

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

ALASKA NATIVE TRIBAL HEALTH
CONSORTIUM, and its successors,

Respondent.

OSHRC Docket No. 21-0530

Appearances:

Nisha Parekh, Esq., Department of Labor, Office of the Solicitor, Los Angeles, California
for Complainant

Willa B. Perlmutter, Esq. and Ariel Stavisky, Esq., Stoel Rives, LLP, Portland Oregon
For Respondent

Before: Administrative Law Judge Christopher D. Helms

DECISION AND ORDER

I. Procedural History

This case is before the Occupational Safety and Health Review Commission (“Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (“the Act”), and concerns enforcement by the Occupational Safety and Health Administration (“OSHA”) into the hazards associated with exposure to the SARS-CoV-2 (“Covid-19”) virus. This disease is spread through the inhalation of droplets containing the Covid-19 virus.

On November 2, 2020, OSHA opened an investigation after Respondent reported the hospitalization of an employee due to Covid-19 infection. As a result of the inspection, on April 12, 2021, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent, alleging one serious violation of the Act, with a total proposed penalty of \$13,653.00. OSHA’s inspection took place six months into the Covid-19 pandemic. Tr. 86-87.

Citation 1, Item 1, the single citation at issue, alleges Respondent violated 29 C.F.R. § 1910.134(d)(1)(ii), which requires an employer to select a NIOSH-certified respirator and to use the respirator in compliance with the conditions of its certification. Specifically, in the alleged violation description (“AVD”), OSHA alleges that Respondent

...did not provide NIOSH certified respirators to employees who were required to care for suspected and confirmed positive Covid-19 patients. The employer provided and required employees to wear respirators labeled surgical masks. However, the surgical masks did not contain certification markings indicating they were certified under an equivalent international standard.

The trial of this matter commenced on April 7, 2022, and continued on April 8, 2022, April 14, 2022, and April 15, 2022, via Zoom videoconferencing technology. The following witnesses testified: Arlene Lamont (OSHA’s Area Director); Soo Chin Choi (Respondent’s employee and a registered nurse); Brittany Francis (Respondent’s employee and a registered nurse); Erin Keith (Respondent’s Safety Officer); Erica Lambers (Respondent’s Infection Control Specialist); and Janet Say (Respondent’s Director of Supply Chain).

For the reasons that follow, the citation issued to Respondent as a result of OSHA Inspection No. 1500593 is VACATED, and no penalty is assessed.

II. Stipulations and Jurisdiction

On March 29, 2022, the parties filed a Joint Stipulation Statement in which the parties specified certain facts that are not in dispute. The parties agreed that Respondent is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, and that Respondent co-managed a health care facility at 4315 Diplomacy Drive, Anchorage, Alaska (“worksite”). In addition, the parties stipulated that COVID-19 can spread through inhalation of droplets containing the SARS-CoV-19 virus. The parties further stipulated that OSHA’s general industry respiratory protection standards at 29 C.F.R. § 1910.134 apply to workplaces where employees may be exposed to respiratory hazards.

III. Factual Background

A. Covid-19

Covid-19, a disease caused by the SARS-CoV-19 virus, can spread through inhalation of droplets containing the virus. Stip. Facts 11-12.¹ An infection with Covid-19 can cause injuries, including organ failure, such as lung and heart failure, suffocation, long-term disability, and death. Stip. Facts 13.

B. Respondent’s Operation

Respondent is a Tribal health organization that provides services to patients across Alaska. Tr. 449-450. As part of its operations, Respondent employs healthcare workers who provide medical services at the worksite. Stip. Facts ¶ 10. Respondent employs approximately 3,000 employees on its main campus in Anchorage, Alaska. Tr. 454. For each shift, Respondent has approximately 300 staff members working in the hospital. Tr. 786.

¹ On March 29, 2022, the parties filed a Joint Stipulation Statement which included Undisputed Facts. References to the stipulated facts will be noted as “Stip. Facts” followed by the paragraph number.

