United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. SPIRIT AEROSYSTEMS, INC., Respondent, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW LOCAL 952), Authorized Employee Representative.	OSHRC Docket No. 10-1697

ON BRIEFS:

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For International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW Local 952), Authorized Employee Representative

DECISION AND REMAND

Before: ROGERS, Chairman; ATTWOOD and MACDOUGALL, Commissioners.

BY THE COMMISSION:

In response to an employee fatality, the Occupational Safety and Health Administration inspected a facility in Tulsa, Oklahoma, owned and operated by Spirit AeroSystems, Inc. OSHA

issued Spirit a serious citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, alleging that the company violated a provision of the general industry lockout/tagout ("LOTO") standard, and proposing a penalty of $7,000. The cited provision states that "[p]rocedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section."[1] 29 C.F.R. § 1910.147(c)(4)(i).

During the hearing and at the conclusion of the Secretary's case-in-chief, Administrative Law Judge Patrick B. Augustine granted Spirit's motion for judgment on partial findings, and accordingly vacated the citation. Because we find that the Secretary presented a prima facie case of noncompliance with the cited standard, we set aside the judge's decision and remand the case to him for further proceedings.

BACKGROUND

Spirit designs and manufactures airplane components, and employs mechanics who perform routine minor servicing and maintenance on company-owned vehicles. On March 19, 2010, one of these mechanics replaced an "air system valve fitting" on a Spirit-owned Sterling diesel truck. After replacing the air valve, the mechanic tried to start the engine, but it would not start because the transmission selector was in the drive position, and starter-system safety switches prevent the engine from starting unless the selector is in neutral. While standing on the ground within the engine compartment, positioned forward of the driver's side front wheel of the truck, the mechanic then attempted to start the engine by short-circuiting the starter relay, which circumvented the safety switches. When he shorted the relay, the truck moved and struck him, resulting in his death.

In the citation, the Secretary alleges that Spirit failed to "develop and document specific energy control procedures for employees who perform maintenance on vehicles." At the hearing, the only witness the Secretary called during his case-in-chief was the compliance officer. After the Secretary rested, Spirit submitted a written motion to the judge for judgment

[1] The LOTO standard "covers 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[,]" and serves to "establish[] minimum performance requirements for the control of such hazardous energy." 29 C.F.R. § 1910.147(a)(1)(i) (emphasis omitted); Lockout/Tagout Final Rule, 54 Fed. Reg. 36,644, 36,687 (Sept. 1, 1989).

on partial findings under Federal Rule of Civil Procedure 52(c).[2] In its motion, Spirit argued that the Secretary had failed to establish a violation of § 1910.147(c)(4)(i) because he did not show that Spirit's energy control procedure was incomplete. After brief oral argument from each party, the judge ruled from the bench, granting Spirit's motion and vacating the citation. The Secretary subsequently filed a motion for reconsideration with the judge, and Spirit filed a brief in opposition. On November 7, 2011, the judge issued a written decision, denying the Secretary's motion and confirming his dismissal of the citation. On review, the Secretary contends that he established a prima facie showing of noncompliance sufficient to survive Spirit's Rule 52(c) motion, and that the judge's decision vacating the citation was accordingly in error.

DISCUSSION

The Commission has held that "[u]nless . . . evidence clearly preponderates against complainant, the Judge must either deny [a Rule 52] motion or defer disposition until the conclusion of respondent's case." *Morgan & Culpepper, Inc.*, 5 BNA OSHC 1123, 1124-25, 1977-78 CCH OSHD ¶ 21,605, p. 25,929 (No. 9850, 1977), *aff'd in relevant part*, 676 F.2d 1065 (5th Cir. 1982). *See also Harrington Constr. Corp.*, 4 BNA OSHC 1471, 1473, 1976-77 CCH OSHD ¶ 20,913, p. 25,110 (No. 9809, 1976) ("Except in unusually short, clear, and

[2] Rule 52(c) provides that:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by rule 52(a).

Although Spirit's counsel identified the motion made at the hearing as a motion to dismiss, the judge characterized it as a motion for directed verdict. In subsequent pleadings, however, both parties refer to Spirit's motion as a request for judgment on partial findings under Rule 52(c), but the judge cited Federal Rule of Civil Procedure 41(b) in his decision. Rule 52(c) governs motions to dismiss at a bench trial and was adopted in 1991 to supersede Rule 41(b). *See* FED. R. CIV. P. 52 advisory committee's notes (1991 Amendment). Thus, the case law developed under Rule 41(b) is now applicable under Rule 52(c). 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2573.1 at 253 (3d ed. 2008).

uncomplicated cases (as where the Secretary's case is clearly inadequate) the Judge should carry the [Rule 52(c)] motion with the case . . . , await a renewed motion to dismiss and then enter a final order at the close of all the evidence.") (citation omitted). Here, the judge granted Spirit's Rule 52(c) motion because he found that: (1) certain vehicle maintenance manuals were incorporated into Spirit's written energy control procedure; and (2) the CO failed to review the manuals, so she "did not know whether or not the procedures contained in those manuals complied with the cited regulation."

