

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

OPENING BRIEF FOR THE SECRETARY OF LABOR

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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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STATEMENT ON ORAL ARGUMENT

The Secretary requests oral argument because he believes oral presentation of the issues would be helpful to this Court's disposition of the petition for review.

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STATEMENT OF JURISDICTION

This matter arises from an enforcement proceeding brought by the Secretary of Labor (Secretary) before the Occupational Safety and Health Review Commission (Commission) under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act or Act). The Commission had jurisdiction over this proceeding under 29 U.S.C. § 659(c). The Commission administrative law judge's (ALJ) decision became a final order of the Commission on July 6, 2016, and the Secretary timely filed his petition for review on September 1, 2016, within the sixty-day period prescribed by the Act. *See* 29 U.S.C. § 660(a). This Court has jurisdiction under 29 U.S.C. § 660(a).

STATEMENT OF THE ISSUES

1. Whether the ALJ erred in holding that the cooling bed fans and counterweights were independent machines under OSHA's Lockout/Tagout standard rather than subsystems of the cooling bed, where the fans and counterweights were physically and functionally integrated with the other cooling bed components, and neither could function independently without the other.
2. Whether Action Electric employees were performing servicing and/or maintenance work at the time of the fatality when they were visually observing the cooling bed fans and discussing the work to be performed.

STATEMENT OF THE CASE

I. The Nature of the Case and Course of Proceedings Below

On December 9, 2011, a multi-ton cooling bed counterweight struck and killed Action Electric (Action) employee James Lanier while he was inspecting a nearby cooling bed fan he was helping replace. Decision and Order (ALJ Dec.) 4. OSHA's inspection revealed that Action employees, including Mr. Lanier, began servicing the cooling bed fans without following the procedures required by OSHA's Lockout/Tagout (LOTO) standard, 29 C.F.R. § 1910.147. Specifically, OSHA issued a citation after its investigation revealed that Action employees failed to affix their personal lockout devices to the group lockbox to ensure that none of the cooling bed components would unexpectedly energize while they were servicing the cooling bed fans. ALJ Dec. 4-5. The Commission administrative law judge (ALJ) vacated the citation, ruling that the cooling bed counterweights and fans were separate machines and therefore the LOTO standard did not apply to the counterweights while employees were servicing the fans. ALJ Dec. 10-13.

The Secretary timely filed a petition for discretionary review of the ALJ's decision with the Commission on June 4, 2013. On July 6, 2016, unable to resolve the issue whether the LOTO standard applied to the cooling bed fans, the Commission vacated the direction for review, thereby allowing the ALJ's decision to become a final appealable order of the Commission. The Commission's

decision vacating the direction for review included separate opinions by the two Commissioners. Chairman Attwood would have reversed the ALJ, held that the cooling bed was a single complex machine and therefore the LOTO standard applied to the entire cooling bed and the work being performed, affirmed the serious citation item at issue, and assessed OSHA's \$7000 proposed penalty. Chairman MacDougall would have affirmed the ALJ's decision vacating the citation.

II. Statement of Facts

A. The Steel Mill Worksite and Cooling Bed

Action provides businesses with electrical service and repair support and since 2004 has worked as a contractor for Gerdau Ameristeel (Gerdau) at Gerdau's steel mill in Cartersville, Georgia. ALJ Dec. 1-2. The mill operates twenty-four hours per day, recasting scrap metal into structurally useful forms. ALJ Dec. 2; Hearing Transcript (Tr.) 24. The recasting process entails melting scrap metal, casting it into billets, and then "rolling" the billets into angles, channels, flats, and I-beams. ALJ Dec. 2. At this stage the steel is approximately 1600 degrees and must be cooled. ALJ Dec. 2; Tr. 24-25. A conveyor transports the hot steel to the cooling bed, where it is cooled for approximately one hour and then transported to the steel straightener. ALJ Dec. 2.

The cooling bed contains multiple components that work together to cool steel billets. The cooling bed is approximately 325 feet long by 100 feet wide, and has a series of grooved metal rakes where the billets are placed. ALJ Dec. 2; Tr. 81-82; Exs. C-1B, C-1L. The rakes move up and down, cooling the hot steel by “walking” it across the bed. ALJ Dec. 2; Tr. 81-82. As the steel “walks” on the rakes, 110 rotary fans blow air across the steel to promote air circulation and thereby expedite the cooling process. ALJ Dec. 2, 8; Tr. 24, 121. Below the cooling bed rakes is the cooling bed basement, which houses the cooling bed’s drive motors, rotating shafts, counterweights, chains, drive pulleys, gear boxes, and other devices, and is the access point for servicing the cooling bed fans. ALJ Dec. 2-3; Tr. 83, 323. The counterweights complete 360-degree clockwise revolutions to help move the rakes up and down. ALJ Dec. 3. The cooling fans are located approximately eight feet above the basement floor, and are bolted to the cooling bed on a rail roughly four to six inches underneath the rakes. ALJ Dec. 2; Tr. 109-110; Exs. C-1L, C-1M. The cooling bed components are thus physically and functionally integrated as a single system, Tr. 199-202, and there is no evidence any of the cooling bed components could perform their intended function—cooling steel billets—without each other.

Down the center of the cooling bed basement is a designated walkway that quality control personnel use to inspect the underside of the steel as it moves along

the rakes during normal operations. ALJ Dec. 3; Tr. 85-86. The designated walkway, which is demarcated by overhead lights, yellow floor paint, and chain rope extending almost the entire length of the basement, is the only safe place to walk in the basement when the cooling bed is not locked out. ALJ Dec. 3; Tr. 119-20. Leaving the designated walkway, as is required to service the fans, exposed employees to hazards emanating from the entire cooling bed, as the various cooling bed components and equipment “overlap so much that you can’t work on one specific piece without locking out other equipment as well.” Tr. 322-23; *see also* Tr. 276, 308.

Under Gerdau’s LOTO policy, before beginning any servicing or maintenance work on any cooling bed components, including the fans, the Action employees had to complete a work authorization permit, which included verifying that the cooling bed had been locked out, and each employee had to affix a personal lock to the cooling bed’s group lockbox. ALJ Dec. 6; Tr. 68, 335-37, 358; Exs. C-5, C-8. The permit was not valid (and work could not begin) until it was signed by a Gerdau supervising technician—such as Chad Hughes—who had to first “tryout” the machinery (to make sure it was locked out), affix his or her lock to the lockbox, and ensure that workers servicing the machine put their locks on the group lockbox. Tr. 41-42, 141, 158, 235.