C. Governmental Guidance Regarding Respirators During Covid

1. OSHA's Guidance on Preparing Workplaces for Covid-19

In March 2020, OSHA published "Guidance on Preparing Workplaces for Covid-19." Tr. 129; Ex. J-5. The document noted that this "guidance is advisory in nature and informational in content. It is not a standard or a regulation, and it neither creates new legal obligations nor alters existing obligations created by the OSHA Standards or the Occupational Safety and Health Act (OSH Act)." Ex. J-5 at 6.

On March 14, 2020, OSHA acknowledged in an enforcement memorandum that there were "supply shortages of N95 filtering facepiece respirators due to the COVID-19 outbreak." *See* Ex. J-6 at 985. OSHA again noted in an enforcement memorandum on April 3, 2022, that there was "supply shortages of disposable N95 filtering facepiece respirators." *See* Ex. J-6 at 1042.

2. Center for Disease Control's Guidance

The Center for Disease Control ("CDC") issued certain guidance that healthcare personnel should use a NIOSH-certified N95 filtering facepiece or respirator or higher. Ex. J-1 at DOL 229. However, the guidance further notes that a facemask should be used if a respirator is unavailable. *Id.* The CDC issued additional guidance entitled "Strategies for Optimizing the Supply of N95 Respirators" and "Implementing Filtering Facepiece Respirator (FFR) Reuse, Including Reuse after Decontamination, When There Are Known Shortages of N95 Respirators." Exs. J-20 and J-21. In the first guidance document, the CDC advised employers that in times of shortage, they could consider using N95 respirators beyond the manufacturer-designated shelf life. Ex. J-20 at 249. This guidance noted that "extended use" of respirators "has been recommended and widely used as an option for conserving respirators during previous pathogen outbreaks and pandemics." Ex. J-20 at 250. This guidance further advised on the prioritization of using N95 respirators, even

when used beyond the manufacture-recommended shelf life but acknowledged the potential use of facemasks “when N95 respirators are so limited that routinely practiced standards of care for all HCP wearing N95 respirators when caring for a COVID-19 patient are no longer possible.” Ex. J-20 at 254.

The second CDC guidance document explained how to determine when an N95 respirator crisis capacity strategy was needed *See* J-21. This guidance noted that a healthcare employer should evaluate the adequacy of its current N95 inventory and the adequacy of the “supply chain.” J-21 at 258. The guidance stated that an employer should evaluate the availability of other respirators within the employer’s inventory, and further determine whether the extended use of N95 respirators (such as using the respirator for more than one patient contact) could meet the PPE needs based on the employer’s “burn rate and ability to procure more PPE when needed.” J-21 at 258.

3. Indian Health Service’s Guidance

Guidance from the Indian Health Service (“IHS”) noted there was “conflicting guidance between OSHA and CDC.” J-4 at 1. The IHS accordingly then provided recommendations, including advising IHS staff to follow OSHA’s respiratory protection standards when employees who are engaged in high exposure risk job-related activities provide care to patients with known or suspected Covid-19. J-4 at 2. However, the IHS guidance further explained that when N95 respirators or alternative respirators were not available, IHS staff should follow CDC’s recommendations for the use of facemasks. J-4 at 2.

D. OSHA's Inspection

OSHA opened an investigation into the worksite on November 2, 2020, after Respondent reported an employee hospitalization due to Covid-19. Stip. Facts 4, 16. *See also* Tr. 81-82; Ex. C-2. Thereafter, during the inspection, Respondent reported two additional employee hospitalizations due to Covid-19. Stip. Facts 16, 17; Tr. 81-82, 109; Ex. C-2. Thus, in total, Respondent reported three employee hospitalizations due to Covid-19 to OSHA on October 30, 2020, November 9, 2020, and November 20, 2020. Stip. Facts 16. Respondent's OSHA 300 logs between October 1, 2020 and December 31, 2020, identified that approximately 162 employees were injured by "Workplace acquired Covid-19." Stip. Facts 23.

