

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Commissioner of MN  
Department of Labor and Industry v.  
Building Restoration Corporation

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Barbara J. Case for a hearing on November 22, 2015. The record closed on December 1, 2015.

Jonathan Moler, Assistant Attorney General, appeared on behalf of the Occupational Safety & Health Review Board (MnOSHA) of the Department of Labor and Industry (Department). Brian T. Benkstein, Jackson Lewis PC, appeared on behalf of Building Restoration Corporation (Respondent).

**STATEMENT OF THE ISSUES**

1. Whether the Department has proven by a preponderance of the evidence that:
  - a. Minn. R. 5206.0700, subp. 1(G) (2015) applies to the Respondent.
  - b. Respondent failed to comply with the standard by failing to conduct required right-to-know training.
  - c. The employees had access to the violative condition.
  - d. The employer knew or should have known of the condition with the exercise of reasonable diligence.
  - e. The severity of violation is appropriately characterized.
  - f. The penalties were appropriately calculated.
  
2. Whether the Department has proven by a preponderance of the evidence that Respondent violated 29 C.F.R. § 1910.134(c)(1)(i) (2015) because the Respondent's written respiratory protection program did not contain adequate procedures for selecting protection in the workplace and that:

- a. 29 CFR § 1910.134(c)(1)(i) applies to the Respondent.
- b. Respondent failed to comply with the standard when it failed to have adequate procedures for selecting respiratory protection or that the procedures were unenforced.
- c. The employees had access to the violative condition.
- d. The employer knew or should have known of the condition with the exercise of reasonable diligence.
- e. The severity of violation is appropriately characterized.
- f. The penalties were appropriately calculated.

### **SUMMARY OF RECOMMENDATION**

Based on the evidence in the hearing record, the Administrative Law Judge finds that the Respondent violated Minn. R. 5206.0700 (2015) and 29 C.F.R. 134 (c)(1) (2015), and that both standards apply to the Respondent. In addition, that Respondent's employees had access to the violative conditions and that the Respondent should have known of the absence of the required training and the required procedures. The Administrative Law Judge finds that the training violation is appropriately characterized as serious and, therefore, the penalty was appropriately calculated. The Administrative Law Judge also finds that the respiratory protection procedure violation was appropriately characterized and the penalty appropriately calculated.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

### **FINDINGS OF FACT**

#### **The Respondent**

1. Respondent is a Minnesota based company that specializes in tuck-pointing, patching, and cleaning stone and brick buildings. Much of their work consists of the dust-producing activity of cutting and grinding masonry, brick, stone and mortar while renovating the exterior of buildings.<sup>1</sup>

2. The exterior restoration work performed by Respondent, which involves the grinding of mortar and concrete, can result in its employee's exposure to, among other particles, silica dust.<sup>2</sup> Silica exposure can lead to silicosis, a debilitating disease that involves scarring of the lungs and leads to difficulty breathing. It is rated as an "A-

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<sup>1</sup> Testimony (Test.) of Dale Zoerb; Ex. 4 (Inspection Narrative Report and Violation Worksheets).

<sup>2</sup> Test. of Ryan Kuehl.

2", or chronic toxicity suspect human carcinogen, by the American Council of Government Industrial Hygienists.<sup>3</sup>

3. Dale Zoerb is the company president and has been in the building restoration business for approximately 35 years.<sup>4</sup>

### **MnOSHA's Investigation**

4. On September 25, 2012, MnOSHA initiated a workplace inspection at 6400 Barrie Road, Edina, Minnesota (the worksite). The investigation derived from a national emphasis OSHA placed on silica exposure.<sup>5</sup>

5. The inspection was carried out by Industrial Hygienist, Kelly Smeltzer (Ms. Smeltzer or Investigator).<sup>6</sup> Ms. Smeltzer has a master's degree in Public Health from the University of Minnesota. The emphasis of her master's degree is in environmental health sciences with an emphasis on environmental exposures and safety.<sup>7</sup>

6. A safety inspector from MnOSHA had noted the project and raised it as a worksite with potential silica exposure concerns with Ms. Smeltzer's supervisor, Clayton Handt.<sup>8</sup>

