No. 16-15792-DD

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

v.

ACTION ELECTRIC COMPANY,

Respondent.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission

REPLY BRIEF FOR THE SECRETARY OF LABOR

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FEBRUARY 3, 2017

CERTIFICATE OF INTERESTED PERSONS

The following persons may have an interest in the outcome of this matter for purposes of Circuit Rule 26.1-1:

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In his opening brief, the Secretary of Labor (Secretary) established that the cooling bed was a single "machine" under his reasonable interpretation of the Lockout/Tagout (LOTO) standard, 29 C.F.R. § 1910.147, because it was a single integrated system whose component parts—including the counterweights and fans—were permanently interconnected and could not perform their intended function without each other. Accordingly, the LOTO standard required the entire cooling bed, including the counterweights, to be locked out while the Action Electric Company (Action) employees were servicing the fans. The ALJ committed legal error by ignoring the Secretary's reasonable interpretation of the LOTO standard and instead determining that the counterweights and fans were separate machines under his own narrow interpretation of the LOTO directive.[1] The Action employees were plainly "inspecting" the fans and therefore engaged in servicing or maintenance work covered by the LOTO standard when the counterweight struck James Lanier, as the ALJ assumed. And because the counterweights and fans were sub-systems of the same machine—the cooling bed—the Action employees were exposed to the release of stored energy from the same machine they were servicing.

[1] The full citation for the LOTO directive is: The Control of Hazardous Energy – Enforcement Policy and Inspection Procedures, CPL 02-00-147 at 1-10 (Feb. 11, 2008) (LOTO Directive).

In response, Action argued that the ALJ's conclusion that the cooling bed was a single machine was a factual finding supported by substantial evidence, and that the Secretary's "'function' test" conflicts with the LOTO directive and "obliterates lines drawn between machinery being serviced or maintained and machinery that is simply adjacent." Action asserts that the ALJ's legal conclusions are entitled to deference because they are consistent with the Secretary's LOTO directive. Finally, Action claims its employees' activities were outside the scope of the LOTO standard because they were "merely looking at" the fans when the counterweight struck Mr. Lanier. Action's arguments are without merit. For the reasons outlined below and in the Secretary's Opening Brief, this Court should reverse the Commission's final order and affirm the citation and proposed penalty of $7000.

I. The ALJ Committed Legal Error by Substituting His Interpretation of the LOTO Directive for the Secretary's Reasonable Interpretation of the LOTO Standard.

The ALJ's determination that the cooling bed counterweights and fans were separate, adjacent machines was contrary to law because it reflected the ALJ's substitution of his interpretation of the LOTO directive for the Secretary's reasonable interpretation of the LOTO standard. The question whether the cooling bed was a single "machine" under the LOTO standard, 29 C.F.R. § 1910.147(a)(1)(i), is a question of interpretation to be resolved by application of

settled deference principles. This Court must determine whether the Secretary's interpretation of the word "machine" in the LOTO standard is reasonable and, if so, evaluate whether the ALJ correctly applied the law, *as interpreted by the Secretary*, to the facts.

This Court does not owe any deference to the ALJ's legal conclusion, based on an excessively narrow interpretation of the LOTO directive, that the counterweights and fans were independent, adjacent machines. Action's assertions to the contrary are unsupported. *See* Br. 14.[2] The standard of review for an ALJ's legal conclusions is whether they are "arbitrary, capricious, an abuse of discretion, *or otherwise not in accordance with the law*." 5 U.S.C. § 706(2)(A) (emphasis added); *see also Reich v. Trinity Indus.*, 16 F.3d 1149, 1152 (11th Cir. 1994) ("This court reviews the Commission's order to determine whether it is in accordance with the law.").

In its brief, Action conflates the standard of review with the principle of deference to an agency's interpretation of its own regulations. *See* Br. 14. When the Secretary and the Commission urge conflicting interpretations of a Department of Labor regulation, such as the LOTO standard, deference principles require the Commission and the Courts of Appeals to defer to the Secretary's interpretation over the Commission's (or the Court's for that matter) as long as it is reasonable.

