United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. MANSFIELD INDUSTRIAL, INC., Respondent.	OSHRC Docket No. 17-0594

Appearances:

Felix Marquez, Esq., Department of Labor, Office of Solicitor, Dallas, Texas
For Complainant

Peter J. Gillespie, Esq., Laner Muchin, Ltd., Chicago, Illinois
For Respondent

Before: Judge Patrick B. Augustine – U. S. Administrative Law Judge

DECISION AND ORDER

I. Procedural History

On October 5, 2016, a chlorine leak occurred at the Formosa Plastics facility in Point Comfort, Texas ("Worksite"). (Tr. 57–58). The leak caused six of Respondent's employees to suffer respiratory injuries requiring hospitalization. (Tr. 60–61). Consistent with its obligation under the Occupational Safety Health Act of 1970, 29 U.S.C. § 651 *et. Seq.* ("Act"), Respondent notified Complainant about the incident. (Tr. 60). In response, Complainant initiated a Fatality/Catastrophe (FAT/CAT) investigation of Respondent and the Worksite. (Tr. 57–58). As a result of her inspection, Compliance Safety and Health Office (CSHO) Hilda Argullin recommended, and Complainant issued, a Citation and Notification of Penalty ("Citation")

alleging two violations of the Act. The Citation alleges violations related to training on hazardous materials and documentation requirements for the use of respirators; and includes a proposed penalty of $12,675.[1] *See* 29 C.F.R. §§ 1910.1200(h)(1), 1910.134(f)(2). Respondent timely contested the Citation.

The matter was designated for Simplified Proceedings by the Chief Administrative Law Judge and assigned to the Court on April 13, 2017. A trial was held on February 20–21, 2018, in Houston, Texas, during which the following individuals testified: (1) CSHO Hilda Argullin; (2) CSHO Stephanie Dovalina; (3) Joseph Martinez, Respondent's on-site manager at Formosa; (4) Mike Lindsey, Director of Environmental Safety and Health for K2 Industrial Services, Respondent's principal owner; and (5) Ryan Reyes, one of Respondent's site foremen. In lieu of closing on the record, both parties submitted timely post-trial briefs.

II. Stipulations and Jurisdiction

The parties stipulated to several facts, mostly jurisdictional. (Tr. 13–14). Those stipulations were submitted by the parties as Joint Exhibit 1.[2] Based on the parties' stipulations, the Court finds the Commission has jurisdiction over the action pursuant to Section 10(c) of the Act, 29 U.S.C. § 659(c). Further, the Court finds Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861, 866–67 (10th Cir. 2005).

III. Factual Background

Respondent was hired by Formosa Plastics to remove rust from, and paint valves at its plastics facility in Point Comfort, Texas. (Tr. 72, 176, 306). On the date of the incident described

1. Only Citation 1, Item 1 has an associated penalty. Complainant characterized Citation 2, Item 1 as "other-than-serious" and assessed no additional penalty. *See* Citation at 6–7.
2. Subsequent references to the parties' Joint Stipulations will indicate the source and specific stipulation, e.g., "Stip. No. ___".

above, Respondent had two crews working at Formosa, both of which were supervised by Joseph Martinez. (Tr. 178). According to Martinez, his crews were working in what is known as the 500 Unit of the facility, which processes chlorine. (Tr. 180). The crew of employees eventually injured by the chlorine leak began their day in the 500C Unit but were soon transferred to the 500AB Unit. (Tr. 129, 175). Martinez testified the distance between 500C Unit and the 500AB Unit was a matter of a "couple of feet". (Tr. 176). Even though the hazards and chemicals were still the same, Respondent still obtained a new work permit for the change in location. (Tr. 177–78). The other crew was in the IEM unit, which was located across a road that cut through the 500 Unit. (Tr. 178).