IV. Discussion

A. Applicable Law

To establish a violation of an OSHA standard pursuant to section 5(a)(2), the Secretary 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). *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994). The Secretary has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361, 1365 (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.

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

B. Citation 1, Item 1 (29 C.F.R. § 1910.134(d)(1)(ii))

1. The Standard Applies

The standard cited requires an employer to select a NIOSH-certified respirator and to use the respirator in compliance with the conditions of its certification. 29 C.F.R. § 1910.134(d)(1)(ii). The respiratory protection standard itself (29 C.F.R. § 1910.134) concerns the control of “occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors . . .” *Id.*

The parties have stipulated that OSHA’s general industry respiratory protection standards at 29 C.F.R. § 1910.134 apply to workplaces where employees may be exposed to respiratory hazards. Stip. Facts 15. This stipulation, however, does not specifically admit that such respiratory hazards include exposure to Covid-19. Still, as the standard at issue certainly relates to diseases caused by breathing air contaminated with “mists,” and in consideration of the testimony that Covid-19 can be spread through the inhalation of droplets containing the virus, the Court finds the standard applies. *See Application of Sunbeam Corp.*, 370 F.2d 358 (C.C.P.A. 1967), *citing* Webster's Third New International Dictionary (Unabridged, 1961) (A “mist” is a “fine spray”).

2. Alleged Noncompliance with the Standard

Pursuant to 29 C.F.R. § 1910.134(d), an employer must evaluate respiratory hazards in a workplace, identify relevant workplace and user factors, and base respirator selection on these factors. The cited standard, 29 C.F.R. § 1910.134(d)(1)(ii), states that the “employer shall select a NIOSH-certified respirator.” However, this section cannot be read in isolation. Indeed, if this section were interpreted without consideration of the subpart as a whole, the section would require

NIOSH-certified respirators at all times irrespective of any hazard ever being present. Rather, as the respiratory protection standard states, the first line of defense for respiratory hazards is accepted engineering control measures, such as enclosures or confinement of operations, ventilation, and substitution of less toxic material. 29 C.F.R. § 1910.134(a)(1). A respirator is required only when such engineering control measures are infeasible or when an employer is in the process of instituting such engineering control measures. *Id.* This, of course, logically follows, as the following subpart (29 C.F.R. § 1910.134(a)(2)) makes clear that “[a] respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee.” 29 C.F.R. § 1910.134(a)(2).

Thus, where engineering controls are feasible and otherwise sufficient, or when a respirator is not necessary to protect the health of employees in the workplace, then a respirator is not required irrespective of whether it is NIOSH-certified. That is, an employer must select “an appropriate respirator” under 29 C.F.R. § 1910.134(d)(1) only when a respirator is necessary to protect the health of employees and when engineering controls are infeasible or in the process of being developed.

The Secretary contends that Respondent violated the standard at issue as some employees were exposed to Covid-19 while only wearing facemasks, such as surgical or procedure masks, that were not NIOSH-certified respirators. Sec’y. Br. 23. He further argues that, as of November 2, 2020, Respondent selected and directed workers to wear facemasks (and not NIOSH-certified respirators) in conditions with a high or very high-risk of Covid-19 exposure. *Id.* Thus, as the Secretary reasons, Respondent violated the standard at issue when it did not select NIOSH-certified respirators when necessary to protect against Covid-19 exposure. *Id.*

Respondent argues that the cited standard concerns NIOSH certification of chosen respirators, not the selection of respirators. Resp. Br. 17. Respondent maintains that the way respirators are selected is contained in other regulatory provisions. *Id.* Thus, Respondent reasons that, based on the standard cited here, the Secretary would have to prove Respondent gave its staff members respirators that NIOSH had not certified. *Id.* Interestingly, Respondent appears to acknowledge that it provided facemasks to staff members, but argues that the standard cited addresses certification of respirators, not facemasks. As Respondent claims, it did not provide respirators for staff members that were not NIOSH-certified, the citations should be vacated. The Court agrees.