Gerda considered the cooling bed, including the fan and counterweights, to be a single machine under its LOTO policy. As Mr. Hughes explained:

[T]he 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.

B. The Fatality and OSHA's Citation for Failure to Follow LOTO Requirements

In the fall of 2011, Action was tasked with replacing seventeen of the cooling bed fans. ALJ Dec. 3-4. On the morning of December 9, 2011, Action leadman Michael Harrison and apprentice James Lanier met with cooling bed maintenance technician Chad Hughes to prepare to replace the final three fans. ALJ Dec. 3-4. Mr. Hughes was the technician responsible for locking out the entire cooling bed before servicing could begin on any of its components. Tr. 275-76, 308, 320-23. The mill was shut down that day for repair work, and Mr. Hughes told Mr. Harrison that he would lock out the cooling bed and meet him at the north entrance of the basement where the Action employees were required to affix their personal locks to the lockbox before beginning work on the fans. ALJ Dec. 4-5, Tr. 141. After this conversation, but before locking out the cooling bed, Mr. Hughes spent about fifty minutes moving the three fans by forklift to the north end

of the cooling bed and assisting two other workers with unrelated matters. ALJ Dec. 4; Tr. 293-94.

After leaving Mr. Hughes, Mr. Harrison filled out the work permit and—without obtaining Mr. Hughes’ required signature or affixing a personal lock to the group lockbox— entered the cooling bed basement with Mr. Lanier. ALJ Dec. 4; Tr. 368. Upon entering the basement Mr. Lanier and Mr. Harrison left the designated walkway and walked over conduits, pipes, and air lines, and under beams to reach the location of the fans that needed replacing. ALJ Dec. 4. During this entire time Mr. Harrison knew that Mr. Hughes had not completed locking out the cooling bed. ALJ Dec. 4.

Mr. Hughes, however, was unaware that Mr. Harrison and Mr. Lanier were in the cooling bed basement when he started the lockout procedure. ALJ Dec. 4. This required locking out the cooling bed counterweights, which caused the multi-ton weights to fall from a resting position of one o’clock to a de-energized position of six o’clock. ALJ Dec. 3. Mr. Lanier and Mr. Harrison were standing underneath one of the counterweights visually inspecting the fans and discussing the replacement work. The counterweight fatally struck Mr. Lanier and came within inches of hitting Mr. Harrison. ALJ Dec. 4.

OSHA subsequently investigated the fatality and cited Action for violating 29 C.F.R. § 1910.147(f)(3)(ii)(D), which states: “Each authorized employee shall

affix a personal lockout or tagout device to the group lockout device, group lockbox, or comparable mechanism when he or she begins work, and shall remove those devices when he or she stops working on the machine or equipment being serviced or maintained.”¹ ALJ Dec. 5-6. The citation specifically alleged:

The employer [Action] did not ensure that each employee performing servicing and maintenance activities [was] in control of the hazardous energy throughout the entire period of exposure. Employees did not affix their personal lockout device to physically secure the isolating device(s) during the servicing or maintenance work performed as specified in the requirements of the group LOTO procedure nor did they avoid working in this area until the lockout process was completed by the host employer, exposing themselves to struck-by hazards.

ALJ Dec. 5. During proceedings before the ALJ, Action did not dispute that its workers failed to affix their personal lockout devices before entering the cooling bed basement. ALJ Dec. 6. Action instead argued that the LOTO standard did not apply to the counterweights because the counterweights were not part of the machine that Mr. Harrison and Mr. Lanier were servicing at the time of the fatality. See Action Electric’s Post-Trial Brief 15.

C. The ALJ’s Decision

The ALJ vacated the citation, holding that the Secretary failed to establish that the cited LOTO standard applied to the cooling bed counterweights during

¹ OSHA also cited Action for failing to adequately train its employees in violation of 29 C.F.R. § 1910.147(c)(7)(i). This citation was later withdrawn and is not at issue on appeal. Dec. 1-2.

servicing of the cooling bed fans. ALJ Dec. 13. The ALJ stated that “[i]n terms of failing to place their locks on the group lockbox, there is no dispute regarding the lack of compliance with the terms of the cited standard, employees’ exposure to the falling counterweight, and Action’s knowledge of the failure to lockout the fans and counterweight.” ALJ Dec. 7. The ALJ also recognized that there “is no dispute that servicing and maintenance work on the fans would require compliance with LOTO[,]” but framed the pertinent issue as “whether the LOTO requirements apply to the counterweights if the servicing and maintenance work is only on the fans.” ALJ Dec. 7.

The ALJ ruled that the fans and counterweights were “not part of a single integrated system” and that the LOTO standard did not require locking out the counterweights because the fans and counterweights operated independently, had separate lockouts, served different purposes, and functioned differently. ALJ Dec. 9. The ALJ stated that OSHA’s LOTO Directive, CPL 02-00-147, supported this conclusion because “the counterweights were not a sub-system of the fans” and the “fans were not an operating component of the counterweights.” ALJ Dec. 10. The ALJ also analogized the case to the Commission’s decision in *Timken Co.*, 20 BNA OSHC 1070 (No. 97-0970, 2003), and determined that the cooling bed was “distinctly different” from the types of systems for which the Secretary intended the LOTO standard to apply. ALJ Dec. 10-11.

After concluding that the standard did not require Action to lock out the counterweights before working on the fans, the ALJ considered whether Action's failure to lock out the fans before performing servicing and maintenance on them violated the standard. He held that even if Mr. Lanier and Mr. Harrison were performing servicing or maintenance work at the time of the accident, the standard was not violated because the Action employees were not exposed to the unexpected energization of, or release of stored energy from, the fans.² See ALJ Dec. 12.