Spirit's written energy control program, "SOI-304," by its terms applies to "all organizations" and "all programs" at Spirit's Tulsa, Oklahoma facility. Contained within the energy control program is a provision stating as follows: "A Machine Specific Energy Control Sheet shall be written, reviewed and maintained by persons with knowledge of the process for *each machine, piece of equipment, and building system* as well as knowledge of the principles of Lockout/Tagout." SOI-304, Sections 11.0, 11.1 (emphasis added). Another provision of the program, titled "Procedure," provides guidance to employees "performing servicing and maintenance or troubleshooting activities on [energized] equipment." SOI-304, Section 4.0. It includes a directive to "Review Machine Specific Energy Control Sheet and identify all energy sources." SOI-304, Section 4.3.5, Step 4. However, despite SOI-304's reliance on machine specific energy control sheets as the centerpiece of Spirit's LOTO procedure, it is undisputed that no documents explicitly identified as machine specific energy control sheets existed for service and maintenance of Spirit's vehicles, including the Sterling truck. Spirit points, instead, to the manufacturers' vehicle maintenance manuals for its trucks, contending that the manuals are the required energy control sheets. Spirit claims that these manuals are incorporated by reference into SOI-304 and that they, in conjunction with the rest of SOI-304, constitute Spirit's energy control procedure for vehicle maintenance. The portion of SOI-304 that Spirit claims incorporates the vehicle maintenance manuals is a "Note" appended to the provision requiring review of the machine specific energy control sheets. It states as follows:

> 4.3 Steps for Lockout/Tagout of All Systems
>
> * * *
>
> 4.3.5 Step 4 – Review Machine Specific Energy Control Sheet and identify all energy sources.

> ***Note*** Refer to maintenance manual or contact supervision if unsure of energy routing, how to attain zero energy state or moving part isolation.

The judge found—without explanation—that SOI-304 "explicitly incorporated" the manuals.[3] On review, the Secretary argues that this was error because the Note—the only part of Spirit's energy control procedure that refers to the manuals—does not actually require Spirit's employees to consult them. According to the Secretary, even if it is assumed that LOTO-compliant procedures for Spirit's vehicles can be found in these manuals,[4] SOI-304's direction that employees "[r]efer to maintenance manual *or* contact supervision *if* unsure" renders the procedure non-mandatory. (Emphasis added.) The Secretary argues that because the language is non-mandatory, it is insufficient under the LOTO standard to incorporate the manuals, and he therefore made a prima facie showing of noncompliance.[5]

We agree with the Secretary that SOI-304 does not incorporate the vehicle maintenance manuals. The wording of SOI-304, Section 4.3.5, Step 4 is clear, and *requires* only two things: that employees review machine specific energy control sheets, and that they identify all energy

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[3] When the judge asked the CO if she was aware that specific vehicle maintenance manuals were incorporated into Spirit's LOTO procedure, she responded: "I see that it says that in—in this program, yes" (referring to SOI-304). Spirit argues, as it did before the judge, that this testimony constituted an "admission" by the CO that the manuals in question were incorporated into Spirit's procedure. We find that the CO simply acknowledged, in response to the judge's question, that she could "see" that the text of SOI-304 references the manuals—but that she was not offering an opinion as to the text's legal significance. Even if the CO's testimony were construed as agreeing that the manuals were incorporated, "the Commission is not bound by the representations or interpretations of OSHA Compliance Officers." *Kaspar Wire Works, Inc.*, 268 F.3d 1123, 1128 (D.C. Cir. 2001); *see also L.R. Wilson & Sons, Inc. v. Donovan*, 685 F.2d 664, 676 (D.C. Cir. 1982); *W. Steel Mfg. Co.*, 4 BNA OSHC 1640, 1643, 1976-77 CCH OSHD ¶ 21,054, pp. 25,341-42 (No. 3528, 1976).

[4] Only certain portions of the manuals are in evidence.

[5] In her dissent, our colleague appears to raise a question regarding whether the manual-incorporation issue requires a legal or factual determination. Whether and to what extent material has been incorporated into a host document is a question of law, and therefore constitutes a legal determination about which the CO was incapable of testifying. *See Advanced Display Systems, Inc. v. Kent State Univ.*, 212 F.3d 1272, 1283 (Fed. Cir. 2000). The only "fact" in this case that bears on whether the manuals are part of Spirit's LOTO procedure is the wording of SOI-304's incorporation provision. But there is no dispute as to its text. What is in dispute is the legal effect of its wording, i.e., whether it is legally sufficient to incorporate the manuals.

sources. Yet, as indicated above, it is undisputed that nothing explicitly identified as a "Machine Specific Energy Control Sheet" existed for Spirit's vehicles. As for the advisory "Note" to Step 4, suggesting reference to "maintenance manuals" or "contact[ing] supervision" if unsure of certain aspects of LOTO, it is neither specific to vehicles (which, as the dissent concedes, are not mentioned), nor does it purport to supplant the requirement to review machine specific energy control sheets. Indeed, treating the words "machine specific energy control sheets" in Step 4 and "maintenance manuals" in the Note as if they were interchangeable would overlook the fact that each reference, on its face, is to a separate document. In addition, equating "manuals" with "machine specific energy control sheets" ignores the "contact supervision" option included in the same Note. Clearly that option has nothing to do with manuals and cannot be equated with "machine specific energy control sheets." In these circumstances, based on the plain wording of SOI-304, Section 4.3.5, Step 4 *in its entirety*, Spirit's contention that its maintenance manuals constituted machine specific energy control sheets is untenable.