Gilberto Santana[3] identified a leak in one of the pipes in the 500AB Unit. (Tr. 293). At that time, it appeared only water was coming out of the tube. (Tr. 293). In response, Ryan Reyes notified Formosa's operations department, who sent two employees to the unit to identify the problem. (Tr. 294). According to Reyes, the two Formosa employees agreed it was only a water leak and one of the employees, Gilberto, asked Reyes for a set of channel locks to crimp the tube in place and secure the leak. (Tr. 295). Reyes went to his truck, which was located 25 feet from the 500AB Unit, to retrieve the channel locks. (Tr. 295). It was not until he began his return trip that Reyes noted the smell of chlorine. (Tr. 296). Reyes alerted the Formosa employee named Tyler, who agreed he smelled chlorine. Reyes also told Tyler his belt gas monitor was going off as well. (Tr. 296–97). At that time, Tyler directed Respondent's employees to the assembly point. (Tr. 297). Reyes testified all employees in the 500AB Unit traveled with him to the assembly point, except for Chris Zamora, who went across the road to the IEM unit to notify the other crew because the alarm had not yet sounded.[4] (Tr. 297–98). Eventually all of Respondent's employees

3. Mr. Santana's father, Magdaleno Lara, also worked on the crew. To ease confusion, the Court had the parties refer to them on the record as "Lara, Sr." and "Lara, Jr."

4. In fact, the alarm did not go off until Respondent's crew was being removed from the assembly point to the decontamination showers. (Tr. 300).

were evacuated from the Worksite, though the entire crew in the 500AB Unit, including Zamora, had to be taken to the hospital due to their exposure to chlorine. (Tr. 300). No one in the IEM unit was injured. (Tr. 278).

Though it was not known at the time, the chlorine leak did not originate at the place where the water leak occurred. (Tr. 226–27). According to Lindsey, the drop-in water level prevented the system from being able to contain the chlorine, which, in turn, caused the leak. (Tr. 276). During a chemical release, employees are trained to move up- and cross-wind from the identified leak, which is aided by the placement of wind socks throughout the plant. (Tr. 292). Unfortunately for the crew in the 500AB Unit, the chlorine leak did not originate from the same location as the water leak; rather, it emanated from the p-trap, which happened to be along their route to the assembly point. (Tr. 226–27). The source of the leak was not identified until Formosa was able to conduct an after-the-fact investigation of the incident. (Tr. 227, 276–78).

As a prerequisite to being allowed onto the Worksite, Respondent's employees had to be trained on the chemicals and other hazards to which they could potentially be exposed. (Tr. 95–97). Formosa did not facilitate the training; rather, it provided Respondent with the basic information, along with testing materials, and required that all entrants onto the Worksite pass the associated examination. (Tr. 91, 96; Ex. C-18). According to the record evidence, all of Respondent's employees passed the English-only exam without missing a question. (Tr. 94; Ex. C-18). This was so even though one of Respondent's employees, Lara, was not fluent in English. (Tr. 97). However, according to Martinez and Lindsey, Mr. Lara was an engaged learner who asked clarifying questions and was supported by his son, Gilberto, who provided translation of the training and examination materials. (Tr. 203, 250–52, 270–72).

After receiving the report of the hospitalization, CSHOs Argullin and Dovalina were dispatched to the Formosa plant, where they conducted interviews and a walk-around inspection. During her interviews, CSHO Argullin understood the evacuation process was chaotic and the employees went in all directions rather than towards the assembly point, revealing to her that training was insufficient. (Tr. 122). Coupled with her determination that the quality of the training assessment was suspect—considering the purported language issue mentioned above—CSHO Argullin determined Respondent failed to provide adequate training on hazardous materials. Further, upon review of Respondent's respirator records, CSHO Argullin found one employee, Adrian Galindo, did not have an up-to-date fit test on record. Based on these findings, she recommended, and the Occupational Safety Health Administration ("OSHA") issued, the citation items discussed in detail below.

