the standard, (2) the existence of **noncomplying conditions**, (3) **employee exposure** or access, and (4) that the **employer knew** or with the exercise of reasonable diligence could have known of the violative condition. See Belger Cartage Service, Inc., 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); Harvey Workover, Inc., 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); American Wrecking Corp. v. Secretary of Labor, 351 F.3d 1254, 1261 (D.C. Cir. 2003).

A respondent may rebut allegations by showing:

> 1. The standard was inapplicable to the situation at issue;
>
> 2. The situation was in compliance; or lack of access to a hazard. See, Anning-Johnson Co., 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976).

The voluntary use of a face mask respirator by an employee at a worksite, notwithstanding a lack of any employer requirement to do so or a job task that required same represents a difficult case for both enforcement and review. These unusual circumstances require reasonable

application of the standards; however the parameters for review of alleged violations by this board must be subject to the governing law. The board is empathetic to the position of a small employer and understanding of the facts where an employee elects to utilize personal protection based upon his own comfort and convenience, however it must apply the established law to the facts in evidence.

The cited standard as codified is **applicable** to the facts in evidence. Employee Nguyen was utilizing a tight fit face mask respirator on the job site while working for the respondent employer. **Non-complying conditions** were established under the sworn testimony of IH Lee as corroborated by the photographic evidence at Exhibit 2, and not subject to any sworn testimony in rebuttal. Ms. Bullentini testified no medical evaluation or fit test was provided by the employer. **Employee exposure** through **access** to **potential** hazardous conditions was demonstrated because there was a mask on site, it was utilized by an employee, and there was no medical evaluation nor any fit test performed for use of the respirator. **Employer knowledge** of the violative conditions was admitted by Ms. Bullentini, but also imputed to the employer under the governing law when a supervisor knew **or with reasonable diligence** could have known of the violative conditions. See Division of Occupational Safety and Health v. Pabco Gypsum, 105 Nev. 371, 775 P.2d 701 (1989). With the exercise of reasonable diligence, Ms. Bullentini could easily have been informed that Mr. Nguyen was wearing a respirator notwithstanding a lack of any requirement for his job task and without any medical evaluation or fit test.

Based upon the applicable law, the violation must be confirmed; however, the classification of the violations as **serious** must reviewed under the facts in evidence.

NRS 618.625 provides in pertinent part:

> ". . . a serious violation exists in a place of employment if there is a **substantial probability that death or serious physical harm could result from a condition** which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use in that place of employment unless the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation."

The board finds insufficient proof to support classification of the violations as "serious". The facts in evidence do not demonstrate a "substantial probability" that death or serious physical harm could result due to the subject employee failing to have been given a medical evaluation for use of a tight fit respirator or fit test not required for his employment, and in an environment where there was no evidence whatsoever of **potential exposure** to harmful substances. To the contrary, respondent evidence clearly demonstrates at Exhibit C, the MSDS, there was no harmful material in the painting products to cause anything other than a minor irritation. Further, at Exhibit 1, the IH rated the exposure on severity probability and gravity as extremely limited. The conditions, facts and evidence involved in this violation, coupled with the actual circumstances of voluntary use of the respirator by an employee do not meet the burden of proof to establish **"serious"** violations. However the evidence supports a finding of **"other"** violations. Before any employee uses a respirator, he/she must be healthy enough to wear the mask itself and be fitted for its use. The Board finds a preponderance of substantial evidence for reclassification of the violation from "serious" to "other".

> "Where the Secretary alleges but fails to prove the seriousness of a violation, a non-serious violation generally will be found. *A.R.A. Mfg.*, 11 OSH Cases 1861, 1863-64 (Rev. Comm'n 1984). Rabinowitz, Occupational Safety and Health Law, 2008, 2nd Ed., page 225."

The board finds, as a matter of fact and law, that a violation did occur as to Citation 1, Item 1, 29 CFR 1910.134(e)(1) and Citation 1, Item 2, 29 CFR 1910.134(f)(2). The violations are reclassified from "Serious" to "Other". The proposed penalty is reduced based upon the evidence to a total for both violations of ONE THOUSAND NINE HUNDRED SIXTY THREE DOLLARS and 50/100 ($1,963.50).

It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** that a violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, 29 CFR 1910.134(e)(1) and Citation 1, Item 2, 29 CFR 1910.134(f)(2). The violations are reclassified from "Serious" to "Other". The proposed penalty is reduced based upon the evidence to a total for both violations of ONE THOUSAND NINE HUNDRED SIXTY THREE DOLLARS and 50/100 ($1,963.50).

The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION, DIVISION OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** and serve copies on opposing counsel within twenty (20) days from date of decision. After five (5) days time for filing any objection, the final Findings of Fact and Conclusions of Law shall be submitted to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing counsel. Service of the Findings of Fact and Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** shall constitute the Final Order of the **BOARD**.

DATED: This 15th day of October 2012.

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

By /s/
JOE ADAMS, CHAIRMAN