7. Ms. Smeltzer arrived at the worksite unannounced. When she arrived, two employees were engaged in grinding mortar. She showed her credentials and explained the purpose and scope of her investigation to the employees including the site foreman, Ryan Kuehl. Mr. Kuehl then explained that the employees on site were done, or almost done, cutting mortar for the day. Ms. Smeltzer explained to the employees that she would be in contact with Respondent's management, who were not on site, and make arrangements to return to do silica sampling.<sup>9</sup> This process, of making an initial visit and then arranging for a follow up visit in order to proceed with sampling is the typical protocol followed by MnOSHA in cases where sampling is required.<sup>10</sup>

8. After making arrangements with the Respondent, Ms. Smeltzer made a second visit to the worksite on October 2, 2012. She equipped two employees with personal sampling pumps to sample for respirable dust and silica. The sampling lasted nearly four hours, and covered the time in which the employees were grinding and cutting mortar away from the brick building. Significant dust was produced by the

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<sup>3</sup> Test. of Kelly Smeltzer.

<sup>4</sup> Test. of D. Zoerb.

<sup>5</sup> Ex. 4 (Inspection Narrative Report).

<sup>6</sup> *Id.*; Test. of K. Smeltzer.

<sup>7</sup> Test. of K. Smeltzer.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

process, and employees wore Bullard CC20 Series PAPR hoods for protection while grinding the mortar.<sup>11</sup>

9. During the October 2, 2012, inspection, Respondent was able to provide a written right-to-know program in response to the inspector's request but was unable to provide documentation that its employees had been trained prior to October 2, 2012.<sup>12</sup>

10. While on the worksite, Ms. Smeltzer interviewed the employees about what training they had received but did not find them forthcoming on that topic. However, the employees were cooperative with the dust and silica sampling performed that day.<sup>13</sup>

11. The results from the two employees who wore devices that tracked their exposure to respirable dust at the worksite on October 2, 2012, showed that the exposure exceeded OSHA's permissible exposure limits (PEL) to those substances.<sup>14</sup> An exposure rating dose of 1 would be at the OSHA PEL. The exposures found on October 2, 2012 were, respectively, 15 and 7.8, both above OSHA's PEL. However, as MnOSHA adjusts the exposure calculation for the length of time the work is being performed, and assumes no exposure for parts of the work day when the work is not being performed, the time weighted adjusted doses were based on 4 hours of exposure and were, respectively, 7.8 and 3.9.<sup>15</sup>

12. After the October 2, 2012 visit, the investigator made requests to Respondent for its Right-to-Know and Workplace Accident and Injury Reduction (AWAIR) Program documents and training records, including its respiratory protection program and proof of fit testing documents.<sup>16</sup>

13. The Respondent did provide a written employee Right-To-Know Program on October 12, 2012, which covered the written program requirement of the standard.<sup>17</sup>

14. Respondent submitted records of training conducted on October 29, 2012, to Ms. Smeltzer via e-mail on October 31, 2012.<sup>18</sup>

15. Following MnOSHA protocol, the investigator held a closing conference with Respondent on October 31, 2012, via telephone. The investigator explained the results of the employee exposure monitoring as well as the proposed citations.<sup>19</sup>

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<sup>11</sup> Ex. 4; Test. of K. Smeltzer.

<sup>12</sup> *Id.*

<sup>13</sup> Test. of K. Smeltzer.

<sup>14</sup> Ex. 5 (Industrial Hygiene Field Report); Test. of K. Smeltzer.

<sup>15</sup> Ex. 5; Test. of K. Smeltzer.

<sup>16</sup> Ex. 8 106.

<sup>17</sup> Ex. 4.

<sup>18</sup> Test. of K. Smeltzer.

<sup>19</sup> Ex. 4.

## Citation 01, Item 2, Minn. R. 5206.0700, Training Requirements

16. Minnesota Rule 5206.0700, subpart 1B applies to Respondent and requires, among other things, that an “employer shall develop a written Employee Right-to-Know program which, at a minimum, describes how the training, availability of information, and labeling provisions of this chapter will be met for hazardous substances....” Subpart 1D of the rule requires that records of the training provided “must be maintained by the employer for three years, and made available, upon request, for review by employees and representatives of the Occupational Safety and Health Division.” The records must include the dates training was conducted, who conducted the training, the names and job titles of employees who completed the training and a brief summary of the information that was included in the training session.