IV. Discussion

A. Law Applicable to Alleged Violations

To establish a violation of an OSHA standard pursuant to Section 5(a)(2) of the Act, Complainant must establish: (1) the standard applies; (2) the terms of the standard were violated; (3) employees were exposed to the hazard covered by the standard; and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most*

> *convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

1. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1910.1200(h)(1): Employees were not provided effective information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard that the employees had not been previously trained about was introduced into their work area:
>
> > Employees who worked in chlorine unit 500 were not provided adequate and effective training on the hazards of an unexpected release.

See Citation at 6.

The cited standard provides:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.

29 C.F.R. § 1910.1200(h)(1).

a. The Standard Applies

The scope and application paragraph of 29 C.F.R. § 1910.1200 is extensive and includes several exceptions to its scope. For the purposes of this case, however, the question of its application is simple. According to the standard, "This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions or in a foreseeable emergency." *Id.* § 1910.1200(b)(2). The weight of the testimony indicated: (1) amongst other chemicals, chlorine was present in the workplace; and (2)

Respondent's employees would not be exposed under normal conditions at Formosa. (Tr. 84, 133, 142–43, 303).

Thus, the Court must determine whether such exposure would occur "in a foreseeable emergency." *Id.* According to the definition section, a 'foreseeable emergency' is "any *potential* occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace." *Id.* § 1910.1200(c) (emphasis added). In other words, Complainant is not required to prove that such an emergency is probable; rather, Complainant need only show such an equipment failure is possible. That such a failure—the uncoupling of the tubing, which led to a chlorine release—occurred illustrates the potential for such a release and, therefore, that such an occurrence was foreseeable. Thus, on the face of it, the cited standard applies.

Respondent, however, claims a more specific standard applies to the conditions at Formosa: the process safety management (PSM) training standard.[5] Specifically, Respondent argues the PSM training standard supplies the applicable training requirements for the release of chlorine gas at a PSM-covered facility. In support of this contention, Respondent points out the HazCom and PSM training standards have overlapping purposes, but that the PSM standard supplies specific training requirements to both host and contractor employees. The Court agrees the two standards have overlapping purposes, and the structure of each standard is different insofar as the obligations of a host employer are different from those of the contract employer, like Respondent in this case. That said, the Court still finds the HazCom training standard applies and is not preempted by the PSM training standard.

5. 29 C.F.R. § 1910.119(h).

According to Subpart A of Part 1910, "If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process." 29 C.F.R. § 1910.5(c)(1); *see also Manganas Painting Co.*, 21 BNA OSHC 2043 (Nos. 95-0103 & 95-0104, 2007) (finding fall protection standard more specifically applicable than personal protective equipment standard). The requirements of the HazCom training standard include: (1) methods and observations used to detect the presence or release of a hazardous chemical; (2) the physical, health, simple asphyxiation, combustible dust, and pyrophoric gas hazards of the chemicals in the work area; (3) the measures employees can take to protect themselves from such hazards, including work practices, PPE, and emergency procedures; and (4) details of the HazCom program, including explanations of labels, the system implementing such labels, safety data sheets, and how employees can find and use such information. 29 C.F.R. § 1910.1200(h)(3). These training requirements are targeted at the hazards associated with the handling of, or exposure to, a specific chemical or group of chemicals.

The structure and content of the PSM training standard, on the other hand, show it is primarily concerned with the integrity of a chemical handling process, how to maintain it, and what to do if integrity is compromised. *See* 29 C.F.R. § 1910.119(h). Specifically, a contract employer is required to ensure that each of its employees is "trained in the work practices necessary to safely perform his/her job", which includes, amongst other things: (1) known potential fire, explosion, or toxic release hazards; (2) applicable provisions of the host employer's emergency action plan; (3) safety rules of the facility; and (4) safe work practices "required by paragraph (f)(4) of this section", which include lockout/tagout, confined space entry, opening process equipment, and control over entry/exit into the facility. *Id.* § 1910.119(h)(3). This information,

for the most part, comes from the host employer of a PSM-covered facility; however, contrary to Respondent's assertion, it is still the contract employer's responsibility to ensure the information is transmitted to and understood by its employees. *See id.* § 1910.119(h)(3)(iii)(contract employer required to document that each employee received and understood training, the employee's identity, date of training, and means used to assess employee comprehension).

