

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING

COMMISSION REVIEW

Some personal identifiers have been redacted for privacy purposes

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,

Complainant,

v.

Spirit Aerosystems, Inc.,

Respondent,

OSHRC DOCKET NO. 10-1697

International Union, United Automobile,
Aerospace & Agricultural Implement Workers
of America (UAW Local 952),

Statutory Party,
29 U.S.C. §659(c).

Appearances:

Christopher Green, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

James Love, Esq., Mary Lohrke, Esq., Titus, Hillis, Reynolds, Love, Dickman & McCalmon, Tulsa, Oklahoma
For Respondent

Gary Willhite, Union Representative, UAW Local 952
For Statutory Party

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C.

§651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an investigation of a Spirit Aerosystems, Inc. ("Respondent") worksite in Tulsa, Oklahoma between March 19, 2010 and March 25, 2010. As a result of that investigation, OSHA issued a *Citation and Notification of Penalty* ("Citation") to Respondent alleging one serious violation of the Act. Respondent timely contested the Citation and a trial was conducted on July 19, 2011 in Tulsa, Oklahoma.

Following Complainant's presentation of evidence, the court granted Respondent's *Motion for Directed Verdict*.¹ (Tr. 135). Two weeks after the trial, Complainant filed a *Motion for Reconsideration of Court's Order Granting Respondent's Motion for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c)*. Respondent subsequently filed a *Brief in Opposition to Complainant's Motion for Reconsideration of Court's Order Granting Respondent's Motion for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c)*. After due consideration, Complainant's motion is DENIED and the court's decision on the merits is set out below.

Jurisdiction

Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Act. At all times relevant to this action, Respondent was an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Complaint and Answer; Joint Stipulation Statement; Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Stipulations

1. Spirit Aerosystems, Inc. ("Spirit") designs and manufactures airplane components for various aerospace customers. (*Joint Stipulation Statement*).
2. Spirit is an employer engaged in a business affecting interstate commerce, with employees, in the United States. (*Joint Stipulation Statement*).

¹ Respondent actually "moved to dismiss" the case based upon Complainant's inability to meet its burden of proof with regard to proving a violation of the cited standard, which the court interpreted as a *Motion for Directed Verdict*. (Tr. 131, 133, 135).

3. [redacted] was hired as a Maintenance Mechanic to work at the Spirit-Tulsa facility in March 2007. (*Joint Stipulation Statement*).
4. [redacted] was one of two Maintenance Mechanics assigned to work in the garage. (*Joint Stipulation Statement*).
5. [redacted] had a degree from Oklahoma State University, Okmulgee in Diesel and Heavy Equipment Mechanics and had approximately thirty (30) years experience as a mechanic prior to being hired by Spirit. (*Joint Stipulation Statement*).
6. The garage mechanics perform routine, minor servicing and maintenance, such as repairing air leaks, on Company-owned vehicles, including diesel tractors. (*Joint Stipulation Statement*).
7. Spirit-Tulsa has a policy, Safe Operating Instruction – AeroStructures Business Unit SOI-304, entitled Control of Hazardous Energy – Lockout/Tagout (hereinafter “SOI-304” or the “policy”) that was issued on October 7, 2009 and in effect on March 19, 2010. (*Joint Stipulation Statement*).
8. The policy applies to all employees at the Spirit-Tulsa facility, and purports to establish safety guidance for the control of hazardous energy to protect employees from the hazards of unexpected start up of machines and equipment during service and maintenance. (*Joint Stipulation Statement*).
9. [redacted] received annual training on SOI-304 in November 2008 and November 2009. (*Joint Stipulation Statement*).
10. [redacted] was fatally injured on March 19, 2010 accident, when he was struck by a Spirit-owned 2002 Sterling diesel tractor (hereinafter the “tractor” or “truck”). (*Joint Stipulation Statement*).
11. Prior to the March 19, 2010 accident, there had been no other accidents involving the tractor. (*Joint Stipulation Statement*).

12. Prior to the day of the accident, [redacted] had been asked by Spirit employee Jerry Dollar to repair an air leak in the air system of the tractor. (*Joint Stipulation Statement*).
13. [redacted] and the other garage mechanic, Jimmy Allen, located the leaky air valve in the tractor's air system the day before the accident on March 18, 2010. (*Joint Stipulation Statement*).
14. On March 19, 2010, [redacted] replaced the air system valve fitting. (*Joint Stipulation Statement*).
15. [redacted] was performing service and/or maintenance on the tractor when he replaced the air system valve fitting. (*Joint Stipulation Statement*).
16. [redacted] worked alone on the tractor on March 19, 2010. The other garage mechanic, Jimmy Allen, was working away from the garage at the time of the accident. (*Joint Stipulation Statement*).
17. There were no eye witnesses to the accident. (*Joint Stipulation Statement*).
18. The tractor's ignition was turned off and the truck's engine was not running while [redacted] replaced the leaky air valve on March 19, 2010. (*Joint Stipulation Statement*).
19. The digital information extracted from the electronic control module installed on the truck and the Daily Engine Usage Log demonstrate that the tractor's engine was only started once on March 19, 2010, and there was no engine idle time. In other words, the truck's engine never ran in the "neutral" position on March 19, 2010. (*Joint Stipulation Statement*).
20. After [redacted] replaced the leaky air valve, he tried to start the tractor's motor, but it would not start because the transmission selector was in the "drive" position. (*Joint Stipulation Statement*).
21. The tractor's motor will not start using the push-button starter if the transmission selector switch is in the "drive" position. The transmission selector must be in neutral, the clutch pedal