However, even assuming the vehicle manuals could be considered energy control sheets, we agree with the Secretary that the advisory Note in which the manuals are mentioned is discretionary and, therefore, use of the manuals would be impermissibly optional. As the Commission has already determined, work rules "that give too much discretion in identifying unsafe conditions [are] too general to be effective." *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1021, 1995-97 CCH OSHD ¶ 31,422, p. 44, 416 (No. 94-200, 1997). That OSHA particularly intended to preclude reliance on such discretion in the LOTO standard is evident both from the language of the standard and its preamble. The cited provision states that energy control procedures must not only be developed and documented—they must be utilized. 29 C.F.R. § 1910.147(c)(4)(i). In the preamble to the standard, OSHA "specifie[d] that the employer ensure that the control measures are used by employees whenever they might be exposed to injury from the unexpected energization or start up of machines or equipment or the release of stored energy." Lockout/Tagout Final Rule, 54 Fed. Reg. at 36,670. As OSHA explained:

> The development and documentation of energy control procedures is of little use unless the employer requires all authorized employees to utilize *the procedures that have been provided* whenever they are servicing or maintaining machines or equipment. . . . [T]he employer [must] ensure that hazardous

> energy control procedures have been implemented . . . and are being complied with by the employees.

Id. at 36,667 (emphasis added).

Allowing an employee the discretion to either forego consulting the manuals, or to consult a supervisor in lieu of the manuals, renders whatever procedures the manuals contain non-mandatory, which contravenes the purpose of the LOTO standard. In addition, construing the cited LOTO provision to allow employees such discretion would effectively nullify the LOTO standard's additional requirement to "*specifically* outline the . . . techniques to be utilized for the control of hazardous energy," since such specificity would be pointless if procedures are not mandatory. 29 C.F.R. § 1910.147(c)(4)(ii) (emphasis added).[6] *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents*, 508 U.S. 439, 454-55 (1993) ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' ") (citations omitted). *See also Custom Built Marine Constr., Inc.*, 23 BNA OSHC 2237, 2239, 2013 CCH OSHD ¶ 33,258, p. 56,311 (No. 11-0977, 2012) (citing *Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986)) ("[R]egulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section") (internal quotation marks and citation omitted); *E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1580-81, 2011 CCH OSHD ¶ 33,150, p. 55,335 (No. 94-1979, 2009) (interpreting cited provision in context of entire

[6] The dissent takes issue with our determination that the discretion afforded under Spirit's LOTO procedure undermines Spirit's contention that the manuals are incorporated. First, our colleague claims that the Secretary did not challenge the incorporation language on this basis below, and thus this issue is not before us on review. But this is not so. At the hearing, in his oral argument opposing Spirit's Rule 52(c) motion, the Secretary noted that the incorporation language was defective because it permitted employees to "refer to the maintenance manual or contact supervision." Subsequently, in his motion to the judge for reconsideration, the Secretary specifically argued that Spirit's procedures are deficient because the incorporation provision is "[not] mandatory. . . . Instead it is ambiguous and discretionary." Second, our colleague states that the Secretary cited Spirit only for failing to "develop and document" LOTO procedures, whereas our rationale implicates an additional, uncited requirement that they be "utilized." However, the citation is not based on a failure to utilize *compliant* LOTO procedures—it is based on the fact that the procedures themselves are defective and, therefore, noncompliant. Proof of utilization of SOI-304 would not have abated the cited condition because the employees would have been permitted to exercise discretion, and it is that discretion which, as the Secretary has alleged, renders SOI-304 noncompliant.

standard and its overall purpose); *accord* 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:5 (7th ed. 2014) ("A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole. *Thus it is not proper to confine interpretation to the one section to be construed*.") (emphasis added) (footnotes omitted). And in the citation at issue here, the Secretary explicitly alleged that Spirit "failed to develop and document *specific* energy control procedures," and elicited testimony that Spirit's procedures were deficient due to a lack of specificity in a number of respects. (Emphasis added.)[7] In these circumstances, we find that based on the language of SOI-304, Section 4.3.5, Step 4, the manuals were not incorporated into Spirit's energy control procedure.

Absent the manuals' incorporation, we find that the Secretary has made out a prima facie case that SOI-304 lacks specific energy control procedures for vehicle maintenance. Although we recognize that the preamble to the LOTO standard provides that a single procedure "can apply to a group of similar machines, types of energy[,] and tasks" if it satisfactorily addresses the hazards and steps to be taken, Lockout/Tagout Final Rule, 54 Fed. Reg. at 36,670, the standard also "requires the lockout procedures for each type of machine to be specifically defined, and [where] there are different types of machines at the plant, [an employer] must have