While Complainant arguably should have cited the PSM training standard based on the allegation made in the Citation narrative, such does not mean the HazCom training standard is preempted by the PSM training standard. As previously discussed, the PSM training standard is broader in scope than the HazCom training standard. In fact, the requirements of HazCom training are only one part of the PSM training regime. *See id.* § 1910.119(h)(3)(ii). Thus, while Respondent is correct the program areas overlap, the HazCom training is the more specific. If Respondent were to train its employees on HazCom alone, such would be insufficient for Respondent to meet its obligations under the PSM training standard, which covers a broader range of information. Complainant's decision to cite the HazCom standard in this instance is a question of prosecutorial discretion, not preemption. Accordingly, the Court finds the cited standard applies.

b. Complainant Failed to Prove a Violation of the Standard

To prove a violation of a training standard, Complainant must show Respondent failed to provide the sort of training a reasonably prudent employer would provide under similar circumstances. *See Compass Environmental, Inc.*, 663 F.3d 1164, 1169 (10th Cir. 2011) (citing *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424 (No. 90-1106, 1993)). Such circumstances include "the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard." *Id.* (citing *W.G. Fairfield Co.*, 19 BNA OSHC 1233, 1236 (No. 99-0344, 2000)). Evidence of industry practice is relevant to this

inquiry; however, it is not dispositive. *See Farrens Tree Surgeons, Inc.*, 15 BNA OSHC 1793, 1794 (No. 90-998, 1992). If the employer rebuts the allegation of a training violation, it is the Secretary's burden to show some deficiency in the training provided. *See N&N Contractors, Inc.*, 18 BNA OSHC 2121 (No. 96-0606, 2000).

Respondent's employees testified regarding the extensive nature of its training program. (Tr. 194, 198, 201, 209, 248–49, 301). Complainant has failed to carry his burden of proof in that he did not establish what "sort of training a reasonably prudent employer would provide" under these circumstances, nor did it show how Respondent's training regimen failed to meet that standard. As such, Complainant cannot prove Respondent's training was insufficient. Complainant placed undue emphasis on two items in an attempt to meet his burden of proof: (1) the CSHO's "understanding" that the evacuation was chaotic (highlighted by Mr. Zamora's diversion from the evacuation path to warn the other crew); and (2) the seeming disconnect between Mr. Lara's ability to pass the requisite test with flying colors when provided with translation help and his inability to do so when the same test is administered in English-only format and no additional help is provided. When analyzed further, neither argument is convincing. In addition, the Court finds Complainant also relied improperly on the fact that an accident occurred. *See Lee Way Motor Freight, Inc. v Secretary of Labor*, 511 F.2d 864, 866 (10th Cir. 1975); *Signode Corp.*, 4 BNA OSHC 1078 (No. 3257, 1976), *petition for review denied*, 549 F.2d 804 (7th Cir. 1977).

CSHO Argullin's understanding of the evacuation is undermined by the testimony of Respondent's employees, who were present on the day of the incident. Complainant did not introduce any of the purported statements referenced in CSHO Argullin's testimony, but instead relied upon CSHO Argullin's recollection of what she was told, which she did not attribute to any

one individual. (Tr. 87). Such vague, unattributed statements are insufficient to contradict the testimony of Martinez and Reyes.