17. Though the investigator made multiple requests to the Respondent for records of employee right-to-know training that complied with 5206.0700, subp. 1D, none were provided to her by Respondent.<sup>20</sup>

18. As a result of Respondent being unable to produce any documentation that employee right-to-know training had been conducted prior to work beginning at the worksite or at any time over the past three years, MnOSHA was unable to establish that any employee right to know training had been conducted prior to October 29, 2012.

19. Respondent provided a record for training that was conducted on October 29, 2012, subsequent to the beginning of the investigator’s investigation.<sup>21</sup>

20. At the hearing, Respondent’s employees testified that they were well aware of the dangers of silica and they had received safety training from Respondent. They also testified that there were information sheets regarding silica posted in the worksite office.<sup>22</sup> However, when during the course of the investigation the employees were asked by the investigator for information on the training they had received, they were uncooperative and provided no indication of previous training dates.<sup>23</sup>

21. MnOSHA determines penalty for a violation by looking at the severity of a violation, the numbers of employees exposed, proximity of the hazard, duration of time of exposure, other risks of the work environment. These factors are derived from the MnOSHA field manual. In this case the Penalty Calculation was rated as an E6.<sup>24</sup>

22. The presumed penalty for this level of violation is \$4,500. In this case Respondent was given a reduction or credit for good faith, a positive safety history and a lack of history of repeated and willful violations. For these credits the penalty was reduced by 70% to \$1,350.<sup>25</sup>

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<sup>20</sup> Ex. 5; Test. of K. Smeltzer.

<sup>21</sup> *Id.*

<sup>22</sup> Test. of R. Kuehl.

<sup>23</sup> Ex. 4.

<sup>24</sup> Ex. 4, Ex. 9 at 67 (Table of Severity Factors); Test. of K. Smeltzer.

<sup>25</sup> *Id.*

23. Using the MnOSHA Field Compliance Manual's Severity Table, MnOSHA rated the violation as a level E, which is Serious and the expected resulting injury of illness is "permanent partial disability from 15% to 60%, temporary total disability, greater than 10 lost workdays or days of restricted work activity."<sup>26</sup>

24. MnOSHA also used the MNOSH Citation Rating Guide, a table prepared by MnOSHA to help assure uniformity in ratings.<sup>27</sup> This table gives guidance on severity ratings correlated to specific statutes and rules. The suggested range of Severity for violations of Minn. R. 5206.0700, subp. 1G is anywhere from level B to level F.<sup>28</sup> The severity is also determined by a MnOSHA table entitled "Type of Illness by Severity Levels."<sup>29</sup> According to this table the severity level for cumulative exposure to silica dust depends on the level of the dose. For the dose as applied by MnOSHA in this case the severity level is F because for both employees the severity level was a dose greater than 3.<sup>30</sup>

25. MnOSHA reduced the severity level from F to E based on their professional judgment that it was reasonable to give Respondent the benefit of the doubt by crediting Respondent for having done some right-to-know training with its employees at some point.<sup>31</sup> Therefore, the Investigator treated the citation as "training not updated annually" and consequently reduced the severity of the violation.<sup>32</sup>

26. MnOSHA uses a Penalty Chart to determine the amount the penalty for various violations with adjustments for Good Faith, Size of the Company and the Company's violation history.<sup>33</sup> The Penalty calculation was based upon the Severity of the hazard, the number of employees exposed, their proximity to the hazard and their proximity to it. The unadjusted penalty for the violation was \$4,500. However, the investigator applied a good faith, safety and lack of history of repeated and willful violations credit to reach a penalty of \$1,350.<sup>34</sup>

### **Citation 02, Item 1: Respiratory Protection Standards**

27. 29 CFR § 1910.134 (c)(1)(i) states that in workplaces where respirators are necessary to protect the health of the employee, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures. Specifically, the program shall include procedures for selecting respirators.<sup>35</sup>

28. The investigator found deficiencies in Respondent's respirator protection program. In specific, the investigator found that, while Respondent provides a number of

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<sup>26</sup> Ex. 9 at 67.