must be depressed, and the ignition switch must be “on” for the push-button starter to start the engine. (*Joint Stipulation Statement*).

22. The Daily Engine Log and digital information extraction show that the truck’s transmission was in drive the entire time the engine was running on March 19, 2010. (*Joint Stipulation Statement*).

23. [redacted] retrieved a battery jump box and presumably continued to try to start the tractor’s motor. The battery jump box cables were still attached to the external terminals of the truck at its final resting stop following the accident. (*Joint Stipulation Statement*).

24. [redacted] circumvented the starter system safety switches by placing a pry bar across the terminals on the starter relay to short-circuit the starter system and start the engine. (*Joint Stipulation Statement*).

25. A pry bar was found after the accident at the scene where the tractor was being repaired. (*Joint Stipulation Statement*).

26. Characteristic pitting from electrical arcing induced by the shorting of the starter relay was observed on the pry bar and corresponding sites on the starter relay terminals. (*Joint Stipulation Statement*).

27. The distance between the pitting marks on the pry bar matches the distance between the terminals and is consistent with placing the pry bar across the starter relay terminals. (*Joint Stipulation Statement*).

28. The short circuiting of the starter energized the starter solenoid, which engaged the starter motor which, in turn, caused the truck’s engine to turn over and start the engine. (*Joint Stipulation Statement*).

29. If the terminals of the starter relay are shorted, then the starter solenoid will engage causing the truck’s engine to start, regardless of the configuration of the ignition and safety interlock systems (the gear selector and clutch). (*Joint Stipulation Statement*).

30. As the starter turned the engine, the transmission engaged second gear, which caused the truck to move forward, overcoming the wheel chocks and rear axle spring brakes which were set at the time of the accident. (*Joint Stipulation Statement*).
31. [redacted] was standing on the ground to the front and inside the driver's side front wheel of the tractor, within the engine compartment, when he shorted the starter relay and was struck by the moving truck. (*Joint Stipulation Statement*).
32. The keys were in the ignition of the truck while [redacted] was standing on the ground within the engine compartment of the truck. (*Joint Stipulation Statement*).
33. The hood of the tractor was unlatched at the time of the accident. (*Joint Stipulation Statement*).
34. The hood being unlatched enabled [redacted] to be standing on the ground within the engine compartment at the time the engine started. (*Joint Stipulation Statement*).
35. The tractor traveled in a circular arc for approximately 290 feet while dragging [redacted] underneath the front axle on the driver's side. (*Joint Stipulation Statement*).
36. The tractor impacted the left front of a Chevrolet Impala parked next to a building. The tractor pushed the Impala into the adjacent building, which stopped the forward movement of the tractor. (*Joint Stipulation Statement*).
37. Spirit employee, Jeffrey Mauldin, who came upon the scene, turned off the truck's ignition key. (*Joint Stipulation Statement*).

Applicable Law

To establish a *prima facie* violation of a specific regulation promulgated under Section 5(a)(2) of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employer's employees had access to the cited conditions; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254 (No. 85-0531, 1991).

Discussion

At the beginning of the trial, the court heard argument and foundational testimony relating to several pre-trial motions filed by both parties in the last few days leading up to the trial. (Tr. 10-51). After due consideration of the information presented in court and the content of the parties' pleadings, the court ruled on: (1) *Respondent's Motion in Limine to Exclude Evidence Relating to OSHA Instruction/Directive Number CPL 02-00-147 and the Oregon OSHA Fact Sheet*, (2) *Respondent's Motion in Limine Precluding Admission of OSHA's Internal Investigation Reports*, (3) *Respondent's Motion in Limine to Exclude Hearsay Evidence*, (4) *Complainant's Response to Respondent's Motions in Limine*, (5) *Complainant's Objections to Respondent's Trial Exhibits and Witness Testimony*, (6) *Respondent's Brief in Support of its Proposed Expert Testimony of Jeremy Daily*, (7) *Complainant's Objections and Motion to Exclude Oral Testimony of Respondent's Expert Witnesses Jeremy Daily and Marcus Durham*, (8) *Respondent, Spirit Aerosystems, Inc.'s, Response to Complainant's Objections to Respondent's Trial Exhibits and Witness Testimony*. (Tr. 52-80). Following the court's multiple rulings and an extended recess, Complainant presented its case in chief by eliciting testimony from one witness in support of its allegations in this case: Compliance Safety and Health Officer ("CSHO") Evette McCready. (Tr. 89).