The cited standard addresses an employer's selection of a NIOSH-certified respirator. 29 C.F.R. § 1910.134(d)(1)(ii). The regulatory standard preceding the cited standard, 29 C.F.R. § 1910.134(d)(1)(i), addresses an employer's selection of an appropriate respirator based on the hazards present. Indeed, (d)(1)(i) concerns the selection of an appropriate respirator, and (d)(1)(ii) concerns ensuring the respirator that is selected is NIOSH-certified and used in compliance with the conditions of the certification. In arguing that Respondent provided facemasks, rather than respirators, to its staff members, the Secretary is challenging Respondent's selection of an appropriate respirator. However, the Secretary has cited a provision relating to making sure that whichever respirator is ultimately selected is one that is NIOSH-certified.

During the trial, the Court questioned the parties regarding whether the fact that the Secretary had not cited under 29 C.F.R. § 1910.134(d)(1)(i) suggested Respondent was in compliance with the standard regarding the selection and provision of an appropriate standard. Tr. 101-102. In its brief, the Secretary maintains that although it did not cite under 29 C.F.R. § 1910.134(d)(1)(i), Respondent did not comply with that provision and thus was in violation of

(d)(1)(i) as well. Thus, the Secretary states that Covid-19 was a respiratory hazard for which Respondent failed to select and provide a respirator. However, while the Secretary's argument in his brief suggests that he acknowledges that perhaps it should have cited § 1910.134(d)(1)(i), he argues that its decision to cite and litigate under § 1910.134(d)(1)(ii) should be given deference because it is a reasonable interpretation of the regulations. Sec'y. Br. 22. The Court is neither questioning whether (d)(1)(ii) would apply nor the Secretary's ability to cite under (d)(1)(ii). Rather, the simple question remains whether he has proven noncompliance with the terms of the standard that was cited here, (d)(1)(ii). The Court concludes that the Secretary has failed to meet his burden of such a violation. Indeed, the testimony of OSHA Area Director Arlene Lamont at trial demonstrates that OSHA did not have any knowledge that any of the respirators used by Respondent were not NIOSH-certified. Tr. 161, 163, 165.

The Secretary appears to ask the Court to defer to his interpretation that (d)(1)(ii) requires Respondent to ensure that staff members are using respirators, and not facemasks. Indeed "[t]he Secretary's interpretation of an OSHA standard is entitled to substantial deference *so long as it is reasonable.*" *Walsh v. Walmart, Inc.*, 49 F.4th 821 (2d Cir. 2022) (emphasis added). However, central to such a consideration is whether the standard is ambiguous. *See Roy Rock, LLC*, No. 18-0068, 2021 WL 3624785, at *5 (O.S.H.R.C., July 22, 2021) (where a standard's undefined term is unambiguous, deference to the Secretary's interpretation is "unwarranted"), citing *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019); *Reich v. Simpson, Gumpertz & Heger, Inc.*, 3 F.3d 1, 5 (1st Cir. 1993) (holding even if term is ambiguous, deference only due to Secretary if interpretation is reasonable). Here, the cited standard, § 1910.134(d)(1)(ii), is unambiguous. Certainly, (d)(1)(ii) requires an employer to select a NIOSH-certified respirator and to ensure compliance with the conditions of its certification, but only when, as specified under (d)(1)(1) the employer must select

and provide an appropriate respirator based on the hazards. To the extent the government would have established that either a respirator was selected that was not NIOSH-certified or the respirator was not used in compliance with the conditions of the certification, a violation of (d)(1)(ii) could be established. However, that is not the evidence put forth in this case. Instead, rather than seeking deference on an ambiguity in the standard, the government asks this Court to supplant the plain text of the cited standard with the government's preferred reading of the standard. Effectively, the Secretary seeks to treat a violation of (d)(1)(ii) as though it were a violation of (d)(1)(i). Given the plain language and lack of any ambiguity in the standard, the Court is unwilling to make such interpretative contortions.