<sup>27</sup> *Id.* at 117

<sup>28</sup> *Id.* at 143.

<sup>29</sup> *Id.* at 156.

<sup>30</sup> *Id.* at 156; Test of K. Smeltzer.

<sup>31</sup> Test. of K. Smeltzer.

<sup>32</sup> *Id.*

<sup>33</sup> Ex. 9 at 84-85.

<sup>34</sup> Test. of K. Smeltzer; Ex. 4.

<sup>35</sup> 29 CFR § 1910.134 (c)(1)(i); Ex. 4; Test. of K. Smeltzer.

respirator choices for its employees, the Respondent does not provide sufficient guidance to the employees about which of several respirators should be worn in any given circumstance.<sup>36</sup>

29. Respondent's selection protocol states that the Respondent "will select and provide an appropriate respirator based on the respiratory hazards to which the worker is exposed and workplace factors that affect respirator performance and reliability." The selection criteria further states that selection shall consist of the following criteria:

- a. Select a NIOSH-certified respirator that shall be used in compliance with the conditions of its certification;
- b. Identify and evaluate the respiratory hazards in the workplace, including a reasonable estimate of employee exposures and identification of the contaminant's chemical state and physical form;
- c. Where exposure cannot be identified or reasonably estimated, the atmosphere will be considered an Immediate Danger to Life or Health (IDLH); and
- d. Select respirators from a sufficient number of models and sizes so that the respirator is acceptable to, and correctly fits, the use.<sup>37</sup>

30. During the investigator's inspection on September 25, 2012, the employees were wearing tight fitting half-masks with cartridges (the cartridge is the filter).

31. When the investigator returned on October 31, 2012 for her follow up visit, the employees were wearing PAPR masks which are a more protective full hood respirator that supplies powered air to the worker.<sup>38</sup>

32. At neither visit by the investigator were the workers wearing a mask that would protect them from an atmosphere considered IDLH.<sup>39</sup>

33. Respondent never provided MnOSHA with any documentation on how they estimated what the hazard or exposure would be at the worksite.<sup>40</sup>

34. The Respondent was not following its written respiratory protection standards on either occasion when the investigator was on the worksite.<sup>41</sup>

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<sup>36</sup> Test. of K. Smeltzer; Ex. 6.

<sup>37</sup> Ex. 6 at BRC 0042.

<sup>38</sup> Test. of K. Smeltzer.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

35. The choice of an appropriate respirator for a particular worksite may be influenced by many factors including, other contaminants that might be present, the temperature, the weather, the level of work effort, how long the respirator is worn, communication requirements, whether the work is interior or exterior, proximity to other workers, tripping hazards and other factors. The combination of any of these factors can also impact respirator selection.<sup>42</sup>

36. An employer is obligated to estimate the exposure of employees to hazardous substances but is not obligated to conduct personal air monitoring for an individual employee.<sup>43</sup>

37. In order to determine the penalty for this violation the investigator turned to MnOSHA's Citation Rating Guide for 29 CFR § 1910.134 (c)(1), which relates to written procedures and selected a severity rating of B, which is the lowest possible rating for this violation and is based on "low exposure – no other deficiencies."<sup>44</sup> At hearing the investigator could not recall why she had given the citation the B rating. However, she stated that MnOSHA's issue with Respondent's program was the way it was written and that was why the citation was rated as non-serious and the penalty \$300.<sup>45</sup>

38. The Citation and Notification of Penalty Notice in this matter was issued on November 13, 2012.<sup>46</sup>

39. Respondent contested the citations by letter dated November 15, 2102.<sup>47</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Commissioner of the Department of Labor and Industry (Commissioner) and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 182.661, subd. 3 (2014).