[2] This brief cites Action Electric's brief to this court as "Br." and the Secretary's opening brief to this court as "Op. Br."

Martin v. OSHRC, 499 U.S. 144, 150 (1991) (holding a reviewing court owes "substantial deference" to Secretary's reasonable interpretation of his own regulations and no deference whatsoever to conflicting interpretations by the Commission); *see also Floyd S. Pike Elec. Contractor v. OSHRC*, 576 F.2d 72, 75 (5th Cir. 1978) (Secretary's interpretation of own regulations entitled to "great deference"). "[T]he Commission is authorized to review the Secretary's interpretations only for consistency with the regulatory language and for reasonableness." *Martin*, 499 U.S. at 154-55. As long as the Secretary's interpretation of the standard is reasonable, the Secretary's interpretation must prevail here even if this Court finds the ALJ's interpretation more persuasive. *See id.* at 158 ("a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary"); *Floyd S. Pike*, 576 F.2d at 75 ("We have held that the promulgator's interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some other.") (quoting *Brennan v. S. Contractors Serv.*, 492 F.2d 498, 501 (5th Cir. 1974)).

Action's claim that the Secretary's position here is an "*ad hoc* litigating position[]" and therefore undeserving of deference, *see* Br. 10, directly conflicts with the Supreme Court's holding in *Martin v. OSHRC*:

> The Secretary's interpretation of OSH Act regulations in an administrative adjudication, however, *is* agency action, not a *post hoc*

> rationalization of it. Moreover, when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress. *See* 29 U.S.C. § 658. Under these circumstances, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a workplace health and safety standard.

499 U.S. at 157. The Secretary's litigating position in this case is embodied in the citation at issue here, which treated the counterweights and fans as components of the same machine under the LOTO standard. It therefore "assumes a form expressly provided for by Congress" and is entitled to controlling deference. *Id.*

Action's reliance on the ALJ's interpretation of the LOTO directive is misplaced. *See* Br. 14 ("The ALJ's legal conclusion that the LOTO standard did not apply also is entitled to deference: it is well supported by the evidence and is consistent with the Secretary's published guidance."). As the Supreme Court further explained in *Martin*, interpretive guidance documents like the LOTO directive bear on the reasonableness of the Secretary's position; however, the primary focus of the deference analysis is on the Secretary's interpretation embodied in the citation. *Id.* ("Although not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers, these informal interpretations are still entitled to some weight on judicial review."). Action cites no legal support for its claim that the ALJ's interpretation of the Secretary's directive controls here, nor could it. *Martin v. OSHRC* squarely holds that the Secretary's litigating position controls in these circumstances, and

the LOTO directive is only relevant "to determine whether the Secretary has consistently applied the interpretation embodied in the citation, a factor bearing on the reasonableness of the Secretary's position." *Id.*

In any event, the Secretary's opening brief demonstrated that the LOTO directive is fully consistent with the Secretary's interpretation here. The relevant portion simply states the general principle that "the LOTO standard does not apply to equipment or machinery that is not the subject of the servicing and maintenance activity and that functions independently from, and is not a sub-system of, the machine/equipment being serviced or maintained." CPL 02-00-147 at 1-10. In other words, the LOTO standard does not apply to independent, adjacent machines that are not the subject of servicing or maintenance. But the LOTO directive does not mandate the narrow test applied by the ALJ here—interpreting "function" simply to mean capable of moving, and asking only whether the counterweights were a sub-system of the fans without asking whether the counterweights and fans were both sub-systems of the cooling bed.