Citation 1 Item 1

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

29 C.F.R. §1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in activities covered by this section: On March 19, 2010, and times prior thereto; the employer failed to develop and document specific energy control procedures for employees who perform maintenance on vehicles. Employees are exposed to multiple hazards such as, but not limited to, being struck by vehicles, electric shock and fire. On March 19, 2010, an employee was fatally injured while replacing a fitting on a Sterling L-90 truck. The truck weighs approximately 35,000 lbs. The employee was found trapped between the wheel and the engine underneath the truck. The keys were in the ignition and the truck was still running. The employee had been dragged 286 feet underneath the truck. He was

pronounced dead at the scene.

The cited standard provides:

29 C.F.R. §1910.147(c)(4)(i): Energy control procedure. (i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

CSHO McCready was assigned to conduct an OSHA investigation at Respondent's Tulsa facility as a result of the fatality accident on March 19, 2010. (Tr. 92-93). During the course of her investigation, she requested and was provided a copy of Respondent's Lockout/Tagout Program ("LO/TO Program"). (Tr. 95-96; Ex. C-6). Upon review, CSHO McCready concluded that the program was deficient because it did not specifically address the energy isolation procedures for the Sterling semi-tractor which was involved in the fatal accident. (Tr. 106-111). However, at trial, CSHO McCready acknowledged that Respondent's Lockout/Tagout Program plainly states, with regard to servicing and maintenance, that specific vehicle maintenance manuals are incorporated into the program and should be referenced by employees. (Tr. 119-120; Ex. C-6, pp. 3-4). In addition, CSHO McCready testified that Nick Nichols, Respondent's Maintenance Manager, told her during his investigative interview that Respondent's garage mechanics had specific vehicle maintenance manuals available to them. (Tr. 123). Despite obtaining these two pieces of information during her investigation, CSHO McCready never reviewed Respondent's maintenance manual for the Sterling semi-tractor involved in the accident. (Tr. 124). Therefore, she did not know whether the maintenance manual contained adequate energy isolation procedures for the type of work being performed by Mr. [redacted] at the time of the accident or other work performed by Respondent's garage employees. (Tr. 124-125). She simply never asked for it, never reviewed it, and did not know what was in it, even by the time of the trial.

Following CSHO McCready's brief testimony, Complainant rested and Respondent immediately moved for directed verdict on the basis that Complainant wholly failed to prove that the

cited standard had been violated, as Complainant's evidence clearly established that OSHA did not know whether the energy control procedures contained in the Sterling semi-tractor maintenance manual were compliant. (Tr. 132). See F.R.C.P. 41(b); Commission Rule 67; *P&Z Company, Inc.*, 6 BNA OSHC 1189, 1977-78 CCH OSHD ¶22,413 (No. 76-431, 1977); *Morgan & Culpepper*, 9 BNA OSHC 1533, 1981 CCH OSHD ¶25,293 (No. 9850, 1981). The court, since it is bound to follow the Federal Rules of Evidence to these proceedings under Commission Rules, must apply the federal standard in ruling on motions for a directed verdict. Under this standard, a court should direct a verdict for the Respondent if the Complainant has failed to adduce substantial evidence in support of her claim. See *Business Dev. Corp. of N.C. v. United States*, 428 F.2d 451, 453 (4th Cir.), *cert. denied*, 400 U.S. 957, 91 S.Ct. 355, 27 L.Ed.2d 265 (1970).

The court has considered only the evidence and any inferences therefrom, and have done so in the light most advantageous to the nonmoving party. The court has resolved any conflicts in favor of the party resisting the motion. Based on CSHO McCready's own testimony, she obtained information from at least two sources during her investigation indicating that Respondent had specific vehicle maintenance manuals in its garage which were explicitly incorporated into Respondent's general LO/TO Program and were supposed to be referenced by Respondent's mechanics. Despite these facts, CSHO McCready neglected to review the information contained in those manuals. Since the allegation in Citation 1 Item 1 is failure of Respondent to have a LO/TO Program which specifically addressed energy isolation procedures during vehicle maintenance, and the CSHO failed to review specific vehicle maintenance manuals at Respondent's facility, and did not know whether or not the procedures contained in those manuals complied with the cited regulation, the court granted Respondent's motion. (Tr. 135). Even considering the evidence presented by Complainant in a light most favorable to Complainant, there was clearly no affirmative showing that Respondent violated the cited standard. The burden to prove all of the elements required to establish a *prima facie* violation of the Act, including failure to comply with the terms of the cited standard, fall squarely on Complainant.

Ormet Corporation, supra.

ORDER

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

/s/ _____
PATRICK B. AUGUSTINE
Judge, OSHRC

Date: November 7, 2011
Denver, Colorado