

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, SW  
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Action Electric Company, Inc.,

Respondent.

OSHRC Docket No. 12-1496  
(REMAND)

Appearances:

Melanie L. Paul, Esq.  
Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia  
For Complainant

J. Larry Stine, Esq. and Mark A. Waschak, Esq.  
Wimberly Lawson Steckel Schneider & Stine, P.C., Atlanta, Georgia  
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER ON REMAND**

On May 31, 2012, the Secretary of Labor (Secretary) issued a two-item serious Citation and Notification of Penalty (Citation) to Action Electric Co., Inc. (Action Electric) located in Smyrna, Georgia. The Citation was issued following an inspection of Gerdau Ameristeel's (Gerdau)<sup>1</sup> facility in Cartersville, Georgia, conducted by the Occupational Safety and Health Administration (OSHA) by Compliance Safety and Health Officer (CSHO) Francine Cruz on December 9, 2011 (Tr. 185). The Citation alleged a serious violation of 29 C.F.R. § 1910.147(c)(7)(i) (Item 1) for failing to train its employees on the purpose and function of an energy control program. Item 1 was withdrawn by the Secretary as confirmed during the hearing held on December 18 and 19, 2012, before Administrative Law Judge Ken S. Welsch, now retired from the Commission (Tr. 3). The Citation also alleged a serious violation of 29 C.F.R. § 1910.147(f)(3)(ii)(D) (Item 2) for failing to affix personal lockout or tagout (LOTO) devices on

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<sup>1</sup> Gerdau Ameristeel's company name has been changed to Gerdau since this incident (Tr. 228).

the group lockbox before the employees began maintenance and service work on the fans. The Secretary proposed a penalty of \$7,000.00 for Citation 1, Item 2. Action Electric denied applicability of § 1910.147(f)(3)(ii)(D) on the basis that at the time of the accident the employees were not servicing the fans and the counterweight was not connected to or associated with the operation of the fans.

Following the hearing, on May 10, 2013, Judge Welsch issued a decision vacating Citation 1, Item 2 and its proposed penalty, finding that § 1910.147(f)(3)(ii)(D) was not applicable. *Action Elec. Co.*, 25 BNA OSHC 2138 (No. 12-1496, 2013) (ALJ).<sup>2</sup> As set forth in the procedural history below, the United States Court of Appeals for the Eleventh Circuit found the cited standard was applicable and remanded the decision to the Commission with instructions to reinstate the Citation. Pursuant to the instructions on remand, the Court reinstates Citation 1, Item 2, affirms it as serious and assesses a \$7,000.00 penalty.

#### *Procedural History*

On June 4, 2013, pursuant to 29 U.S.C. § 660(a), the Secretary filed with the Commission a *Petition for Discretionary Review* of Judge Welsch's decision. The Petition was granted on June 14, 2013. On July 6, 2016, then Chairman Cynthia L. Attwood and then Commissioner Heather L. MacDougall issued a decision on review. The two were divided regarding applicability of the LOTO standard, and resolved to jointly vacate the direction for review with instructions to allow the decision to become the final appealable order of the Commission, with the precedential value of a non-reviewed ALJ decision. *Action Elec. Co.*, 25 BNA OSHC 2120 (No. 12-1496, 2016). The Commission thereby adopted the decision of Judge Welsch vacating Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1910.147(f)(3)(ii)(D).<sup>3</sup>

Thereafter, the Secretary appealed the Commission's decision to the United States Court of Appeals for the Eleventh Circuit, which rendered a decision on July 13, 2017, vacating the adopted ruling of the Commission, and remanding the case to the Commission "with instructions

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<sup>2</sup> In his Decision, in addition to finding the standard was not applicable, Judge Welsch addressed the remaining elements of the Secretary's burden of proof to establish a *prima facie* case and set forth findings that the cited standard was violated; employees were exposed to the hazard of the counterweight falling from stored energy; and that the leadman knew the cooling bed was not locked out when he entered the basement. *Action Elec. Co.*, 25 BNA OSHC 2138 (No. 12-1496, 2013) (ALJ)