According to the testimony of Martinez and Reyes, the process of evacuation began when Reyes identified the scent of chlorine as he returned to the site of the water leak with a set of channel locks that was requested by the Formosa employees, neither of whom identified the water leak as problematic. Upon smelling chlorine and observing the indicator on the Formosa employee's belt, Reyes and the Formosa operations employee directed the crew to evacuate. (Tr. 296–97). According to all accounts, all of Respondent's employees in the Chlor-Alkali Unit evacuated as they were trained—upwind and cross-wind, away from what they believed was the origin of the leak—and were already evacuating the assembly point by the time Formosa's alarm even sounded. (Tr. 271, 300). It was not until Formosa conducted a post-accident investigation they found the chlorine leak did not come from the same location where the water leak occurred, but instead emanated from an implement known as a "p-trap", which was in the path of the otherwise proper evacuation route. (Tr. 275). This is likely why each of the employees in the Chlor-Alkali Unit had to be hospitalized. That Respondent's employees evacuated away from what they and Formosa reasonably believed at the time to be the source of the leak, only to later find out the water leak caused a release of chlorine elsewhere along their escape route, should not and will not be held against Respondent.

Respondent's employees, with one exception, evacuated based on a reasonable assessment of where the chlorine was coming from, which was consistent with the training they received. The lone exception was Zamora, who walked across the road that cut through the 500 Unit to warn another crew about the leak. (Tr. 278). According to Lindsey, the other employees were in the

IEM unit, which was roughly 100 feet north of the Chlor-Alkali Unit. (Tr. 278). CSHO Argullin testified this act was the principal reason for Citation 1, Item 1. (Tr. 75–76).

According to Martinez, Respondent's site manager at Formosa, Zamora did not re-enter the area they had just evacuated, but instead took a slight detour across the road. (Tr. 221). To this point in the evacuation process, Formosa's plant alarm had not yet sounded. (Tr. 223–24). Insofar as the Court can tell, Zamora's actions appear to be motivated out of concern for his coworkers, not on the failure of Respondent to provide adequate training. That everyone else on the Chlor-Alkali Unit rallied to the proper assembly point and were headed to the showers before the alarm sounded provides solid evidence that Respondent's employees received proper training and acted in accordance therewith.

With respect to the method by which Respondent assessed training comprehension, Complainant's suggestion that the perfect scores achieved by Respondent's employees were somehow unattainable is nothing more than speculation. Complainant did not introduce persuasive evidence to suggest the scores were manipulated or the training was deficient. Instead, Complainant's principal argument is that, post-accident, Lara has been unable to pass the same or similar exams he previously passed to be permitted to work at Formosa. (Tr. 92–93). In other words, Complainant would have the Court infer that Lara's inability to pass the exam now proves his understanding of the material was deficient when he was initially trained. Such an inference might be permissible if Lara's current troubles were coupled with other evidence of deficient training; however, Complainant failed to show any deficiency in the content or the method of training employed by Respondent: Lara, according to Lindsey, Martinez and Reyes, was at the assembly point along with the rest of his crew and began exiting the facility prior to the alarm sounding.

Respondent is obligated to ensure training is provided and understood, but the method by which they assess understanding is not mandated by regulation. *See* 29 C.F.R. § 1910.1200(h)(3). Prior to the incident giving rise to this case, Formosa allowed Respondent to provide the applicable training and administer the post-training assessment. Afterward, Formosa changed its training requirements to mandate computer-based testing at the Point Comfort training facility, which only provides English-only examinations. (Tr. 250). Though Formosa is certainly entitled to impose, and change, its own training and testing prerequisites, post-accident changes do not dictate whether Respondent complied with the cited standard, which does not include a specific testing requirement. According to all accounts, Lara was an engaged learner, who consistently asked questions and sought clarification during the training provided by Respondent. That he can no longer pass an English-only exam—which he is now required to take unassisted—that was previously translated to him in Spanish is hardly surprising, and the Court accords such evidence no weight. *See Henning v. Union Pacific R. Co.,* 530 F.3d 1206 (10th Cir. 2008) (evidence of actions taken after an injury or harm to prove culpable conduct is excluded as not relevant); *Rivera Pomales v. Bridgestone Firestone, Inc*., 224 F.R.D. 50 (D.P.R. 2004).