[7] In her dissent, our colleague appears to imply that the Secretary cited Spirit under the wrong provision of the LOTO standard. She asserts that had the Secretary intended to fault Spirit for a lack of specificity in its LOTO procedure, he should have cited § 1910.147(c)(4)(ii), which prescribes the degree of specificity required under the LOTO standard. The dissent also claims that had the Secretary done so, the cited provision, § 1910.147(c)(4)(i), would have been preempted. *See* 29 C.F.R. § 1910.5(c). But this is the dissent's argument, not Spirit's. Spirit never claimed that the Secretary cited the wrong standard and it did not make any preemption argument. Under Commission precedent, preemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer. 29 C.F.R. § 1910.5(c)(1); *see* Commission Rules 34(b)(3) and (4), 29 C.F.R. § 2200.34(b)(3) and (4); *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1194 (10th Cir. 2004); *Vicon Corp.*, 10 BNA OSHC 1153, 1157, 1981 CCH OSHD ¶ 25,749, p. 32,159 (No. 78-2923, 1981) (describing a claim that a general standard was preempted by a more specific standard as an affirmative defense). Here, despite the Secretary's reference in the citation to a lack of specificity and similar testimony elicited at the hearing, Spirit neither raised this issue as a defense in its answer nor sought to amend its answer to add it. Therefore, we find that the argument was waived. *See Gen'l Motors Corp., Chevrolet Motor Div.*, 10 BNA OSHC 1293, 1296-97, 1982 CCH OSHD ¶ 25,872, p. 32,361 (No. 76-5344, 1982).

more than one lockout procedure." *Drexel Chem. Co.*, 17 BNA OSHC 1908, 1913, 1995-97 CCH OSHD ¶ 31,260, p. 43,876 (No. 94-1460, 1997). Because SOI-304 does not contain any procedures specific to vehicle maintenance, the Secretary has met his prima facie burden to show that it does not comply with the cited standard with respect to the factual circumstances at issue in this case.

In light of the foregoing, we conclude that the Secretary presented a prima facie case of noncompliance with § 1910.147(c)(4)(i), and that the judge therefore erred in granting Spirit's Rule 52(c) motion and vacating the citation. Accordingly, we reverse the judge's decision vacating the citation, order the citation reinstated, and remand this case for further proceedings to allow Spirit an opportunity to present evidence on its behalf, and the Secretary an opportunity for rebuttal.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: December 24, 2014

MACDOUGALL, Commissioner, dissenting.

I respectfully dissent from my colleagues' decision to remand this case to Judge Augustine because I am in agreement with his decision, and I would affirm it. The issue in this citation on review before the Commission is whether the Secretary failed to prove that Spirit did not develop or document energy control procedures in violation of § 1910.147(c)(4)(i).[1] It is undisputed that Spirit's primary written energy control program document, "SOI-304," while it does not address the Sterling semi-tractor truck by name, states that employees should "[r]efer to maintenance manual or contact supervision if unsure of energy routing, how to attain zero energy state or moving part isolation."[2] It is also undisputed that Spirit maintained a Sterling-specific vehicle maintenance manual, which was readily available for reference by the garage mechanics. Lastly, it is undisputed that OSHA's compliance officer never reviewed any vehicle maintenance manuals, including the Sterling manual; thus, she did not know whether the manual contained adequate energy isolation procedures for the type of work at issue in the citation. Therefore, the correctness of the judge's judgment on partial findings depends upon whether the Sterling-specific maintenance manual should be construed as part of Spirit's LOTO program. I find that the vehicle maintenance manual is part of Spirit's LOTO program. Further, because the Secretary conceded that the compliance officer never reviewed the Sterling-specific manual, the Secretary has failed to prove that Spirit failed to comply with § 1910.147(c)(4)(i) as cited.

A judgment on partial findings pursuant to Federal Rule of Civil Procedure 52(c) is properly entered where the judge determines that the Secretary "has failed to offer persuasive evidence regarding the necessary elements of his case."[3] *CMS Software Design Sys., Inc. v. Info*

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[1] Section 1910.147(c)(4)(i) provides that "[p]rocedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section." The citation alleges that "[t]he employer failed to develop and document specific energy control procedures" with respect to the Sterling vehicle. Hence, as discussed further below, the Secretary did not cite Spirit for an alleged failure of utilization of energy control procedures.

[2] Portions of the Sterling maintenance manual and one other related maintenance manual were admitted into evidence at the hearing. However, it is the Sterling-specific maintenance manual that is specifically at issue on review, as this is the vehicle that was involved in the accident and fatality, and the manual relied upon by the judge in vacating the citation.

[3] The parties have stipulated that a motion for judgment on partial findings is governed by the same standard as a motion for involuntary dismissal under Rule 41(b). *See* majority's discussion

Designs, Inc., 785 F.2d 1246, 1248 (5th Cir. 1986). Under Rule 52(c), "the [j]udge, as trier of fact, is not subject to the same constraints imposed upon the [j]udge in a jury trial who must under Rule 50 determine whether or not to deny the jury its role as the finder of fact." *Morgan & Culpepper, Inc.*, 5 BNA OSHC 1123, 1124, 1977-78 CCH OSHD ¶ 21,605, p. 25,929 (No. 9850, 1977). Rather, "a judge may evaluate the evidence with the same scrutiny as if rendering a judgment at the conclusion of the proceedings." *Id.* The judge may even resolve disputed issues of fact. *DuPont v. S. Nat'l Bank of Houston*, 771 F.2d 874, 879 (5th Cir. 1985). In comparison to a motion for summary judgment, the judge is not required to view the evidence in the light most favorable to the Secretary, and he "is not required to deny the motion even if the evidence, when viewed in a light most favorable to a plaintiff, establishes a prima facie case."[4] *Morgan & Culpepper, Inc.*, 5 BNA OSHC at 1124, 1977-78 CCH OSHD at p. 25,929.