<sup>3</sup> The Commission held that the cooling bed counterweights and fans were independent machines rather than subsystems of the cooling bed for LOTO purposes, and Action Electric employees were not servicing the fans at the time of the incident, rendering the LOTO standard inapplicable. *Action Elec. Co.*, 25 BNA OSHC at 2130-38.

to reinstate the Secretary's citation."<sup>4</sup> *Action Elec. Co.*, 26 BNA OSHC 1727, 1735 (No. 16-15792, 2017). By mandate filed September 20, 2017, this case was remanded to the Commission. In turn, the Commission remanded this case to the Chief Administrative Law Judge to proceed pursuant to the instructions of the Eleventh Circuit. The Chief Judge assigned this case to the undersigned Judge to carry out those instructions.

Action Electric has not challenged the findings of the Eleventh Circuit on the reinstatement of the Secretary's Citation. The Citation included a proposed penalty of \$7,000.00 which was not addressed by the Eleventh Circuit. Therefore, only that \$7,000.00 proposed penalty is at issue. The undersigned held a conference call with the parties' counsel on November 1, 2017, to determine whether the parties would like a hearing and the opportunity to brief the penalty issue. The undersigned also inquired whether they would like an opportunity to confer regarding settlement of the penalty issue. Counsel for the parties advised that neither a hearing nor further briefing was necessary, and they would rely on the briefs previously filed in this matter. They did not agree to confer regarding settlement. Accordingly, the undersigned advised the parties that a decision would be rendered on the record already developed.

#### *Background*

Action Electric provides electrical service and repair support, and has worked as a contractor for Gerdau at its Cartersville, Georgia location since 2004. *Action Elec. Co.*, 26 BNA OSHC at 1727. The facility is a structured mill which operates twenty-four hours a day, melting and casting scrap metal into billets to form structural materials including angles, channels, flats, and I-beams (Tr. 24). The process involves the use of a cooling bed system, through which the billet goes into a reheating furnace, where it exits upon the cooling bed for the fan to cool the structural form in several cycles (Tr. 24). This cooling bed process alone takes approximately forty-five minutes to an hour to bring the structural form from one side of the cooling bed to the other before the form is introduced into a straightener (Tr. 25).

In approximately September or October of 2011, Gerdau requested that Action Electric service and replace as needed the approximately one hundred cooling bed fans at the facility.

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<sup>4</sup>The Eleventh Circuit vacated the Commission's decision on the grounds that the counterweight and fan components of the steel mill's cooling bed were part of one "machine," and that in surveying the machine, Action Electric employees were performing servicing and maintenance activities on the fans that would require implementation of LOTO procedures due to their potential exposure to hazardous energy outside of normal production operations. *Action Elec. Co.*, 26 BNA OSHC at 1730-34.

Action Electric determined seventeen fans needed to be replaced. *Id.* at 1728 (Tr. 243, 356-57). To replace the fans, Action Electric needed access to the cooling bed basement. When servicing and maintenance work is scheduled in the cooling bed basement, Gerdau requires that the machine and equipment be locked out by Gerdau's cooling bed maintenance technician. The process takes approximately twenty minutes and involves locking out the machines and equipment at various locations around the bed (Tr. 233, 247).