In addition, even if the terms of § 1910.134(d)(1)(ii) were deemed ambiguous, the interpretation buoyed by the Secretary is unreasonable. Although his brief does not explicitly state how he is interpreting any alleged ambiguity, he yet maintains that (d)(1)(ii) "requires employees to use NIOSH-certified respirators where respirators are needed to protect against respiratory hazard exposure." Sec'y. Br. 22. Through such an argument, he seeks to conflate the requirements of (d)(1)(i) and (d)(1)(ii). Any violation for not selecting and not providing an appropriate respirator based on respiratory hazards would properly be cited under (d)(1)(i). To the extent an employer did not violate (d)(1)(i) and thus selected and provided an appropriate respirator, the employer could nonetheless be cited under (d)(1)(ii) if the selection was not of a NIOSH-certified respirator or if the respirator was not used in compliance with the conditions of the certification. Here, the Secretary has failed to meet its burden of proof that Respondent's selection of respirators were not NIOSH-certified respirators or that the use was not in compliance with the certification conditions.

The gravamen of the Secretary's argument appears to be that Respondent should have selected respirators (specifically, NIOSH-certified respirators), and not facemasks, to protect employees working in conditions with high or very high risk of Covid-19 exposure. *See* Sec'y. Br. 22-23. He further seeks a strained view of (d)(1)(ii) in order to meet his burden. His prior interpretations of the standard bear on the reasonableness of adhering to the interpretation that the Secretary seeks. *See S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1297 (D.C. Cir. 1995) (finding the Secretary's interpretation in this case was inconsistent with its interpretations in other cases). While the Court was unable to locate precedent related to (d)(1)(ii), cases do exist under (d)(1)(i) which demonstrate that the Secretary has previously enforced (d)(1)(i) for failure to provide respirators, precisely what the Secretary seeks in this matter. *See, e.g., Mead Coated Board, Inc.*, No. 01-0551, 2003 WL 271955, at *15 (O.S.H.R.C.A.L.J., Feb. 3, 2003) (citing employer under (d)(1)(i) for not providing escape respirators to employees for protection against hydrogen sulfide exposure).

The preamble to the final rule is also instructive:

Paragraph (d)(1)(ii) requires the employer to select a NIOSH-certified respirator and to use the respirator only in ways that comply with the conditions of its certification. There was little controversy about this requirement, and there is no disagreement that respirators must be tested and found to be effective before they can be marketed. NIOSH has performed this function in the past and has begun to revise its certification requirements to ensure that its procedures continue to define the performance capabilities of acceptable respirator models, and to identify unacceptable models. The ISEA (Ex. 65-363), the trade association that represents most major respirator manufacturers, urged OSHA to require that only NIOSH-certified respirators be used to comply with this standard, and other commenters agreed

Respiratory Protection, 63 Fed. Reg. 1152, 1197 (Jan. 8, 1998) (to be codified at 29 C.F.R. pt. 1910 and 1926). The preamble makes clear that the concern as it relates to (d)(1)(ii) is over a respirator's actual certification by NIOSH as being tested and found effective. The selection of

another means of protection, such as a facemask, in lieu of a respirator was not contemplated for this particular standard. Interestingly, the preamble also notes the following:

The requirement for NIOSH certification is unconditional in the final standard, as it was in the proposal. However, because OSHA stated in the proposed preamble that this requirement would apply only when such respirators “exist” (59 FR 58901), some commenters urged OSHA to state in the regulatory text that the requirement for NIOSH certification applied only to existing certifications.

Id.