Finally, the evidence also suggests Respondent's employees were arguably better prepared for the leak than those in charge of the facility. It was Reyes who first smelled the chlorine upon his return to the site of the water leak, and it was also Reyes who identified that the belt alarm of a Formosa employee was alight. By arguing the foregoing illustrates a training violation, Complainant seeks to impose a higher burden upon Respondent than what is required by the standard or that placed on Formosa, whose own employees did not recognize the implications of the water leak in the Chlor-Alkali Unit. That result is not supported by the clear reading of the regulation, nor has any caselaw been cited by Complainant to support this position. The evidence

shows Respondent's employees received training, took an assessment examination, and, as a result, properly evacuated after identifying the leak. The fact that the collective group of Respondent's and Formosa's employees incorrectly identified the pre-existing water leak as the source of the chlorine, and plotted their escape route accordingly, is neither surprising nor condemnable.

Instead of showing how Respondent's training regime was insufficient based on content, communication methodology, or assessment, Complainant relied upon Zamora's isolated diversion from the evacuation route[6] and Lara's inability to pass an English-only examination that he previously passed with the assistance of a translator. That Zamora, alone, acted contrary to evacuation protocol to warn others does not negate that all of Respondent's other employees in the Chlor-Alkali Unit properly evacuated based on what they knew at the time. Nor, for that matter, does Lara's current inability to comply with Formosa's now-heightened training and assessment requirements imply that he was inadequately trained for the job at the time the incident occurred, especially when all indications were that he properly evacuated from the area. Absent any other evidence regarding the quality of the training provided, the Court finds Complainant did not prove a violation of 29 C.F.R. § 1910.1200(h)(1). Accordingly, Citation 1, Item 1 shall be VACATED.

2. Citation 2, Item 1

Complainant alleged a serious violation of the Act in Citation 2, Item 1 as follows:

> 29 CFR 1910.134(f)(2): Employee(s) using a tight-fitting facepiece respirator were not annually fit tested:
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> > Employee working around chlorine gas was not provided required annual fit test.

See Citation at 7.

The cited standard provides:

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6. As well as the, unattributed testimony of CSHO Argullin.

> The employer shall ensure that an employee using a tight-fitting facepiece respirator is fit tested prior to initial use of the respirator, whenever a different respirator facepiece (size, style, model or make) is used, and at least annually thereafter.

29 C.F.R. § 1910.134(f)(2).

After she conducted her inspection, CSHO Argullin requested Respondent's documentation of respirator fit tests. (Tr. 63). According to the records, one employee, Adrian Galindo, was scheduled to receive his annual fit-test in February 2016 but did not complete one until a week or two after the chlorine leak. (Tr. 117). Based on Respondent's failure to ensure Galindo had an up-to-date, annual fit-test performed, Complainant issued the foregoing Citation item, which it characterized as a paperwork violation and assessed no penalty.

Respondent contends the annual fit test was not required because Galindo was not using, nor was he in a situation that required, a respirator. Instead, Respondent employed Galindo as a gofer, which meant he performed ancillary duties, such as tool retrieval, but did not remove rust or paint. (Tr. 199). Because Galindo was not using a respirator or exposed to conditions requiring the use of a respirator on the date of the incident, the Court finds Respondent was not required to perform a fit-test until such time that one was necessary.