The Secretary's interpretation in the citation here is consistent with the LOTO directive, the LOTO preamble, the *Timken* decision, subsequent case law, and the purpose of the LOTO standard. *See Op. Br.* 15-35. Under the Secretary's controlling interpretation, determining whether two pieces of equipment are adjacent, independent machines or whether they are sub-systems of the same

machine requires evaluating whether the two pieces of equipment are permanently interconnected in a single integrated system, or whether they are more like separate, stand-alone machines that can perform their production function without each other. *See* Op. Br. 15-17. Far from "supported by nothing" or "newly coined," as Action alleges, Br. 12, 17, the term "single integrated system" is a direct quote from Commissioner Rogers' opinion in *Timken*, and fully consistent with the LOTO directive, the LOTO preamble, and subsequent case law. *See* Op. Br. 15-35; *Timken*, 20 BNA OSHC 1070, 1072 (No. 97-0970, 2003) ("In Commissioner Rogers' view, the machines described in those documents are more *permanently interconnected in a single, integrated system* distinctly different from the independently operated teeming car and traverser.") (emphasis added); CPL 02-00-147 at 1-10; *S. Foods*, 21 BNA OSHC 1153, 1154, 1156 (No. 03-1928, 2004) (ALJ); *Cf. Timken Co.*, 20 BNA OSHC 2034, 2044 n.4 (No. 97-1457, 2004) (Commissioner Rogers).

Action also revives its hyperbolic assertion that the Secretary's interpretation of the cooling bed as a single machine is "akin to finding that an automobile factory is a single machine because its function is to produce cars." Br. 10. But an entire automobile factory could not possibly satisfy the Secretary's interpretation of "machine" in the LOTO standard, which only considers two pieces of equipment to be components of the same machine if they are permanently

interconnected in a single integrated system and incapable of performing any production function without each other. As the Secretary explained in his opening brief, he is not taking the position that Gerdau's rolling mill, reheating furnace, rougher, or straightener are all components of a single machine simply because they all contribute to producing steel. Op. Br. 32. There is no evidence supporting Action's claim that Gerdau's entire steel mill or an entire automobile factory could possibly meet this definition.

Finally, the Secretary's interpretation effectuates the purpose of the LOTO standard, which is to protect employees from hazards related to servicing machines that are shut down but could unexpectedly energize or release stored energy. 29 C.F.R. § 1910.147(a)(1)(i); 54 Fed. Reg. at 36644; CPL 02-00-147 at 3-2 – 3-4. In contrast, the machine guarding standard is meant to protect employees during normal production operations. 54 Fed. Reg. at 33646-67; CPL 02-00-147 at 3-6. It would have been impossible to service the fans safely while the cooling bed was operating in production mode, and the cooling bed could serve no production function while the fans were being serviced.

Because the Secretary's interpretation of the LOTO standard is reasonable and consistent with the LOTO preamble, the LOTO directive, relevant case law, and the purpose of the LOTO standard, it controls here. The ALJ committed legal error in holding that it is not "material" whether the cooling bed was one system

and that the counterweights "functioned independently from" the fans simply because they were capable of moving while the fans were de-energized. ALJ Dec. 9. The question whether the cooling bed was a single integrated system of which the counterweights and fans were both subsystems is not only material but critical to correctly analyzing the applicability of the LOTO standard here.

II. The Machine Guarding Standards Apply to Machines in Production Mode, not to a Component of a Complex Machine that is Shut Down Because it Cannot Perform its Production Function While Another Component of the Same Machine is Being Serviced.

Action's argument that the counterweights should have been guarded, *see* Br. 13, 15-16, misses the point. The excerpt of the LOTO preamble Action cites on pages 15-16 of its brief simply states the obvious point that "[w]hen a machine is being used for production, [OSHA's general machine guarding standard] requires that the point of operation be guarded," whereas the LOTO standard applies to a machine being serviced. 54 Fed. Reg. at 36646-47. By way of example, the preamble goes on to explain that a table saw "being used for production" must be guarded around the point of operation to protect the employee operating the saw from injury. *Id.* at 36646. But when the saw is being serviced, the LOTO standard applies. *Id.* at 36647.