D. The Commission's Decision

The Commission initially granted the Secretary's petition for review of the ALJ's decision but later issued a decision vacating the direction for review on the grounds that the two Commissioners could not agree whether the LOTO standard applied to the cooling bed counterweights during servicing of the cooling bed fans. Both Commissioners filed separate opinions explaining their positions. Commissioner Attwood would have held that the LOTO standard applied to the entire cooling bed during servicing of the fans, affirmed the serious citation item at issue, and assessed the \$7000 proposed penalty. Comm'n Dec. at 13. The LOTO

² In response to Action's argument that the ALJ should vacate the citation because Gerdau (and not Action) violated the LOTO standard, the ALJ ruled that Gerdau's failure to verify the location of all workers before locking out the counterweights did not relieve Action of its responsibility to ensure its employees were safe from hazards. Dec. 12-13. The Secretary does not contest this portion of the ALJ's decision.

standard applied, she explained, because “Action employees were servicing a complex machine—the *cooling* bed—that necessarily contains many component parts,” and therefore, “before servicing of the cooling bed’s fans could begin, lockout was required of all cooling bed components because the cooling bed posed LOTO hazards to the workers performing the servicing.” *Id.* at 5. She noted that the cooling bed fans “are not only physically connected to the cooling bed but are also functionally integrated to simultaneously interact and accomplish a single goal” and in fact “serve no useful purpose if operated independently of one another.” *Id.* at 5-6.

Commissioner Attwood rejected the argument that the size and complexity of the cooling bed make it a collection of many machines as opposed to one machine, noting that such an interpretation would lead to “the absurd result of precluding [the LOTO standard’s] application where the hazard of unexpected energization may be greatest.” *Id.* at 7. She pointed out that the LOTO standard and Commission cases interpreting the standard in fact demonstrate that “the more complex the machine, the more comprehensive [the LOTO] procedures may need to be” and the greater the likelihood of unexpected energization or release of stored energy when one person starts the machine while another person is performing servicing or maintenance on the machine out of sight of the person who starts it

due to the size and complexity of the machine. *Id.* at 8 (internal quotation omitted). This is precisely the situation that led to the fatality here. *Id.* at 9.

Commissioner Attwood dismissed Action's and Commissioner MacDougall's claim that adopting such an interpretation would inevitably lead to the erosion of any and all differentiation among the various machines in a factory, noting that Gerdau itself required lockout of the entire cooling bed when servicing the fans but did not require lockout of the entire steel mill when servicing the cooling bed. *Id.* at 10. She concluded that the Secretary's longstanding interpretation of the LOTO standard—as applying to servicing or maintenance of different subsystems of a single complex machine as long as the subsystems do not function independently from each other—reasonable, and entitled to deference. *Id.* at 10-11.

Finally, Commissioner Attwood agreed with the Secretary's interpretation that the LOTO standard's definition of "inspecting" equipment includes visual observation relating to servicing and maintenance that places employees in the zone of danger, and therefore Action's employees were "inspecting" the cooling bed within the meaning of the LOTO standard. *Id.* at 12.

Commissioner MacDougall wrote in a separate opinion that she would affirm the ALJ's decision vacating the citation on the grounds that the LOTO standard did not apply to the cited activities at the time of the fatality because the

cooling bed, fans, counterweights, and other components are separate machines.

Id. at 19.

Commissioner MacDougall would have held, based on the Commission's non-precedential decision in *Timken* and OSHA's LOTO Directive, CPL 02-00-147, that the LOTO standard did not apply to the cooling bed while employees serviced the fans because the fans were adjacent, independent, and unrelated to the cooling bed, and the fans and counterweights have no physical, electrical, or hydraulic connections. *Id.* 23-24, 26. Commissioner MacDougall rejected as unreasonable the Secretary's interpretation of "machine" and Commissioner Attwood's determination that the cooling bed is a "single integrated system." *Id.* at 24-25. Commissioner MacDougall opined that such a theory would lead to conflating all equipment "critical to the output or quality of a finished product" as a single, integrated system, *id.* at 28 n.22, and "could afford the Secretary almost unfettered discretion as to the breadth of the LOTO standard, thereby eliminating fair notice to the regulated community," *id.* at 29.

Commissioner MacDougall agreed with the ALJ that if the LOTO standard does not apply there is no need to determine whether Action's employees were engaged in servicing or maintenance under the standard. *Id.* at 29. She nevertheless noted that she would not consider "viewing the fans from the basement" a covered activity. *Id.*

III. Standard of Review

This Court reviews the Commission's factual findings under the substantial evidence standard, and its legal determinations for whether are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."³ 5 U.S.C. § 706(2)(A); *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."). When interpreting ambiguous OSHA regulations, a reviewing court must defer to the reasonable interpretations of the Secretary of Labor. *Fluor Daniel v. Occupational Safety and Health Review Comm'n*, 295 F.3d 1232, 1236 (11th Cir. 2012) (citing *Martin v. OSHRC*, 499 U.S. 144, 158 (1991)).

SUMMARY OF THE ARGUMENT

The ALJ erred in vacating the citation under the LOTO standard on the ground that the cooling bed, which contained a number of components including counterweights and cooling fans, was not a single machine and therefore Action employees servicing the cooling fans were not required to ensure that the counterweights were locked out before beginning their work. This Court should reverse the Commission's final order because the cooling bed constituted a single machine with various interrelated components, including the counterweights and

³ Where, as here, the Commission does not direct review of an ALJ's decision, the ALJ's findings become the Commission's. *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 108 (1st Cir. 1997).

fans, that were physically and functionally integrated and could not function independently without each other.

Based on his erroneous conclusion that the counterweights and fans were separate machines for LOTO purposes, the ALJ further erred in concluding that Action employees were not servicing the same machine that exposed them to the hazard of unexpected energization or release of stored energy. There is no dispute that the workers were exposed to the unexpected energization of, or release of stored energy from, the counterweights at the time of the fatality. Finally, the Action employees' activities at the time of the fatality constituted inspecting the cooling fans and therefore servicing the cooling bed under the LOTO standard.

ARGUMENT

I. The Secretary Reasonably Determined that the Cooling Bed Counterweights and Fans Were Components of the Same Machine Because They Were Permanently Interconnected in a Single Integrated System and Served No Independent Function Without Each Other.