a. The Standard Does Not Apply

To establish the cited standard applies, Complainant must first show that an employee is using a tight-fitting respirator. *See* 29 C.F.R. § 1910.134(f)(2). Oddly enough, however, the catalyst for Complainant's citation was an individual who was *not* wearing a respirator: Galindo. Even though there was no evidence to suggest Galindo was wearing a respirator on the day of the chlorine leak, Complainant contends the annual fit-test requirement is mandatory irrespective of whether the employee in question is exposed to conditions requiring a respirator. The plain

language of the standard, as well as Complainant's prior interpretations of it, indicate otherwise. When determining the meaning of a standard, the Commission first looks to its text and structure. *Superior Masonry Builders, Inc*., 20 BNA OSHC 1182, 1184, 2002-2004 CCH OSHD ¶ 32,667, p. 51,417 (No. 96-1043, 2003). "If the meaning of the [regulatory] language is 'sufficiently clear,' the inquiry ends there." *Beverly Healthcare-Hillview,* 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006) (consolidated) (citing *Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993)), *aff'd in relevant part*, 541 F.3d 193 (3d Cir. 2008).

The cited standard is designed to protect employees who are required to wear tight-fitting respirators from atmospheres that cannot otherwise be controlled by engineering control measures. *See* 29 C.F.R. § 1910.134(a)(1). To ensure the respirator is performing as it is intended, an employer is required to have its employees that use respirators take a fit-test. A fit-test is method to "quantitatively or qualitatively evaluate the fit of a respirator on an individual." *Id.* § 1910.134(b). There are three situations that require a fit-test: the first time a respirator is used, any time a different facepiece is used, and annually thereafter. *Id.* § 1910.134(f)(2). According to the preamble, the annual requirement was precipitated, in part, by studies indicating fit tests performed over a longer interval resulted in a greater number of employees wearing ill-fitting respirators, thereby inadvertently exposing them to hazardous atmospheres. Respiratory Protection, 63 Fed. Reg. 1152, 1224 (January 8, 1998). This was due, in part, to minor fluctuations in the employees' weight, facial structure, and other conditions that might not be immediately noticeable but accumulate over time. *Id.*

The standard is clear: the annual fit-test is a required element of any compliant respiratory protection program. But, the Court finds Complainant has unnecessarily expanded the standard's scope to require an annual test irrespective of whether the employee is using a respirator and

exposed to a hazard. By doing so, Complainant disregards the plain language of the standard's opening clause, which requires that an employee be using a respirator in the first place. As illustrated by the preamble, the standard is targeted towards people who are required, either by the conditions or by their employer, to wear a respirator and are, in fact, wearing one. The hazard to an employee wearing an ill-fitting respirator may be the same (or similar) to an employee not wearing one at all; however, the basis for citing one condition over the other is different. If an employee is already required to wear a respirator, the hazard is presumed, and the concern is whether the selected equipment is performing as expected. If the employee has not been fit-tested, the presumption is the respirator is ill-fitting and the employee is potentially exposed. On the other hand, if an employee is not wearing a respirator, the hazard and exposure to the hazard must be proven, and the concern is whether a respirator is required at all.

The way Complainant has gone about citing Respondent for this purported violation skips a couple of foundational steps. First, Complainant did not prove Galindo was wearing a respirator, which is the trigger for the fit-testing requirement. *See* 29 C.F.R. § 1910.134(f)(2). Second, Complainant did not prove the conditions in the Chlor-Alkali Unit were such that Galindo, who was not painting or removing rust, was required to wear a respirator. Not even Formosa's own employees, who came to assist Respondent's crew with the leak, wore tight-fitting respirators to move through the plant.[7] Instead, Complainant argues that working around chlorine processing equipment, and the subsequent, unexpected release of chlorine, exposed Galindo to a hazard mandating the use of a respirator. Because Galindo was purportedly exposed to a condition requiring the use of a respirator (which he did not wear) and was not timely fit-tested on an annual basis, Complainant contends a violation occurred.

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7. This makes a certain degree of sense in that a good portion of the Formosa plant is in open air.