Thus, it appears OSHA at one point observed in the proposed preamble that (d)(1)(ii) would apply to existing respirators. *See* Respiratory Protection, 59 Fed. Reg. 58884, 58901 (proposed Nov. 15, 1994) (to be codified at 29 C.F.R. pt. 1910 and 1926) (“OSHA is therefore proposing to maintain the requirement that NIOSH approved respirators be used when such respirators exist.”). While not dispositive on the topic, the preamble’s discussion of (d)(1)(ii) centers on the certification of any respirator being provided by an employer to ensure the respirator has been properly tested and determined effective. Nothing in the preamble suggests that (d)(1)(ii) was meant to act as a mandate to employers to use only respirators rather than other protective devices. Certainly, any such mandate perhaps could possibly be accomplished through enforcement of (d)(1)(i) or section 5(a)(1) of the OSH Act.

While perhaps the Secretary could have cited Respondent for such a violation, whether under (d)(1)(i) or the general duty clause (section 5(a)(1) of the OSH Act), that is neither the citation issued, nor the case presented to this Court. Interestingly, even the AVD of the Citation claims that Respondent did not “provide” a NIOSH-certified respirator to employees and notes that the “surgical masks did not contain certification markings indicating they were certified under an equivalent international standard.” The cited standard concerns the selection of, not the providing of, an appropriate respirator. Rather, (d)(1)(i), which the government did not cite, addresses this concern. Accordingly, the Secretary has failed to meet its burden of proof in

establishing that Respondent was not in compliance with the standard actually cited in this case, 29 C.F.R. § 1910.134(d)(1)(ii).

Further, even if the Court were to indulge the Secretary's requested interpretation of the standard, the evidence demonstrates that facemask usage was allowed for droplet hazards, as opposed to airborne hazards. *See* Tr. 103, 105, 654, 659; Ex. R-2. OSHA does not require respirators for droplet hazards. Tr. 187. However, airborne hazards, such as tuberculosis, do require healthcare staff to wear respirators for protection. Tr. 430. Respondent's Infection Control Preventionist, Erica Lambers, testified at trial that Respondent's initial understanding based upon the World Health Organization's and CDC's recommendations was that Covid-19 "primarily and most predominantly spread through a heavy respiratory droplet route." Tr. 707. Indeed, the parties have stipulated that Covid-19 can spread through inhalation of droplets containing the virus. Stip. Facts 12. Moreover, through an Emergency Temporary Standard issued by OSHA on June 21, 2021, the agency acknowledged that according to the CDC the primary way that the Covid-19 virus spreads is through the respiratory droplets that are produced. Occupational Exposure to COVID-19; Emergency Temporary Standard, 86 Fed. Reg. 32,376, 32,392 (proposed June 21, 2021; effective upon publication) (to be codified at 29 C.F.R. pt. 1910). While OSHA further noted that the virus may spread through airborne particulate under certain conditions, it acknowledged that the currently available information related to Covid-19 exposure during aerosol-generating procedures ("AGPs") is limited. *Id.*

Thus, as a droplet hazard, and based on CDC guidance, Respondent determined precautions for droplet hazards (i.e. facemasks) were appropriate. Tr. 654, 659, 695, 704-707. *See also* Ex. R-2. At trial, Respondent's Accredited Safety Officer, Erin Keith, testified that Covid-19 becomes a respiratory hazard when it is aerosolized, but that prior to this it is a heavy respiratory droplet.

Tr. 281, 291-293, 434. Similarly, Respondent's Infection Control Preventionist likewise testified that in her practice she expects Covid-19 to spread through large droplets as long as there are no high-risk AGPs occurring. Tr. 657. Thus, Respondent implemented a policy requiring respirators to be used during AGPs. Tr. 698-700; Exs. C-5 at 161, J-11, J-12. This policy prioritized respirators for AGPs on known or suspected Covid-19 patients. Exs. C-5 at 161, J-11, J-12. Respondent's policy required respirators for AGPs on Covid-19 positive or suspected patients. *See* Exs. C-5 at 161, J-11, J-12. Once shortages of respirators (including N95s) became apparent, Respondent tracked respirator supplies and burn rates, and then factored those elements in when devising PPE policies. Tr. 601, 609-610, 720-721, 731-732, 734-735, 738-739.