2. MnOSHA provided proper notice of the citations, penalties, and hearing in this matter, and has fulfilled all relevant procedural requirements under the Minnesota Occupational Safety and Health Act and applicable rules.<sup>48</sup>

3. Respondent is an "employer" as defined by Minn. Stat. § 182.651, subd. 7 (2014).

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Ex. 9 at 123; Test. of K. Smeltzer.

<sup>45</sup> Test. of K. Smeltzer.

<sup>46</sup> Ex. 1.

<sup>47</sup> Ex. 10.

<sup>48</sup> Minn. Stat. §§ 182.65–.676; Minn. R. 5205.0010-.1400 (2015).

4. Minnesota Statutes section 182.653, subdivision 3 (2014), requires each “employer” to comply with Occupational Safety and Health standards and rules adopted pursuant to Minn. Stat. ch. 182 (2014).

5. The Commissioner has the burden of establishing a violation of an Occupational Safety and Health Standard by a preponderance of the evidence.<sup>49</sup>

6. Respondent is responsible under Minn. R. 5206.0700 to provide right-to-know training to its employees regarding silica and other hazards related to Respondent’s operations. This right-to-know training must be provided before an initial assignment to a workplace where an employee may be routinely exposed to a hazardous substance<sup>50</sup> and training updates must be repeated at intervals of not greater than one year.<sup>51</sup>

7. Respondent violated Minn. R. 5206.0700 by failing to provide right-to-know training to its employees prior to their assignment at the workplace at issue in the case as indicated by its lack of records of having provided any training over the last three years, the period for which record retention of training is required.<sup>52</sup>

8. The employees at the worksite had access to the violative condition because they were working at the worksite without having received the training, and Respondent, with many years of experience in the industry, knew or should have known that the training had not been provided.

9. The violation was correctly found to be serious by the Department and the Administrative Law Judge finds that the proposed penalty of \$1,350, is reasonable.

10. Federal Occupational Safety and Health standards for Personal Protective Equipment found at 29 C.F.R. § 134 (2014), are adopted by reference in Minn. R. 5205.0010, and are applicable to contractors operating in Minnesota. A “violation of any portion of a standard may be the basis for a citation.”<sup>53</sup>

11. Federal Occupational Safety and Health standards for Personal Protective Equipment require that employers develop and implement a written respiratory protection program with required worksite-specific procedures and elements for respirator use.<sup>54</sup> These procedures include procedures for selecting respirators for use in the workplace.<sup>55</sup> They also require the employer to evaluate respiratory hazard(s) in the workplace, identify relevant workplace and user factors, and base respirator selection on these factors.<sup>56</sup>

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<sup>49</sup> Minn. R. 1400.7300, subp. 5 (2015).

<sup>50</sup> Minn. R. 5206.0700, subp. G(1) (2015).

<sup>51</sup> Minn. R. 5206.0700, subp. G(4) (2015).

<sup>52</sup> Minn. R. 1400.5206, subp. D (2015).

<sup>53</sup> Ex. 14 (MNOSHA Field Compliance Manual at 43); Minn. R. 5210.0530, subp. 1 (2015).

<sup>54</sup> 29 C.F.R. § 1910.134(c).

<sup>55</sup> 29 C.F.R. § 1910.134(c)(1)(i).

<sup>56</sup> 29 C.F.R. § 1910.134(d).

12. The Personal Protective Equipment requirements apply to Respondent. Respondent had written policies that mirrored the requirements for a respiratory protection program and the related respirator selection procedures. However, the evidence shows that the procedures were not implemented as written. The employees at the worksite had access to the violative conditions and Respondent knew or had reason to know that the employees were choosing respirators based on their own evaluation of the workplace hazards rather than on specific information provided to them by Respondent regarding the specific workplace hazards.

13. The violation was correctly found to be nonserious by the Department and the Administrative Law Judge finds that the proposed penalty of \$300, is reasonable

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

### **ORDER**

The MnOSHA citations at issue in this case are upheld and the penalties are found to be reasonable.