The Secretary agrees that two pieces of equipment are separate machines for LOTO purposes when one continues to perform its normal production function while the other is being serviced—like the traverser in *Timken* that could perform

its normal production function independently (moving other teaming cars in other parts of the plant) while an individual teaming car was being serviced. *See Timken Co.*, 1998 WL 754132, at *4 (No. 97-0970, 1998). There is no dispute that the machine guarding standard applies to hazards emanating from adjacent machinery operating in normal production mode. But this principle does not apply in the case at bar because the counterweights could not perform their normal production function—or any production function—while the cooling fans were being serviced.[3] Accordingly, the machine guarding standard had no application to the servicing operation at issue in this case.

Far from supporting Action's claim that the counterweights should have been guarded during servicing of the fans, the excerpt from the LOTO preamble in fact highlights the essential distinction the Secretary makes in this case. If one piece of equipment is capable of performing its normal production function while an adjacent piece of equipment is being serviced, it "functions independently." In such a case, the two pieces of equipment are separate machines, and the machine guarding standard applies to the machine in normal production mode while the LOTO standard applies to the machine being serviced.

[3] The forces that killed Mr. Lanier were not those incident to the normal operation of the counterweights, but rather those incident to the release of the counterweights' stored energy—precisely the hazard addressed by the LOTO standard.

Here, the counterweights were not an independent machine with a production function to perform while the fans were being serviced—the counterweights never operated while the fans were locked out for servicing because they could not perform any production function without the fans. *See* ALJ Dec. 2; Tr. 109-10, 121, 154, 199-202; Br. 24. Because the counterweights and fans were subparts of a single integrated system that were permanently interconnected and could not perform their intended function without each other, the LOTO standard applied to the entire cooling bed as a single machine and therefore required the counterweights to be locked out during servicing of the fans.

The machine guarding standard has no applicability in these circumstances. The counterweights simply have nothing in common with a stand-alone table saw operating in normal production mode while the fans were being serviced, nor does any other component of the cooling bed. Because none of the cooling bed components could operate in normal production mode while the fans were being serviced, the LOTO standard applied to protect employees from the release of stored energy from the cooling bed counterweights, not the Machine Guarding standard.

III. Under the Secretary's Controlling Interpretation of the LOTO Standard, the Counterweights and Fans Were Components of the Same Machine—the Cooling Bed—Even Assuming the ALJ's Factual Findings are Supported by Substantial Evidence.

None of the ALJ's factual findings undercut the Secretary's position embodied in the citation at issue here that the cooling bed was a single machine for LOTO purposes because its components—including the counterweights and fans—were permanently interconnected and could not perform their production function without each other. There is no factual dispute that the fans were bolted to the cooling bed on a rail approximately eight inches below the rakes (ALJ Dec. 2-3, Tr. 109-10; Exs C-1L, C-1M), and that the fans were so physically intertwined with multiple other cooling bed components that servicing the fans placed employees "directly in harm's way by several different pinch points" within the cooling bed, and removing the fans required employees "to crawl up in between the rakes." Tr. 276, 323. Accordingly, the fans were plainly "permanently interconnected" with the other cooling bed components under the Secretary's controlling interpretation of " machine" for LOTO purposes. And there is no evidence whatsoever that the fans or counterweights could "function independently" in the sense that one could operate in normal production mode without the other. All of the facts found by the ALJ either support the Secretary's position or are irrelevant to the inquiry here.

For example, the ALJ found that "[t]he fans are not fixed nor permanently attached to the counterweights and rakes" but rather "are bolted to a beam or rail running the length of the bed below the rakes." ALJ Dec. 8-9. These factual findings support the Secretary's position that the fans were permanently interconnected with the cooling bed (they need not be connected directly to the counterweights). In its brief, Action ignores the fact that the fans were permanently connected to the cooling bed, an obvious distinction from the traverser in *Timken*. *See Timken Co.*, 1998 WL 754132, at *4. Even if the fans and counterweights were not directly connected to each other, there is no dispute that they were both permanently affixed to the cooling bed.