The LOTO standard applies to the “*servicing and maintenance of machines and equipment* in which the unexpected energization or start up of the machines or equipment, or release of stored energy could cause injury to employees.” 29

C.F.R. § 1910.147(a)(1)(i) (emphasis added).⁴ Although the standard itself does

⁴ To establish a violation of a standard, the Secretary must show: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the cited employer knew, or with the exercise of reasonable diligence could have known, of the

not define the term “machine,” the Secretary’s longstanding interpretation, embodied in the citation at issue here, is that two pieces of equipment are components of the same machine if they are permanently interconnected in a single integrated system and neither can serve its intended function without the other.

See Control of Hazardous Energy – Enforcement Policy and Inspection Procedures, CPL 02-00-147, p. 1-10 (Feb. 11, 2008) (LOTO Directive) (citing *Timken Co.*, 20 BNA OSHC 1070 (No. 97-0970, 2003)).⁵

The Secretary’s interpretation of “machine” as including integrated equipment systems such as the cooling bed has been consistent over time and reasonably conforms with the language and purpose of the standard, and it is therefore entitled to controlling deference. *See Martin*, 499 U.S. at 150-57 (Secretary’s interpretation of an ambiguous OSHA standard is entitled to substantial deference if it is reasonable); *Floyd S. Pike Elec. Contractor v. OSHRC*, 576 F.2d 72, 75-76 (5th Cir. 1978) (Secretary’s reasonable interpretation of an ambiguous regulation he promulgated is entitled to controlling deference). The

condition. *See Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994) (citation omitted). The only element in dispute here is whether the group LOTO requirements applied to the cooling bed counterweight that struck and killed Mr. Lanier while he was inspecting the cooling bed fans. Dec. 9.

⁵ The LOTO Directive further explains that Section 5(a)(1) of the OSH Act and other relevant standards like the Machine Guarding standard apply when servicing and maintenance work are performed on an “independent, unrelated machine/piece of equipment.” *Id.*

cooling bed fans were permanently interconnected with the other cooling bed components, including the counterweights, and none of the cooling bed components could perform its intended function while the cooling fans were locked out for servicing.

A. The Cooling Fans Were Permanently Interconnected with the Cooling Bed in a Single Integrated System.

Two pieces of equipment are a single machine under the LOTO standard if, among other factors, they are “permanently interconnected in a single integrated system.” *See Timken Co.*, 20 BNA OSHC at 1072 (opinion of Commissioner Rogers). In the Commission’s non-precedential decision in *Timken*, the two Commissioners agreed in separate opinions that the LOTO standard did not apply to a traverser (a piece of equipment that traveled along rails moving various teeming cars carrying ingot molds between different stages in the ingot-making process) during servicing of a teeming car. *Id.* at 1070-71. Commissioner Rogers reasoned that the LOTO standard only applied to machines that “are more permanently interconnected in a single, integrated system[,]” and Chairman Railton similarly reasoned that the LOTO standard was inapplicable in part because the traverser and teeming cars were “not part of the same equipment.”⁶ *Id.*

⁶ The Commissioners in *Timken* disagreed about how to apply OSH Act section (5)(a)(1) and therefore vacated the direction for review, allowing the ALJ’s decision and order to become the final appealable order of the Commission with the precedential value of an unreviewed ALJ’s decision. 20 BNA OSHC at 1072.

at 1072, 1076. Importantly, “[t]he traverser [was] not fixed nor permanently attached to a particular teeming car, but rather [was] continually moving.” *Id.* at 1072.

Here, the cooling bed fans were permanently interconnected with the other cooling bed components, including the counterweights. Gerdau itself considered the cooling bed to be a single machine because its components were so physically integrated. Tr. 276, 308, 322-23. The cooling fans were permanently bolted to the cooling bed on a rail approximately four to six inches below the rakes. ALJ Dec. 2; Tr. 109-10; Exs. C-1L, C-1M. Gerdau safety manager Ecky Hall referred to the cooling bed as “a piece of process equipment” and testified that the cooling bed components “act as one unit” and are “all part of one big system.” Tr. 154, 199. Mr. Hall testified that the cooling bed components “overlap so much that you can’t work on one specific piece without locking out other equipment as well.” Tr. 119-20.

Likewise, Chad Hughes, the Gerdau maintenance technician responsible for the entire cooling bed, stated:

[T]he 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 (emphasis added); *see also* Tr. 43 (Mr. Hall explaining Mr. Hughes' expertise regarding the cooling bed). There was "not any place underneath th[e] cooling bed that you can go off of that designated walkway without locking everything out." Tr. 322-23. Describing the location of the fans within the cooling bed, Mr. Hughes explained that "you've got rakes above you, you've got the job shafts behind you, and the counterweights are directly right there by you. You physically have to crawl up in between the rakes in order to remove the fans." Tr. 323; *see also* Tr. 308, 275-76.

The above-cited testimony demonstrates that the cooling fans operated together with other components to cool the steel as it "walked" along the bed, and were located together with the other components in the cooling bed basement in such proximity that servicing and maintenance on the fans could not be performed unless all of the components of the system were locked out. That hazards emanated from the entire cooling bed is further supported by testimony that quality control inspectors could enter the cooling bed basement during normal operations to inspect the steel only if they stayed on the designated walkway, which was demarcated by lights, yellow floor paint, and chain rope. Dec. 3; Tr. 85-86, 103. In contrast, workers were not permitted to leave the walkway (which was necessary to perform fan maintenance work) without following lockout procedures, and signs posted on the walkway and nearby stated, "Do not enter

without lockout/tagout.” Tr. 179-80, 231. Gerdau’s recognition of the need for personnel to stay on the walkway unless lockout procedures were initiated underscores that the entire cooling bed system—not just isolated components—presented hazards to servicing and maintenance workers.

It is significant that the Secretary’s interpretation mirrors Gerdau’s own understanding that the cooling bed was a single machine with multiple components, all of which had to be locked out before servicing or maintenance could proceed on any one component. As the owner and operator of the facility, Gerdau was intimately familiar with the operation of the various cooling bed components and their relationship with each other. Moreover, Action itself appears to have understood that the cooling bed was a single integrated machine. On the two prior occasions when they replaced cooling fans, Action employees complied with Gerdau’s mandatory LOTO procedure when replacing cooling fans prior to the accident and did not proceed until the entire cooling bed was locked out and everyone had placed his or her personal lock in the group lockbox. *See* Tr. 244-46. Thus, Action’s *post hoc* argument that the fans and counterweights were entirely separate machines is artificial and wholly inconsistent with the expectations of those most familiar with the actual operation of the cooling bed components at the facility.