The judge's decision to grant Spirit's motion for judgment on partial findings was entirely proper. Upon Spirit's motion, the judge observed that the vehicle maintenance manuals were *expressly* referenced in SOI-304, and the Secretary never offered any evidence (far less than a preponderance of the evidence) to support a contrary conclusion—in other words, that the vehicle maintenance manuals should be deemed *excluded* from the overall LOTO program. Because the compliance officer conceded that she failed to review the maintenance manuals, including the Sterling manual, the judge concluded the Secretary did not satisfy his burden of proving the LOTO program as a whole was deficient.

It is fundamental that the Secretary bears the burden of proving all elements of the citation, including showing that the cited standard was violated. *Ormet Corporation*, 14 BNA OSHC 2134, 1991-93 CCH OSHD ¶ 29,254, p. 39,199 (No. 85-0531, 1991) (to establish a prima facie violation of a specific regulation, the Secretary must prove by a preponderance of the evidence that the terms of the standard were violated). Here, this means the Secretary must show that procedures for the control of potentially hazardous energy were not "developed" or "documented" in violation of § 1910.147(c)(4)(i). *See Gen. Motors Corp.*, 22 BNA OSHC 1019,

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of Rule 52(c), in footnote 2 *supra*, which governs motions to dismiss at a bench trial and was adopted in 1991 to supersede Rule 41(b).

[4] Even so, in granting the motion for judgment on partial findings here, the judge stated that he had considered the evidence and any inference therefrom in the light most favorable to the non-moving party.

1046, 2004-09 CCH OSHD ¶ 32,928, p. 53,625 (No. 91-2834, 2007) (" 'The key . . . [is] the language of the statute or the specific standard or regulation cited.' ") (internal citation omitted).

My colleagues posit a smorgasbord of alternative possibilities as to why the judge should be reversed: (1) the Sterling vehicle maintenance manual was not incorporated into Spirit's LOTO program; (2) Spirit's LOTO program affords its employees too much discretion; (3) Spirit's LOTO program does not require its employees to utilize the vehicle maintenance manuals; and (4) Spirit's LOTO program lacks the required specificity. The fundamental error the majority opinion commits in reversing the judge's disposition of the citation is that it would amend the substantive requirements of 29 C.F.R. § 1910.147(c)(4)(i). I cannot join in this unwarranted determination.

Whether Spirit's LOTO Program Incorporated the Vehicle Maintenance Manuals

At the outset, the majority ignores that § 1910.147(c)(4)(i) is a performance-based standard. As such, it allows the employer to determine the procedures necessary to provide effective LOTO protection for its employees. In developing a LOTO program an employer may use "*[a]ny method of identification* . . . that enables an authorized employee to determine which energy control instructions . . . apply to a particular machine or piece of equipment . . . ." OSHA Directive CPL-02-00-147, *The Control of Hazardous Energy – Enforcement Policy and Inspection Procedures,* p. 3-42 (Feb. 11, 2008) ("LOTO Directive") (emphasis added). The preamble to the LOTO standard expressly states: "The Final Rule . . . provides flexibility for each employer to develop a program and procedure which meets the needs of the particular workplace and the particular types of machines and equipment being maintained or serviced." Lockout/Tagout Final Rule, 54 Fed. Reg. 36,644, 36,659 (Sept. 1, 1989). If the Secretary contends that Spirit's reliance on the SOI-304 cross-reference to incorporate vehicle maintenance manuals failed to comport with this broad, performance-based standard, he must offer a preponderance of the evidence to support his position.

The Secretary failed to offer persuasive evidence that SOI-304's cross-reference was insufficient or to otherwise show that the Sterling-specific manual should be deemed excluded from Spirit's overall LOTO program. To the contrary, as the judge found, the uncontroverted evidence showed that the manuals were expressly cross-referenced in SOI-304 and that they were readily available to the garage mechanics. The judge correctly concluded that the plain terms of the cross-reference in SOI-304 were sufficient to render the Sterling maintenance

manual part of Spirit's overall LOTO program, especially in the absence of any evidence to the contrary. In light of the compliance officer's concession that she *never even reviewed* the Sterling maintenance manual, the Secretary did not bear his burden of proving that Spirit failed to develop or document procedures for controlling hazardous energy associated with the Sterling truck in violation of § 1910.147(c)(4)(i).

While the Secretary attempts to shift the burden of persuasion to Spirit regarding the inclusion (or exclusion) of the vehicle maintenance manuals, the judge correctly noted that the burden of proof regarding any citation lies with the Secretary, rather than the Respondent. *E.g., Crown Cork & Seal USA, Inc.*, 23 BNA OSHC 1674, 1681, 2011 CCH OSHD ¶ 33,155, p. 55,421 (No. 09-0973, 2011). Thus, if the Secretary contends the vehicle maintenance manuals are not part of Spirit's LOTO program, the Secretary must show this by a preponderance of the evidence.