The ALJ's finding that "[t]he fans provide air movement to assist in cooling the heated metal as it moves across the bed," ALJ Dec. 8, is consistent with the Secretary's position that the fans and counterweights worked together to perform the same production function—cooling hot steel. His finding that "[t]he fans and counterweights serve different purposes and function differently, although part of the cooling bed process" may be true in the sense that the counterweights moved the rakes while the fans blew air, but this only establishes that they were different components of the cooling bed, not that they were separate, stand-alone machines.

In any remotely complex machine, some components will perform different discrete tasks. In the hogger example in the preamble to the LOTO standard, the

conveyor belt and hogger obviously performed different sub-functions—the conveyor belt moved paper product into the hogger and the hogger crushed the product—but they were still subparts of the same machine because they were permanently interconnected and could not perform their production function without each other. *See* 54 Fed. at 36646. There would be no point in operating the conveyor belt while the hogger was locked out for servicing or vice versa. The same is true of the counterweights and fans. There is no evidence that the other cooling bed components could operate in normal production mode—i.e., function independently—while the fans were locked out for servicing. On the contrary, the witnesses universally testified that the cooling bed operated as a single machine. *See, e.g.*, Tr. 43 ("A cooling bed is a piece of process equipment"), 154 (the components of the cooling bed "are all synchronized together" and "act as one unit"), 99 ("It's all part of one big system. . . . They all work integral."). And, there was no way to safely service the fans "while the cooling bed is in normal operation" because

> The equipment overlaps in so many different ways with the fans. You have chains that overlap with the fans, brakes. Basically the equipment acts as one, and if you were to go in and try to work on the fan, you would be directly in harm's way by several different pinch points.

Tr. 276; *see also* Tr. 357 ("[T]he entire cooling bed has to be locked out in order to work on the fans").

Other facts found by the ALJ are largely irrelevant. The ALJ found that "[t]here are four disconnects that control the electric power to all one hundred ten fans"; "[t]he written procedure in place at the time of the accident did not include the fans, which was the only equipment Action was authorized to work on and the only equipment Action could lockout when replacing/repairing the fans"; "[t]he fans and counterweights . . . have separate lockouts"; and "there are no electrical connections between the fans and drive chains that tells [sic] the fans to turn on when the chain drives are on." ALJ Dec. 9. Even assuming all of these facts to be true, the ALJ cites no support for his determination that the counterweights and fans were separate machines simply because they had separate energy sources and separate written LOTO procedures.[4] On the contrary, the Commission has routinely applied the LOTO standard to a single complex machine with multiple energy sources. *See* Op. Br. 28-29. Nor is it relevant that Gerdau may have

[4] The Secretary does not concede that the fans were omitted from Action's written LOTO procedures for the cooling bed. The ALJ's finding that the fans had a separate lockout procedure is not supported by substantial evidence. The ALJ acknowledged at the hearing that locking out the fans was part of Gerdau's lockout procedure. Tr. 308. His finding that the fans were not explicitly noted in Gerdau's *written* procedure does not undermine the fact that locking out the fans was part of Gerdau's LOTO procedure for the cooling bed. Tr. 275-76. And the ALJ stated at trial that although he would not admit a set of written procedures that included locking out the fans, he understood Mr. Hughes' testimony that locking out the fans was in fact part of the procedure. Tr. 327.

permitted the Action employees to unlock the fans, but not the rest of the cooling bed, for operational testing.[5]

Undisputed facts establish that the LOTO standard applied to counterweights while the Action employees serviced the fans regardless of whether the fans were explicitly mentioned in Gerdau's written LOTO procedures, whether the Action employees were allowed to unlock the fans for operational testing, whether the fans shared an energy source with the counterweights or other cooling bed components, or whether the counterweights were capable of moving while the fans were locked out for servicing. The ALJ's decision to ask only whether the counterweights were a sub-system of the fans without evaluating whether the counterweights and fans were both sub-systems of the cooling bed, and to ask only whether the counterweights were capable of moving while the fans were locked