B. The Counterweights and Cooling Fans Were Functionally Interdependent Because They Could not Perform Their Intended Function—Cooling Hot Steel—Without Each Other.

In addition to being physically interconnected, the counterweights and cooling fans were functionally interdependent. As OSHA’s LOTO Directive explains, citing *Timken Co.*, 20 BNA OSHC 1070, the LOTO standard does *not* apply to adjacent equipment “that functions independently from, and is not a sub-system of, the machine/equipment being serviced or maintained.”⁷ CPL 02-00-147 at 1-10. This principle is illustrated in the *Timken* case, in which the traverser and teeming cars were considered separate machines because the traverser could perform its intended function—carrying ingot molds between different stages in the process—perfectly well while one single teeming car was being serviced:

The function of the traverser was independent of the teeming cars. The traverser only moved the teeming cars, which held the ingot molds, from station to station for various processes. Once it had moved one teeming car into a particular slot, it moved on to another assignment (Joint Ex. 1). On the day of the accident, as the repairs were being performed upon the teeming car, which had been disabled so as to prevent the release of energy, the traverser continued to operate in a completely independent manner.

⁷ The Directive further explains that Section 5(a)(1) of the OSH Act and other relevant standards like the Machine Guarding standard apply when servicing and maintenance work are performed on an “independent, unrelated machine/piece of equipment.” *Id.*

Timken Co., 1998 WL 754132, at *4 (No. 97-0970, 1998) (ALJ).⁸

Here, by contrast, the fans and the counterweights operated together and neither component had any independent function without the other. The critical word here is “function,” which necessarily connotes carrying out the purpose for which the machine was intended. According to Webster’s Dictionary, “function” means “the action for which a person or thing is specially fitted or used or for which a thing exists: PURPOSE.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 498 (1991). The question is therefore not whether one piece of equipment is simply capable of moving without the other, but rather whether it is capable of *functioning*, in the sense that it can carry out the function for which it was intended, independent of the other.

In a single integrated system, the component parts work together to perform a unified function: if one component is shut down, the other parts cannot perform their intended function independently. In contrast, separate machines can perform

⁸ Subsequent decisions have reach similar results, reaffirming that the LOTO standard applies to component parts of an integrated system that work together to perform their intended function. *See Southern Foods*, 21 BNA OSHC 1153, 1154, 1156 (No. 03-1928, 2004) (ALJ) (“undisputed” that LOTO standard triggered in case where “blow mold machine, cooling table and trimmer work together as an integrated system that manufactures gallon milk jugs”); *Cf. Timken Co.*, 20 BNA OSHC 2034, 2044 n.4 (No. 97-1457, 2004) (Commissioner Rogers) (citing prior *Timken* decision to support “undisputed” fact that “all of the [piercing mill] machinery and equipment [that] worked together to produce tubes from steel billets . . . should have been locked out for the hydraulic hose repairs at issue”).

their respective functions independently of each other. Thus, the LOTO Directive reflects the Commissioners' agreement in *Timken* that the traverser and teaming car were separate machines for LOTO purposes where the traverser could still perform its intended function—moving teaming cars—while one individual teaming car was locked out for servicing.

This straightforward use of the word “function” is also consistent with the preamble to the LOTO standard, which explained that the standard would apply to a conveyor belt feeding product into a hogger during servicing of the hogger. 54 Fed. Reg. 36644, 36646 (Sept. 1, 1989). Although the conveyor belt was plainly capable of *moving* while the hogger was shut down for servicing, the conveyor belt and hogger were considered to be the same machine for LOTO purposes. *Id.* The conveyor belt could not perform the *function* for which it was intended without the hogger. As Commissioner Attwood noted, “OSHA considered [the hogger and conveyor belt] components of a single ‘machine’ for LOTO purposes.”⁹ Comm’n Dec. 6. In contrast, the traverser in *Timken* had many other functions it could

⁹ She also correctly rejected Commission MacDougall’s suggestion that the example is distinguishable because the conveyor was running at the time of the injury, in contrast to counterweights, which were releasing stored energy during the lockout process. Comm’n Dec. 6 n.6 (Attwood) (addressing MacDougall’s point at Comm’n Dec. 26 n.19). “[T]he critical point illustrated by the waste hogger example is that one component—the conveyor—needed to be locked out in order to protect the employee who was working on another component—the hogger.” *Id.* at 6 n.6.

perform independently while one teaming car was being serviced—it could move other teaming cars to other parts of the plant. *Timken Co.*, 1998 WL 754132, at *4. It could therefore perform the function for which it was intended while one individual teaming car was being serviced.

Unlike the traverser and teaming car in *Timken*, and like the conveyor belt and hogger in the LOTO standard's preamble, the counterweights and fans never operated without each other because they could only perform their intended function—cooling hot steel—working together. ALJ Dec. 2; Tr. 109-10, 121, 154, 199-202. Specifically, as the counterweights helped move the rakes to “walk” the steel, the cooling fans blew air underneath the steel, promoting air circulation and expediting the cooling process. ALJ Dec. 2; Tr. 109-10, 121. Gerdau safety manager Ecky Hall testified that the fans worked together with other components as a single system, Tr. 199-202, and there is nothing in the hearing record suggesting that the cooling bed operated (or could effectively operate) without functioning cooling fans, or that any of the cooling bed components served any purpose without each other.