The Secretary also contends the judge erred by relying on a rule of law, rather than a finding of fact, in concluding that the vehicle maintenance manuals are part of the LOTO program. Here, the Secretary's position is plainly in error. The judge based his decision on findings of fact, stating that:

> The court has considered only the evidence and any inferences therefrom, and have [sic] 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 . . . 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.

Indeed, even before opening arguments, the judge stated that his decision whether to include the vehicle maintenance manuals would turn on a question of fact, not law: "[Witnesses] will not testify as to any conclusion that the Respondent's policy was in compliance with the standard as that is legally based and is within my purview. [However] you can tell me that the Standard Operating Procedure is this *and that the Standard Operating Procedure links it to the manual* . . . .") (emphasis added).

On occasion, the Secretary appears to lose sight of his own argument, seemingly conceding that the judge's decision was based on facts. *E.g.*, Sec'y Br. p. 11 (characterizing judge's decision as a "finding" which was "not supported by a clear preponderance of the evidence"). The Secretary even stipulates that this matter is governed by Rule 52(c) which, by

definition, applies to judgments rendered on partial findings of *fact*.[5] *See* FED. R. CIV. P. 52 advisory committee's notes regarding 1991 Amendment (Rule 52(c) "authorizes the court to enter judgment at any time that it can appropriately make a dispositive finding of fact on the evidence."). Whatever the Secretary's position here is, the judge's decision was properly based on a factual finding and any argument to the contrary is in error.

Morgan & Culpepper, 5 BNA OSHC 1123, 1977-78 CCH OSHD ¶ 21,605 (No. 9850, 1977), which is relied upon by the majority, is Commission precedent that supports my determination to affirm the judge's ruling. In *Morgan & Culpepper*, the respondent was cited under a standard requiring portable ladders to be "tied, blocked, or otherwise secured" while in use. The compliance officer testified that the ladder in question was not tied or blocked, but she conceded that she had not checked whether the ladder was *otherwise secured*, as would have put the respondent in compliance with the cited standard. As a consequence, the Commission affirmed the judge's conclusion that "complainant has failed to establish by a clear preponderance of the evidence that respondent had not complied with the cited standard." *Id.* at 1125, 1977-78 CCH OSHD at p. 25,929. Just as the compliance officer in *Morgan & Culpepper* did not examine the stability of the ladder, the compliance officer here did not examine the sufficiency of the Sterling maintenance manual. Thus, just as the compliance officer in *Morgan & Culpepper* could not testify as to the stability of the ladder, the compliance officer here could not testify as to the sufficiency of the manual. As in *Morgan & Culpepper*, the Secretary failed to make a prima facie showing that the cited standard was violated. I agree that the judge properly vacated the citation on the ground that the Secretary failed to adduce substantial evidence in support of his claim that the vehicle maintenance manuals should be excluded from Spirit's LOTO program.

Whether Spirit's LOTO Program Affords Employees Too Much Discretion

The Secretary argues that the judge should have excluded the vehicle maintenance manuals because the language of the SOI-304 cross-reference vests employees with discretion to decide whether or not to consult the vehicle maintenance manuals, rather than requiring them to

[5] The Secretary's position controverts my colleagues' conclusion that this issue depends upon a question of law, rather than a question of fact.

do so. In support of his argument, the Secretary relies on a well-known principle of contract law: an extrinsic document should only be incorporated into a contract if the parties have clearly and specifically agreed to do so. However, to begin with, the Secretary never sought to exclude the Sterling maintenance manual based on a principle of contract construction; in any event, excluding it on such a basis is improper here. This is not a case involving the scope of an agreement between contracting parties, and the Secretary's reliance upon a rule of contract construction is misplaced.[6] Rather, this case involves an employer's use of cross-references to notify employees about the existence of machine-specific safety information. As already noted above, OSHA recognizes that an employer's LOTO program may take any form which "enables an authorized employee to determine which energy control instructions . . . apply to a particular machine or piece of equipment . . . ." LOTO Directive, at 3-42; *see also* Lockout/Tagout Final Rule, 54 Fed. Reg. at 36,659 ("The Final Rule . . . provides flexibility for each employer to develop a program and procedure which meets the needs of the particular workplace and the particular types of machines and equipment being maintained or serviced.").

Even if rules of contract construction did apply here, Spirit would still prevail. "Under general principles of contract law, a contract may incorporate another document by making clear reference to it and describing it in such terms that its identity may be ascertained beyond doubt." *New Moon Shipping Co., LTD v. MAN B & W Diesel, AG*, 121 F.3d 24, 30 (2d Cir. 1997). Here, there can be no doubt that the SOI-304 cross-reference permits a reader to identify the pertinent vehicle maintenance manuals referenced therein. *See* Restatement (Second) of Contracts § 132 reporter's note (1981) (noting that Restatement has been "revised . . . to state the doctrine which has gained increasing support over the years, that a sufficient connection between the papers is established simply by a reference in them to the same subject matter . . . .") (internal quotation

[6] My colleagues appear to agree that the Secretary's cited contract cases, which are not Commission precedent, are inapplicable, and they disregard those cases in favor of *Advanced Display Systems, Inc. v. Kent State Univ.*, 212 F.3d 1272, 1283 (Fed. Cir. 2000) (discussing patent law jurisprudence of anticipation, a question of law, versus incorporation by reference, a question of law). However, I conclude that reliance upon *Advanced Display Systems* and patent law jurisprudence is also misplaced. Here, Spirit's written energy control procedure is neither a contract nor a patent application but, rather, a unilateral and internal statement of an employer's policies; as such, patent case law is equally inapplicable.

marks omitted). There is no basis to conclude that the vehicle maintenance manuals should be deemed excluded based on rules of contract construction.