The citation alleges an exposure date of on or about November 20, 2020. The Secretary takes issue with the fact that until December 4, 2020, Respondent did not require its healthcare staff to wear respirators when treating Covid-19 suspected or positive patients that were not undergoing AGP. *See* Sec'y. Br. 11. In addition, he criticizes Respondent for not selecting NIOSH-certified respirators for employees collecting Covid-19 diagnostic samples. *Id.* However, the testimony at trial demonstrated that CDC's guidance on Covid-19 precautions and transmission evolved over time. During the relevant period, Respondent updated its Covid-procedures and instituted policies when, for example, the CDC added guidance, noting that when moderate to high community spread of Covid-19 was occurring in a community, an unidentified person with Covid-19 entering the worksite would be more likely and thus Respondent required staff members to wear N95s and/or a PAPR for AGPs. Tr. 573-574.

For the reasons discussed herein, the Secretary has failed to bear his burden of proof as it relates to Respondent's alleged noncompliance with the cited standard.

3. Employee exposure to the hazardous condition

There is no reasonable disagreement in this case that employees of Respondent were exposed to the hazardous condition. *See Stip. Facts 35*. Indeed, Respondent stipulated that prior to December 4, 2020, employees may have been exposed to Covid-19 while wearing facemasks during interactions with patients suspected or confirmed positive for Covid-19. *Stip. Facts 35*. Further, employees frequently worked in conditions with high or very high risk of Covid-19 exposure. *Ex. C-10 at 14-21*. The parties have also stipulated that between October 1, 2020, and December 31, 2020, approximately 162 employees were injured by “Workplace acquired Covid-19.” *Stip. Facts 24*. Accordingly, the Secretary has established that Respondent’s employees were exposed to the hazardous condition.

4. Employer knowledge of the violative condition

There is no question that Covid-19 presents a hazard to health. However, the hazardous condition alleged by the Secretary relates to Respondent permitting employees who cared for suspected or confirmed positive Covid-19 patients to wear surgical facemasks rather than respirators. As discussed in Part IV(B)(2), *supra*, the hazardous condition pressed by the Secretary does not align with the standard cited in the citation. Indeed, the citation itself notes in the AVD the alleged failure by Respondent: “the surgical masks did not contain certification indicating they were certified under an equivalent international standard.” Citation.

As explained in Part IV(B)(2), *supra*, the cited standard only requires NIOSH certification when a respirator is selected under 29 C.F.R. § 1910.134(d)(1)(i). The Secretary has failed to establish Respondent knew, or through the exercise of reasonable diligence, could have known that selected respirators were not NIOSH-certified. Importantly, OSHA’s Area Director testified that she had no knowledge that any respirators in use at the worksite were “not certified.” *Tr. 161*,

163-165. Accordingly, based on the standard cited, the Secretary has failed to establish this element of its *prima facie* case.

V. Conclusion

The Secretary bears the burden of establishing each element of his case, including violations of the applicable standards and Respondent’s knowledge of any violative conditions. As discussed herein, the Secretary has failed to meet his burden in establishing noncompliance with the cited standard and the requisite knowledge by Respondent of the hazardous condition.

In view of the evidence discussed above, the Court finds that the Secretary has failed to meet his burden. Accordingly, the Citation item proposed in this case is VACATED.

VI. Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that Citation 1, Items 1 is hereby VACATED.

SO ORDERED.

Dated: February 13, 2023
Denver, Colorado

/s/ Christopher D. Helms

Christopher D. Helms
Judge, OSHRC