The Secretary's interpretation here is also consistent with OSHA's intent as expressed in the LOTO standard's preamble. OSHA stated in the preamble that the intent of the group lockout requirements in the LOTO standard is to ensure that servicing and maintenance personnel *each* retain “control over his/her own

protection, rather than having to depend completely upon other people.” 54 Fed. Reg. at 36681; *Cf. Exelon Generating Corp.*, 21 BNA OSHC 1087, 1090 (No. 00-1198, 2005) (“individual control over the lockout/tagout device constitutes a core performance requirement of the” electric power generation, transmission, and distribution standard). A fundamental difference between the proposed and final standard demonstrates that the ALJ’s decision here is inconsistent with the Secretary’s intent. As explained in the preamble to the final standard, OSHA initially proposed a group lockout system under which an “authorized employee” retained authority to lock out (and unlock) equipment, and servicing employees were not required to have their own locks.¹⁰ 54 Fed. Reg. at 36681. Under the proposed rule, the authorized employee was “responsible for the safety of all the employees in the group.” *Id.* Following the notice and comment period, OSHA reexamined this issue and imposed the additional requirement that “each employee in the group needs to be able to affix his/her personal lockout or tagout system device as part of the group lockout.” *Id.*

¹⁰ The notice of proposed rulemaking is available at 53 Fed. Reg. 15,496, 15,520 (proposed Apr. 29, 1988). Differences between proposed and final regulations are evidence of the Secretary’s intent, especially when the preamble accompanying the final rule discusses the differences. *See MetWest Inc.*, 22 BNA OSHC 1066, 1069 (No. 04-0594, 2007) (“OSHA’s specific explanation of the proposed rule and the changes made in its preamble to the final rule support the plain meaning ascribed to it by the Secretary and adopted here by the judge.”) (citation omitted).

The ALJ's holding that the cooling bed is not a single integrated system contravenes the Secretary's intent by depriving workers of individual control over hazards associated with the cooling bed. Workers had to leave the designated walkway in order to service the fans. Tr. 179-80. Although it is undisputed that leaving the walkway exposed workers to hazards from numerous parts of the cooling bed, including the counterweights, *supra* pp. 18-20, under the ALJ's interpretation these workers would receive no group LOTO protection. For example, workers servicing the cooling fans were not required to affix their personal lockout devices to the group lockbox (to control the counterweights), even though working on the fans put workers within the swing radius of the counterweights. Tr. 412. Reversing the ALJ's ruling is necessary to ensure that employees retain control over machinery and equipment that threatens their safety.

The Secretary's position that the cooling bed was a single machine for LOTO purposes is reasonable and consistent with his longstanding interpretation of the standard. This position is also consistent with Commission case law and with "the well-established principle that the Act is to be construed liberally to effectuate its purpose of 'assur[ing] so far as possible ... safe ... working conditions.'" *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1382-83 (D.C. Cir. 1985) (citations omitted). Therefore, it is entitled to substantial deference. *See Martin*, 499 U.S. at 150-57 (Secretary's interpretation of an ambiguous OSHA

standard is entitled to substantial deference if it is reasonable); *Floyd S. Pike*, 576 F.2d at 75-76 (Secretary's reasonable interpretation of an ambiguous regulation he promulgated is entitled to controlling deference).

C. The ALJ Erred in Determining that the Cooling Bed Counterweights and Fans were Separate Machines Without Evaluating Whether They Were Components of a Single Integrated System.

The ALJ fundamentally misapprehended the nature of the cooling bed and misapplied the law to the facts of this case. Despite the central importance of whether the cooling bed fans were permanently interconnected with the other cooling bed components in a single integrated system, the ALJ erroneously ruled that this consideration was “not ‘material’” under OSHA's LOTO Directive because the counterweights functioned independently from and were not a subsystem of the fans. ALJ Dec. 9. He was wrong on both counts.

The ALJ's analysis was too narrow because it asked only whether the counterweights were a subsystem of the fans and failed to analyze whether the counterweights and fans were both sub-systems of the cooling bed—that is, permanently interconnected in a single integrated system with a unifying function. The cooling bed fans are obviously distinguishable from the traverser in *Timken*, which “was not fixed nor permanently attached to a particular teeming car, but rather [was] continually moving,” *Timken Co.*, 20 BNA OSHC at 1072 (separate opinion of Commissioner Rogers). Rather, like the conveyor belt and hogger

example in the LOTO standard's preamble, the cooling fans were permanently affixed to the cooling bed and served no purpose other than cooling steel while the other cooling bed components were operational. These were not free-standing pedestal fans that could be relocated to other parts of the facility like the *Timken* traverser. The cooling fans were permanently affixed to the cooling bed: they were bolted to a rail on the cooling bed and were so physically integrated with the other cooling bed components that a person servicing the fans had "rakes above," "job shafts behind," and "counterweights right there," and "physically [had] to crawl up in between the rakes to service the fans." Tr. 323; *see also* Tr. 308, 275-76. Yet the ALJ focused on the fact that the fans and counterweights were not directly connect to each other and ignored the undisputed fact that they were both permanently attached to the cooling bed.

Rather than focusing on the permanent physical interconnectedness of the cooling bed components, the ALJ instead stressed that the fans and counterweights had no electrical connections to each other and had separate lockouts. ALJ Dec. 9. But the test for LOTO applicability is whether two components are permanently interconnected in a single integrated system or whether they can perform their intended function without each other. *See supra* pp. 15-27. The number of electrical connections or disconnects within a complex machine does not diminish the scope of LOTO protection. *See General Motors Corp.*, 22 BNA OSHC 1019,

1027 (Nos. 91-2834E & 91-2950, 2007) (noting LOTO applicability to “very complex machines,” including the “machine” at issue, which “contained ’15 or 16 automatics, 165 weld guns, probably 300 limit switches [and] over 150 disconnects,’ and for which at least four safety locks were necessary to lock it out.”) (quoting case record); *Dayton Tire, Bridgestone/Firestone*, 23 BNA OSHC 1247, 1258-59 (No. 94-1374, 2010), *aff’d in relevant part*, 671 F.3d 1249 (D.C. Cir. 2012) (applying LOTO standard to multiple machines that were *each* “extraordinarily complex, var[ied] in size and configuration, and [had] different combinations of energy sources”); *see also* Comm’n Dec. 8 (Commissioner Attwood discussing these cases). In an “extraordinarily complex” machine with “300 limit switches [and] over 150 disconnects,” or with “different combinations of energy sources,” there are necessarily some component parts with no direct electrical connection to other component parts.

The ALJ also found it important that the fans were not mentioned in Gerdau’s written lockout procedures for the cooling bed. ALJ Dec. 9. However, there is no dispute that Gerdau required the entire cooling bed to be locked out while the fans were being serviced. Tr. 275-76, 308, 320-23. The mere fact that Gerdau’s written procedure at the time of the accident may have omitted specific steps for locking out the fans does not demonstrate that they were separate machines. First, the record shows that the fans and counterweights operated

together as integral components of a single system and had no function or purpose outside that system. *See supra* pp. 15-27. Second, Gerdau plainly understood that servicing and maintenance on the fans could not safely be performed before the counterweights and associated drive shafts, chains and motors were locked out. *See supra* pp. 18-20.