Moreover, while the Secretary cited Spirit under § 1910.147(c)(4)(i), any issue taken with regard to the degree of discretion afforded to employees in consulting vehicle maintenance manuals relates to a different standard—29 C.F.R. § 1910.147(c)(4)(ii).[7] *E.g.*, *Gen. Motors Corp.*, 22 BNA OSHC at 1026, 2004-09 CCH OSHD at p. 53,608. It is notable that the term "discretion" does not appear in the citation. The Secretary did not offer any witness testimony at the hearing regarding the degree of discretion afforded to Spirit employees by SOI-304. Further, the Secretary did not challenge the language of the SOI-304 cross-reference or the degree of discretion afforded to employees, in opposing Spirit's motion for judgment on partial findings. In fact, over the course of the entire hearing, the Secretary did not once attempt to rely upon the SOI-304 cross-reference or the degree of discretion afforded to employees. Instead, the Secretary's case focused solely upon the question of whether the overall LOTO program contained procedures that were specific to the Sterling truck.

In addition, the degree of discretion which may be afforded to employees under a compliant LOTO program amounts to a question of fact, which the Secretary failed to develop at the hearing. *Id.* ("the amount of detail required [in a LOTO program] . . . depend[s] on the complexity of the equipment and the control measures to be utilized") (internal quotations omitted). Therefore, in my opinion, questions regarding the language of the SOI-304 cross-reference, including the degree of discretion afforded to employees, are not properly before the Commission. *See* Commission Rule 92(c), 29 C.F.R. § 2200.92(c) ("The Commission will ordinarily not review issues that the [j]udge did not have the opportunity to pass upon."); *Altor,*

[7] The Secretary has never sought leave to amend its citation to assert a violation of 29 C.F.R. § 1910.147(c)(4)(ii). *See, e.g., Cleveland Wrecking Co.*, 24 BNA OSHC 1103, 1107 n.2, 2013 CCH OSHD ¶ 33,277, p. 56,448 n.2 (No. 07-0437, 2013) (issue abandoned where not raised on review). Regardless, the issue was not tried by consent, and it would be prejudicial to Spirit to permit any amendment at this late stage. *See Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1387-88, 1995-97 CCH OSHD ¶ 30,909, p. 43,031 (No. 92-262, 1995) (citations omitted) (applying Rule 15(b)(2) of the Federal Rules of Civil Procedure and stating consent to try an unpleaded issue may be express or implied, but it occurs only when the parties squarely recognized that they were trying an issue not raised in the pleadings).

Inc., 23 BNA OSHC 1458, 1461 n.7, 2011 CCH OSHD ¶ 33,135, p. 55,132 n.7 (No. 99-0958, 2011) ("[W]e see no basis to address that issue given the Secretary's failure to preserve her objections before either of the judges that were assigned to this matter below."), *aff'd*, 498 F. App'x 145 (3d Cir. 2012) (unpublished). I therefore conclude that the Secretary's discretion argument is insufficient to avoid vacation of the citation.

Whether Spirit's LOTO Program Fails Because it Does not Require Employees to Utilize the Vehicle Maintenance Manuals

The majority raises a more nuanced argument relating to the question of discretion: the majority argues that the degree of discretion afforded by SOI-304 should result in a finding that Spirit failed to *utilize* (rather than *develop* or *document*) energy control procedures as required by 29 C.F.R. § 1910.147(c)(4)(i). The majority's argument is incredible given that the Secretary never once suggested that the citation to Spirit implicated the question of utilization. Instead, the citation expressly alleged that "[t]he employer failed to *develop and document* specific energy control procedures for employees who perform work on vehicles . . . One feasible means of abatement would have been to *develop and document* specific energy control procedures . . . ." (Emphasis added). The majority's attempt to cram a square peg in a round hole illustrates the simple and undeniable fact that, viewed in the proper light, the Secretary's offer of proof is insufficient to prove a failure to comply with the terms of the standard as cited.

Whether Spirit's LOTO Program Lacks the Required Specificity

In a fallback argument, the Secretary next argues that even if the Sterling vehicle maintenance manual is deemed part of the overall LOTO program, the program is deficient because it lacks specificity.[8] Here, the Secretary falls short based on the same reasoning already discussed above: the Secretary's only witness conceded that she never reviewed the Sterling-specific manual and, thus, the Secretary simply cannot challenge the sufficiency of the overall LOTO program. Moreover, the Secretary's specificity argument falls under the well-established

[8] I note that this is a fallback argument because the Secretary did not contend in its citation that the LOTO procedures for the Sterling vehicle are too general or, in other words, non-specific; rather, the Secretary argued that machine-specific procedures for the Sterling vehicle did not exist at all. Any suggestion now that the existing Sterling procedures are *non-specific* is essentially a concession that Sterling-specific procedures do, in fact, exist and that the original citation lacks merit.

principle of statutory construction that the specific takes precedence over the general. *See* 29 C.F.R. § 1910.5(c). That is, "[i]f a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process." *Id.* In determining whether a specific standard preempts a general one, we are guided by the principle that the standards should be applied so as to effectuate the Secretary's rulemaking intent. *See Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1444, 1983-84 CCH OSHD ¶ 26,552, p. 33,920–21 (No. 80–3203, 1983), *aff'd,* 725 F.2d 1237 (9th Cir. 1984).