Dated: January 4, 2016

s/Barbara J. Case  
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BARBARA J. CASE  
Administrative Law Judge

Reported: Digitally Recorded  
No transcript prepared

### **NOTICE**

Pursuant to Minn. Stat. § 182.661, subd. 3 (2014), this Order is the final decision in this case. Under Minn. Stat §§ 182.661, subd. 3; .664, subd. 5 (2014), the employer, employee or their authorized representatives, or any party, may appeal this Order to the Minnesota Occupational Safety and Health Review Board within 30 days following service by mail of this Decision and Order.

## MEMORANDUM

### Right to Know Training (Citation 01, Item 002)

Respondent does not dispute that Minn. R. 5206.0700, requiring employee right-to-know training, applies to it. However, Respondent characterizes its failure to produce records that prove it provided the training as a record keeping violation and not a failure to provide training. Respondent claims that it had provided training and Respondent's employees testified that the training had been provided prior to work beginning at the worksite. However, Respondent's employees were not credible on this point for a number of reasons. First, as employees of Respondent it is likely that a continued positive relationship with their employer is dependent on their testifying on their employer's behalf. Additionally, when the investigator interviewed them at the worksite they were not forthcoming regarding any right-to-know training they had received.

Moreover, the rule requires that "[r]ecords of training...must be maintained by the employer, retained for three years, and made available, upon request, for review by employees and representatives of..." MnOSHA.<sup>57</sup> Respondent has been in the construction business for over three decades and is certainly aware of this rule. There is nothing onerous about keeping the required records, a summary or outline of the training information, the dates the training was conducted, the name and qualifications of the trainers and a list of attendees with their names and job titles is all that is required to be maintained.<sup>58</sup> In this case, it is reasonable to infer that a lack of records denotes a lack of training. It was well within reason for the investigator to conclude, based on the lack of any specifics regarding training during the worksite interviews and the lack of records after repeated verbal and written requests, that no training had been provided prior to work beginning at the worksite. The lack of training was a violative condition to which Respondent's employees had access and it is reasonable to conclude that Respondent, an experienced long-time employer, knew that its employees, who were on a worksite where they would be exposed to silica, had not received the required employee right-to-know training.

Although the investigator had a reasonable basis, pursuant to the MnOSHA Citation rating guide which the Department uses in order to assure reasonable uniformity in citations for similar violations, to treat this violation as training not conducted prior to the initial assignment, the MnOSHA investigator treated the citation as "training not updated annually" and consequently reduced the severity of the violation from level F to E. The investigator made this reduction based on her professional judgment that it was reasonable to give Respondent the benefit of the doubt and credit Respondent for having done some right-to-know training with its employees at some point in the past.<sup>59</sup>

Respondent's characterization of this violation as a mere paperwork violation is not convincing. MnOSHA would not be construing its rules in a manner that protects

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<sup>57</sup> Minn. R. 5206.0700, subp. D.

<sup>58</sup> *Id.*

<sup>59</sup> Test. of K. Smeltzer.

those the rules are intended to protect if it simply assumed that training was given in the absence of any records.

In addition to contesting the appropriateness of citing Respondent for failing to provide right-to-know training, Respondent objects to MnOSHA's designation of the violation as a serious violation. Minnesota Statutes defines a "serious violation" as:

a violation of any standard, rule, or order other than a de minimis violation which is the proximate cause of the death of an employee. It also means a violation of any standard, rule, or order which creates 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 such a place of employment, unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.<sup>60</sup>

MnOSHA's finding that lack of training for workers whose work routinely exposes them to silica was not arbitrary or even based only on the investigator's professional judgement. The investigator relied on the MnOSHA Field Compliance Manual to evaluate the severity level of the violation. MnOSHA determines the penalty for a violation by looking at the severity of a violation, the numbers of employees exposed, proximity of the hazard, duration of time of exposure, and other risks of the work environment. These factors are derived from the MnOSHA Field Manual. In this case the Penalty Calculation was rated as serious because the potential exposure is to a substance, silica that is a suspected carcinogen and is known to cause a long term illness, silicosis.<sup>61</sup> By its nature the damage caused by the violation will likely not be known immediately or in the short-term.