The ALJ erred by failing to consider the critical question whether the cooling bed was a single integrated system in which the fans were permanently interconnected to the other cooling bed components. It is undisputed that the fans were permanently affixed to the cooling bed, and the cooling bed components were permanently intertwined so that accessing the fans exposed workers to hazards from multiple other cooling bed components. Tr. 275-76, 308, 322-23.

Moreover, the ALJ's determination that the counterweights "functioned independently" of the fans ignores the plain meaning of the word "function" and the abundant evidence that the counterweights never in fact functioned while the fans were being serviced and could not perform their intended function without the fans. The ALJ ruled that under the LOTO Directive, the counterweights "functioned independently" simply because they "operated independently of the counterweights." ALJ Dec. 9. But the ALJ erroneously focused too narrowly on whether the counterweights were physically capable of moving while the fans were locked out rather than whether they were capable of performing the function for

which they were intended. If the relevant question were simply whether one piece of equipment is capable of moving while the other is being serviced, there is no rational basis for distinguishing between the hogger and conveyor belt example in the LOTO directive and the traverser and teaming car example in *Timken*.

By analogizing the instant case to *Timken*, the ALJ and Commissioner MacDougall both overlooked the critical distinguishing fact that the *Timken* traverser had many functions to perform while one teaming car was being serviced. *Timken Co.*, 1998 WL 754132, at *4. The facts in the present case are therefore readily distinguishable from those in *Timken* because the counterweights could not perform their intended function while the fans were locked out for servicing. Tr. 121, 154, 199.

Commissioner MacDougall's suggestion that the Secretary's interpretation of "machine" would "wreak havoc" by causing entire factories to be considered single machines is, as Commissioner Attwood noted, "preposterous." *See Comm'n Dec. 9, 28*. Gerdau itself considered the cooling bed to be a single machine. Tr. 276. It assigned one technician, Chad Hughes, to be responsible for locking out the entire cooling bed before any of its components, including the fans, could be serviced. Tr. 275-76, 308, 320-23. Mr. Hughes told the Action employees not to leave the designated walkway in the cooling bed basement until he had completed locking out the cooling bed and they had affixed their personal locks to the group

lockbox, but the Action employees disregarded his instructions. ALJ Dec. 4-5; Tr. 293-94.

Far from requiring the entire steel mill to be shut down while the fans were being serviced, the Secretary's reasonable and longstanding interpretation of the LOTO standard only required shutting down the other cooling bed components that did not serve any independent purpose while the fans were locked out. The Secretary is not arguing that Gerdau should be required to lock out equipment it could otherwise be using while the cooling bed fans were locked out for servicing—the cooling bed could not perform its intended purpose without the fans, therefore it could not “function independently” of the fans.

No one is suggesting that the cooling bed is the same “machine” as Gerdau's rolling mill, reheating furnace, rougher, or straightener simply because they all contribute to the same end goal of producing steel billets. There is no evidence that the rolling mill, reheating furnace, rougher, and straightener are permanently interconnected to each other in the way that the fans and counterweights are interconnected within the cooling bed, or that they all “act as one unit” in the way that the cooling bed components do, or that Gerdau considered all the equipment in the facility to be so physically integrated as to constitute one machine. See *supra* pp. 18-20. Moreover, each of the other machines in the facility could presumably perform the function for which it was intended—rolling, reheating, roughing, and

straightening—while the cooling bed was shut down. In contrast, the fans could not perform their intended function—cooling steel billets—without the other components of the cooling bed, including the counterweights.¹¹

The ALJ and Commissioner MacDougall take an extreme position here. Their interpretation eviscerates the LOTO standard for all but the most simple machines: separate components of a single engine would be considered separate machines for LOTO purposes—even if they serve no purpose without each other—simply because they are not directly connected to each other and one is capable of moving while the other is locked out for servicing. In essence, the LOTO standard would not apply to the most complex machines in which the hazards it was meant to address are greatest. *See* 54 Fed. Reg. at 36682 (Sept. 1, 1989) (discussing 29 C.F.R. § 1910.147(f)(4), and recognizing that “servicing of some complex equipment may take days or weeks, and that in some cases, hundreds of lockout or tagout devices may be necessary”); *Exelon Generating Corp.*, 21 BNA OSHC 1087, 1089 (No. 00-1198, 2005) (Commission recognized application of LOTO

¹¹ Nor is there any notice problem here, as Commissioner MacDougall claimed. *See* Comm’n Dec. 29. Gerdau plainly understood that servicing and maintenance on the fans could not safely be performed before the counterweights and associated drive shafts, chains and motors were locked out. Tr. 276, 308, 322-23. Gerdau therefore required Action to complete a work authorization permit, which included verification that energized equipment had been locked out, and affix a personal lock to the cooling bed’s group lockbox before servicing the fans. Dec. 4. Action agreed to this procedure, but failed to follow it. *Id.*

standard to “complex equipment . . . serviced and maintained by numerous employees extending across multiple workshifts”).

Commissioner MacDougall’s suggestion that OSHA’s machine guarding standard should apply here is similarly problematic. The machine guarding standard applies to adjacent machines in normal production mode (that is, carrying out their intended function). But the counterweights could not have been in normal production mode while the fans were shut down—they served no purpose while the fans were locked out. The Secretary illustrated this precise point in an OSHA memorandum interpreting the LOTO standard issued in 1999:

The [LOTO] standard requires that employees be protected when performing servicing or maintenance; in this case, all components and/or nearby machines or equipment posing employee hazards must be shut down and locked/tagged out to protect the authorized and affected employee(s). Conversely, the machine guarding Subpart O requirements would apply in the scenario where an authorized employee is performing servicing or maintenance activities on one machine and is exposed to machine hazards from an adjacent machine or piece of equipment *in the normal production mode of operation* (without service or maintenance activities taking place).

OSHA Memorandum on LOTO Std. (October 5, 1999) (emphasis added).

Accordingly, if nearby equipment is “in the normal production mode of operation,” the machine guarding standard applies to protect employees servicing an adjacent machine. Here, however, the counterweights were not “in the normal production mode of operation” while the fans were being serviced, nor could they have been as they served no purpose while the fans were locked out.