Any allegation that Spirit's LOTO program lacked specificity requires citing a violation of § 1910.147(c)(4)(ii), which preempts § 1910.147(c)(4)(i). Section 1910.147(c)(4)(ii) requires an employer to "clearly and specifically" outline the methods to be used in controlling hazardous energy, including "specific" statements of intent, procedural steps for shut down, procedural steps for locking out, and requirements for testing the effectiveness of the energy control measures used. According to the preamble to the LOTO standard final rule, "[o]vergeneralization can result in a document which has little or no utility to the employee who must follow the procedure." Lockout/Tagout Final Rule, 54 Fed. Reg. at 36,670. Consequently, if the Secretary contends that, while Spirit had an energy control program, its procedures were inadequate to satisfy the standard's specificity requirement, the Secretary should have cited a violation of § 1910.147(c)(4)(ii).[9] *See Gen. Motors*, 22 BNA OSHC 1019, 2004-2009 CCH OSHD ¶ 32,928 (discussing and finding violations of § 1910.147(c)(4)(i) where respondent's employees failed to *utilize* energy control procedures and of § 1910.147(c)(4)(ii) where respondent's energy control procedures were *inadequate*). *See also* OSHA's LOTO Directive, at 2-9 ("In section (c)(4)(i) of the LOTO standard, employers are required to develop, document, and utilize procedures for the control of potentially hazardous energy and, pursuant to section (c)(4)(ii), these procedures must, in part, clearly and specifically . . . [address] . . . clear and specific steps to be followed in order to control hazardous energy.") (emphasis in original).

Finally, regarding the specificity argument, I note that the majority now seems to question whether Spirit properly maintained "machine specific energy control sheets," a term not

[9] *See supra,* footnote 7 (amendment would now be improper).

contained in the LOTO standard but which appears in Spirit's LOTO program. The majority suggests the citation should be affirmed because "it is undisputed that no documents explicitly identified as machine specific energy control sheets existed . . . ." The majority's discussion of machine specific energy control sheets is a red herring. As the Secretary's sole witness, the compliance officer, conceded during direct examination, the citation in this case is based on the Secretary's claim that "Spirit's lockout/tagout program [was] deficient because it did not have 'specific, written procedures, documented procedures, for maintenance or servicing of vehicles' "—in other words, specifically for the Sterling vehicle. Neither the citation nor the complaint contains the term "machine specific energy control sheet." In addition, neither the citation nor the complaint suggests that the titling of the documents in question is pertinent to this case. The form or title of the information does not bear upon the relevant question of *whether Spirit developed and documented the required procedures for the Sterling vehicle*, which was undisputed given the compliance officer's admission that she never reviewed the vehicle maintenance manuals.

Moreover, even if the "machine specific energy control sheets" were relevant to the citation, there is no basis for my colleagues' suggestion that the existence (or non-existence) of machine specific energy control sheets is "undisputed" in this case. Spirit argues that the term "machine specific energy control sheets" is simply another term for the vehicle maintenance manuals, including the Sterling manual. Indeed, the majority's suggestion that this issue is "undisputed" is contradicted by the very next sentence in the majority opinion, where my colleagues concede: "[Spirit] contend[s] that the manuals are the required energy control sheets." In my view, to characterize this issue as "undisputed" misstates the record and the parties' contentions.

In the absence of some evidence from the Secretary, I note that his proposed limitation on Spirit's use of cross-references would be contrary to the goal of promoting employee safety. In some cases, a cross-reference to machine-specific information may be *the very best way* to ensure that employees have access to the best safety information available. Indeed, OSHA's LOTO Directive concedes this point. *See* LOTO Directive, at 3-24 ("It is essential for employers to consult with and incorporate specific vehicle manufacturer servicing and maintenance guidelines (e.g., operating manuals and bulletins) and other relevant materials to establish the hazardous energy control procedures. These manuals and materials often provide specific step-

by-step instructions on how to safely perform servicing or maintenance tasks."). In any given case, the Secretary may offer proof that a cross-reference to a separate document is insufficient under the circumstances, or he may argue that employees were unaware that a separate document existed. However, in the absence of such evidence, I would not restrict the use of machine-specific cross-references that can improve employee safety. Here, again, the Secretary failed to meet his burden to prove a failure by Spirit to comply with the terms of the cited standard.

I would affirm the judge's decision and vacate the citation.

/s/
Heather L. MacDougall
Commissioner

Dated: December 24, 2014

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Spirit Aerosystems, Inc., Respondent, ---------- International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW Local 952), Statutory Party, 29 U.S.C. §659(c).	OSHRC DOCKET NO. 10-1697

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*).
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*).

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).

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