There are multiple problems with this argument. First, there is no evidence to suggest the conditions in the Chlor-Alkali Unit required the use of tight-fitting respirators designed to filter chlorine. According to Martinez, the crew members other than Galindo were wearing respirators with cartridges designed to protect against paint. (Tr. 182–83). There was no indication that Formosa's existing engineering controls were insufficient such that respirators were needed under normal conditions; indeed, Complainant did not cite Respondent because Galindo was not wearing a respirator or because his co-workers were wearing the wrong cartridges for chlorine. But for the leak, there was no indication of a hazardous atmosphere at Formosa's plant that would require full-time use of a respirator.

Second, Complainant's strict liability approach to the annual requirement disregards obstacles and changes in employment that may prevent timely annual testing or even render the need for a test obsolete. There may very well be instances, such as this one, where getting an employee in to be fit-tested can be a hassle based on time, distance, and availability. (Tr. 199–200). If an employer, like Respondent, takes steps to remove an untested employee from situations requiring the use of a respirator, it is unnecessary to impose a strict annual testing regimen upon that employee until they will be exposed again. This is especially so if the employee's exposure to hazardous atmospheres is intermittent.[8] Again, the plain language of the standard's opening clause indicates the testing requirement is precipitated by "an employee *using*" a respirator. This not only explicitly requires active and current use of the respirator, but also implies the employee regularly wears a respirator as part of their employment.

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8. In one of Complainant's letters of interpretation, Richard Fairfax, the Director of Enforcement Programs for Complainant, addressed a question regarding the testing requirement as applied to a group of home health aides, some of whom were intermittently exposed to patients with tuberculosis. In response, Fairfax stated that annual testing would not be required if exposure to TB requiring respirators was intermittent, but that testing would be required prior to each "initial" use of the respirator. *See* Letter from Richard Fairfax, Director, OSHA Directorate of Enforcement, to Noreen Coyne, Director, Tender Loving Care (March 29, 2004), *available at https://www.osha.gov/laws-regs/standardinterpretations/2004-03-29-0.*

Finally, Complainant attempts to short-circuit its burden of proof on exposure by characterizing Citation 2, Item 1 as a mere paperwork violation and pointing out that Galindo was exposed to chlorine by the leak. As an initial matter, characterizing this citation item as a paperwork violation only holds water if Respondent complied with its obligations but failed to have an adequate system of documentation. Unlike filling out the OSHA 300 log, which is retrospective, the failure to properly and timely fit-test can have serious consequences for someone that is required to wear a respirator. 63 Fed. Reg. at 1224.

Complainant alleges Galindo was exposed to a hazard based on an unexpected chlorine leak in a location that otherwise did not require the use of a respirator. This, of course, is true; however, for Complainant to meet its burden, the manner of exposure must be connected to the standard Complainant alleged to have been violated. *See RGM Constr. Co.*, 17 BNA OSHC 1229 (No. 91-2107, 1995) ("The zone of danger is determined by the hazard presented by the violative condition and is normally that area surrounding the violative condition that presents the danger to employees which the standard is designed to prevent.") (citation omitted). Exposure under the cited standard focuses on the potential failure of personal protective equipment. Galindo, on the other hand, was exposed to a hazard because of the failure of engineering controls, which is a separate issue from whether he was required to wear a respirator, let alone whether he was required to get fit-tested for it. In other words, it was not Respondent's failure to schedule an annual fit test that caused Galindo's exposure

While Complainant's motivations are admirable, his approach lacks common sense. Martinez testified without contradiction that the only employees required to wear respirators were the individuals painting and removing rust from the equipment. (Tr. 185–86). Galindo was not one of those employees, and there was no evidence produced by Complainant to suggest otherwise.

Without proof Galindo was wearing a respirator or that he was engaged in painting and removing rust from the equipment, Complainant cannot establish the cited standard applies or was violated. Accordingly, Citation 2, Item 1 shall be VACATED.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.
2. Citation 2, Item 1 is VACATED.

SO ORDERED

/s/ Patrick B. Augustine
Patrick B. Augustine
Judge, OSHRC

Date: September 24, 2018
Denver, Colorado