[5] The ALJ did not cite any source of law indicating that allowing employees to unlock a piece of equipment for troubleshooting is relevant to whether that piece of equipment is a stand-alone machine or a component of a larger machine. ALJ Dec. 9. Even assuming that the Action employees were authorized to unlock the fans for troubleshooting, that does not establish that the fans were a separate machine from the rest of the cooling bed. Rather, it merely shows that Action permitted them to unlock the fans for operational testing, which is consistent with the LOTO standard. 54 Fed. Reg. at 36647. Mr. Harrison explained that it was conceivable Action would be allowed to unlock the fans for operational testing, Tr. 165, but there was no need to unlock the rest of the cooling bed to conduct operational testing on the fans (nor would it have been safe to do so). In any case, the Action employees knew they were not allowed to service the fans until the rest of the cooling bed was locked out. Tr. 357.

out instead of asking whether the cooling bed could function in normal production mode without the fans, ALJ Dec. 9-10, was reversible legal error.

The Secretary quite reasonably treated the cooling bed as a single machine for LOTO purposes because its components—including the counterweights and fans—were inextricably intertwined and could not perform their production function without each other. None of the ALJ's factual findings undermine the Secretary's position. The ALJ improperly substituted his own narrow interpretation of the LOTO directive for the Secretary's reasonable interpretation of the standard. But the Secretary's reasonable interpretation must prevail here, under which the LOTO standard required the counterweights to be locked out while the Action employees were servicing the fans.

IV. Action Did not Even Attempt to Explain Why Its Employees' Actions at the Time of the Fatality Did not Constitute "Inspecting" the Fans and Therefore "Servicing and/or Maintenance" Under the LOTO Standard.

As explained in the Secretary's opening brief, Action's employees were plainly "inspecting" the fans when the counterweight struck Mr. Lanier and were therefore engaged in "servicing and/or maintenance" covered by the LOTO standard. *See* 29 C.F.R. § 1910.147(b) (defining "servicing and/or maintenance" as including "inspecting"); Op. Br. 35-39. Action does not even attempt to explain why its employees' actions did not constitute "inspecting" the cooling fans. Instead, Action cites to the second sentence in the definition of "servicing and/or

maintenance" discussing a non-exhaustive list of examples and ignores the first sentence listing "inspecting" as covered activity. Br. 21. But the Secretary's reasonable position here is that the Action employees' activities at the time of the fatality constituted "inspecting" under the first sentence of the definition, not that they were engaged in the activities listed in the second sentence of the definition. This interpretation is entitled to substantial deference. *Martin*, 499 U.S. at 150.

To downplay the fact that the Action employees were inspecting the fans when the counterweight struck Mr. Lanier, Action again resorts to hyperbole, claiming that the Secretary would have all casual observation of a machine considered servicing under the LOTO standard. *See* Br. 20. But the Secretary has never taken the position that "merely looking at" a machine is covered by the LOTO standard, and Action's assertion that its employees were "merely looking at" the fans ignores the undisputed evidence that they were observing the fans and junction boxes to evaluate where the last employee had stopped work so they would know where to begin, and discussing which fans needed to be replaced and how to perform the work. Tr. 374-75. Mr. Harrison testified unequivocally that these activities were a "necessary" and "integral" part of replacing the fans. Tr. 375, 416. As such, these activities constituted "inspecting" the fans and therefore servicing of the fans under the LOTO standard. *See* Op. Br. 35-39.

If this Court agrees with the Secretary that the cooling bed was a single machine for LOTO purposes of which the counterweights and fans were component parts, and that the Action employees were inspecting the fans at the time of the fatality, Action's claim that its employees were not exposed to the release of stored energy from the same machine they were servicing necessarily fails. There is no question that the Action employees were exposed to the release of stored energy from the counterweights while they were inspecting the fans.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(B)

This brief was produced using Microsoft Word, in Times New Roman Style 14-point typeface, and complies with the type-volume limitation prescribed in Fed. R. App. P. 32(a)(7)(B), because it contains 4487 words, excluding the material referenced in 11th Cir. R. 32-4.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2017, a copy of the foregoing Reply Brief of the Secretary of Labor was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit and was served electronically upon the following counsel of record for Action Electric Company via the Court's CM/ECF system:

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