It may be difficult to accept that lack of training regarding the risks of exposure to silica and the potentially resulting silicosis is a serious violation because the link between lack of training and the disease, which develops over time, is attenuated. However, the very lack of a danger as obvious as, for example, the potential of falling off a roof is what makes the training, absent in this case, so important. The out-of-sight out-of-mind quality of the danger makes frequent training imperative. In another MnOSHA case an Administrative Law Judge similarly found that lack of right-to-know training, where the potential hazard was heat stress and excessive noise, "created a substantial probability of serious injury due to workers being uninformed about the hazards to which they were exposed."<sup>62</sup> There, as in this case, the Administrative Law Judge found the argument that there had been no exposure on the days the MnOSHA investigator was on site unavailing.

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<sup>60</sup> Minn. Stat. § 182.651, subd. 12.

<sup>61</sup> Ex. 4, Ex. 9 at 67 (Table of Severity Factors); Test. of K. Smeltzer.

<sup>62</sup> *Bastian v. J&L Schwieters Const. Inc.*, OAH No. 8-1901-11335-2, 1998 WL 526503 (June 1998).

## Respiratory Protection Program (Citation 02, Item 1)

Respondent argues that the Department added a gloss to the regulation that underlies the citation when it cited the company for not having an “adequate” respiratory protection program. The specific regulation cited states merely that an employer shall include in a respiratory protection program “[p]rocedures for selecting respirators in the workplace.” The Respondent points out that nowhere does the regulation mandate that the procedures be adequate. Though the word adequate is arguably assumed, in that one assumes that federal OSHA does not intend its protection program to result in inadequate respiratory protection, Respondent’s point is still well taken. It appears that the Department did not issue the citation to the regulatory cite that most closely matched the Department’s concern with the Respondent’s program. Though the citation might have been issued more broadly or the Department’s complaint more precisely drafted, the fact remains that Respondent is not providing enough information to its employees about likely exposures to hazards at particular worksites. Respondent is responsible for the entire section of the federal regulation on respiratory protection and as one section is part of and informs the other, Respondent does not escape responsibility because the Department attempted to be overly precise. Respondent does not claim that he provides the information, rather he argues that in a workplace with variables such as wind and work effort, providing such information is not possible. The law does not recognize such an exception, it requires an employer to make a reasonable estimate of the hazard in order to inform the selection of respiratory protection.

There is a citation in the same section of the federal code of regulations that does reflect the Department’s concern. 34 CFR § 1910.134(d)(1) of the federal regulations, the section which concerns itself with protection for workers who labor in environments that may contain airborne hazards, there is a section on the “Selection of respirators” that more closely fits the alleged violation in this case. This section requires that “[t]he employer shall select and provide an appropriate respirator based on the respiratory hazard(s) to which the worker is exposed and workplace and user factors that affect respirator performance and reliability.”<sup>63</sup> The section goes on to make clear that it is the employer’s responsibility to “identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazards(s) and identification of the contaminant’s chemical state and physical form.”<sup>64</sup>

Respondent’s position is that, unlike a business with a relatively static environment such as a car painting shop, the Respondent’s worksites change with innumerable factors such as weather conditions, proximity of workers to each other, the qualities of the mortar being cut, other contaminants that might be present and other factors. Therefore, the Respondent argues that it is infeasible for Respondent to synthesize all of these factors into a written program. The testimony of Respondent’s employees confirmed this belief in that their testimony was that they are aware of the

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<sup>63</sup> 34 CFR 1910.134(d)(1)(i).

<sup>64</sup> 34 CFR 1910.134(d)(1)(iii).

hazards of silica and that they wear the protection they deem appropriate depending on the type of work they are performing and other conditions. However, the federal regulations require more than an employer leaving the choice of protection to worker discretion. The employer must “estimate the employee exposure” or consider the atmosphere to be IDLH.<sup>65</sup> There is no parameter that limits this regulation to only those employers who have relatively static working conditions. In fact an argument can be made that the employer’s estimation of workplace hazards is more important where there are shifting conditions. Respondent, by its own written procedures and according to the regulations, is required to provide information to its employees about the estimated level of workplace hazards and help them choose the correct protection. Respondent did not abide by the regulation.

**B. J. C.**

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<sup>65</sup> 34 CFR § 1910.134(d)(a)(iii)