It is undisputed that Gerdau considered the cooling bed, including the cooling fans, to be a single machine for LOTO purposes (Tr. 154, 276, 308, 322-23); the fans were permanently bolted to the cooling bed (ALJ Dec. 2; Tr. 109-10, Exs. C-1L, C-1M); the fans were so interconnected with the other cooling bed components that “[y]ou physically have to crawl up in between the rakes in order to remove the fans” (Tr. 323); the cooling bed counterweights could not perform their intended function while the fans were locked out for servicing (Tr. 121, 154, 199); and workers servicing the fans were exposed to hazards emanating from numerous parts of the cooling bed, including the counterweights (Tr. 276, 308, 322-23). Yet under the ALJ’s interpretation, workers servicing the cooling fans would receive no group LOTO protection. For example, workers servicing the cooling fans were not required to affix their personal lockout devices to the group lockbox (to control the counterweights), even though working on the fans put workers within the swing radius of the counterweights. Tr. 412. Reversing the ALJ’s ruling is necessary to correct his legal errors and ensure that employees retain control over all components of complex machines they service.

II. Action Employees Were Performing Servicing and/or Maintenance Work on the Cooling Bed Fans at the Time of the Fatality.

The only remaining question is whether the activities the Action employees were performing at the time of the fatality constituted “servicing” under the LOTO standard. As previously discussed, the LOTO standard applies to “servicing and

maintenance.” 29 C.F.R. § 1910.147(a)(1)(i). Accordingly, even if the cooling bed is deemed a single integrated system, Action employees must have been performing servicing and/or maintenance work on the cooling bed at the time of the fatality in order for the LOTO standard to apply to their activities. The LOTO standard defines “servicing and/or maintenance” as:

Workplace activities such as constructing, installing, setting up, adjusting, *inspecting*, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the *unexpected* energization or startup of the equipment or release of hazardous energy.

29 C.F.R. § 1910.147(b) (emphasis added). The ALJ declined to decide whether the Action employees’ activities at the time of the fatality constituted “servicing and/or maintenance” under the LOTO standard, instead ruling that the standard did not apply in any case to hazards emanating from the counterweights during servicing of the fans.¹² However, if this Court agrees with the Secretary that the cooling bed was a single integrated machine for LOTO purposes, the LOTO standard required protecting the Action employees from the release of stored energy from all of the cooling bed components, including the counterweights,

¹² Although the ALJ failed to rule on whether the Action employees were “servicing” the fans at the time of the fatality, a remand is not necessary to resolve this issue because this is a legal question this Court can resolved based on undisputed facts in the record.

during servicing of the fans.¹³ This Court would therefore need to reach the question the ALJ glossed over: whether the Action employees' activities at the time of the fatality constituted "inspecting" and therefore "servicing" the cooling bed fans.

The ALJ stated that "[v]iewing a machine and equipment such as a fan *may be* considered an inspecting or setting up activity contemplated by the definition of 'servicing and/or maintenance.'" ALJ Dec. 12 (emphasis added). He found that the Action employees "were visually observing the fans to be replaced and discussing the work to be performed," and quoted Mr. Harrison's testimony that such "visual observation was an important part of replacing the fans." ALJ Dec. 11 (citing Tr. 374, 397, 416).

The LOTO standard does not define "inspecting," so it is appropriate to reference dictionary definitions to determine its meaning. *See, e.g., Pace Construction Corp.*, 14 BNA OSHC 2216, 2222, 1991 WL 12007630, at *7-8 (No. 86-0758, 1991) (examining dictionary definition of "floor"). Webster's Dictionary defines "inspect" as "to view closely in critical appraisal: look over." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 626 (1991). Visually observing the fans and

¹³ The ALJ's conclusion to the contrary, Dec. 12, was based on from his erroneous conclusion that the cooling fans and counterweights were separate machines. There is no dispute that the Action employees were exposed to the counterweights at the time of the fatality. ALJ Dec. 6.

discussing the work to be performed is consistent with the plain meaning of “inspecting.”

It is undisputed that at the time of the fatality Mr. Harrison and Mr. Lanier were in the cooling bed basement examining the cooling fans and discussing which fans needed to be replaced and how they would perform this task. Tr. 375. Mr. Harrison testified that observing the fans was an “integral part of the job” and that he and Mr. Lanier were discussing “what was going on so [Mr. Lanier] would know what to do.” Tr. 397, 416. Mr. Harrison further testified that without performing these activities they could not replace the fans. Tr. 416. As

Commission Attwood noted:

Action acknowledges in its brief on review that its employees were “view[ing] the fans they were going to replace . . . to see where the last worker had stopped working on the fan wiring so [they] could know where to start.” And the Action leadman agreed that looking at the fans to see where the last worker had left off was a “necessary” and “integral” part of the job.

Comm’n Dec. 12 (alternations in original). Commission MacDougall’s dismissive suggestion that the Action employees were “simply looking at” the fan, Comm’n Dec. 29-30, is belied by the evidence.

Visual observation of a machine that is reasonably related to hands-on servicing and maintenance constitutes “inspecting” activity within the meaning of 29 C.F.R. § 1910.147(b). This position is consistent with the dictionary definition of “inspect,” and authorities recognizing that servicing and maintenance activities

can place employees in the zone of danger even if they are not physically working on the equipment. *See Gen. Motors Corp.*, 22 BNA OSHC at 1041 (holding that LOTO standard applied to “troubleshooting” activity consisting of worker who “inspects or observes the machine in an effort to discover how to fix it”); *cf.* 54 Fed. Reg. at 36660 (“OSHA believes that the steps required by [the LOTO] standard are considered part of the servicing activity, regardless of whether they take place before or after the specific work on the equipment has been performed.”). This interpretation is reasonable and entitled to controlling deference. *See Martin*, 499 U.S. at 150-51 (citations omitted). Accordingly, the LOTO standard applied to the Action employees’ activities at the time of the fatality because they were performing servicing and/or maintenance on the cooling bed fan when the cooling bed counterweight struck and killed Mr. Lanier.

CONCLUSION

For the foregoing reasons, this Court should reverse the final order of the Commission and affirm the citation and the proposed penalty of \$7000.

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2016, a copy of the foregoing Opening 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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