On December 9, 2011, at approximately 7:00-7:15 a.m., Action Electric leadman Michael Harrison and an apprentice met with Christopher Chad Hughes, the cooling bed maintenance technician, to make preparations to replace the final three fans (Tr. 290, 397). The maintenance technician told the leadman he would lock out the cooling bed and meet him later. The leadman understood they were to meet at the north end entrance to the cooling basement (Tr. 290, 350, 366-67). The leadman and apprentice then proceeded into the cooling bed basement from the north entrance to conduct an inspection prior to the fan replacement (Tr. 402). Once they left the meeting with him, the maintenance technician moved the three new fans by forklift to the north end of the cooling bed before initiating the mill's cooling bed lockout procedures (Tr. 74, 290, 292-93, 388, 413; Exhs. C-12A, R-3). While the leadman and apprentice were in the cooling bed basement, the maintenance technician initiated the LOTO procedure to first activate the cooling bed rake E-stop which allows counterweights to rotate to a zero energy state, moving the counterweights from a one o'clock position to a de-energized six o'clock position. As a result, the counterweight struck and killed the apprentice, and barely missed the lead supervisor (Tr. 289, 383; Exh. C-10).

#### *Penalty Assessment*

The Commission is the final arbiter of penalties in all contested cases. *See Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits"), *aff'd*, *Valdak Corp.*, 17 BNA OSHC 1492 (No. 95-2194, 1996).<sup>5</sup> The Commission

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<sup>5</sup> On November 5, 1990, section 17 of the OSH Act, 29 U.S.C. § 666 was amended to increase the maximum penalty for a serious violation from \$1,000 to \$7,000. Thereafter, new penalties were established for violations that occurred after November 2, 2015 pursuant to the Federal Civil Penalties Inflation Adjustment Act of 2015. Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). 81 Fed. Reg. 43430 (July 1, 2016). *See Penalty- Act's Penalty Provisions Outlined*. The citations in this case were issued on May 31, 2012. Accordingly, the old penalty structure implemented prior to 2015 with a maximum penalty of \$7,000 for a serious violation applies for this case.

has wide discretion in penalty assessment. *E.g., Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1621-23 (No. 88-1962, 1993).

Under § 17(j) of the Act, the Commission must give “due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.” The principal factor in a penalty determination is gravity, which “is based on the number of employees exposed, duration of exposure, likelihood of injuries, and precautions against injuries.” *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Although the record does not provide specific evidence of Action Electric’s size, CSHO Cruz testified the number of employees employed by Action Electric at the time of the incident was “[p]robably in the hundreds” (Tr. 456). The purpose of considering employer size in a penalty determination is “to avoid destructive penalties” due to the size of a company and its financial status. *Colonial Craft Reprods., Inc.*, 1 BNA OSHC 1063 (No. 881, 1972). There is no evidence in the record that Action Electric would face undue hardship should the full proposed penalty be assessed.

The gravity of the violation alleged in Citation 1, Item 2 is high.<sup>6</sup> An Action Electric employee died from the failure of Action Electric to properly implement LOTO procedures for inspection of the cooling machine and counterweight components. The leadman and apprentice were directly exposed to the hazard of counterweight de-energization through their service and maintenance on the fans for approximately forty-five minutes.<sup>7</sup> In addition, two other Action Electric crew members were present on site to complete the fan installation and potentially were at risk (Tr. 289, 337, 343, 383; Exh. C-11).

Although only a few employees were exposed for a relatively short period of time, the violation warrants a higher penalty in consideration of the strong likelihood of injury and few precautions taken by Action Electric to prevent injury. Exposure to counterweights in completing the fan inspection was inevitable. In inspecting the fans from the cooling bed basement, the

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<sup>6</sup> CSHO Cruz testified that the severity and probability of injury were both high, warranting the gravity-based penalty of \$7,000.00 (Tr. 428).

<sup>7</sup> Harrison testified that he met Hughes in his office to go over service and maintenance of the fans immediately prior to his basement fan inspection at 7:00 a.m., while Hughes testified that he met Harrison at approximately 7:15 a.m. (Tr. 290, 397). CSHO Cruz testified that based upon documents and interviews, the accident occurred around 7:53 a.m. thereafter (Tr. 452).

leadman and apprentice walked outside of the designated walkway towards the location of the counterweights and fans.<sup>8</sup> The LOTO procedures had not been performed, and as a result, the counterweights to which the employees were exposed had not been de-energized (Tr. 265-66). With the LOTO procedures not implemented, the counterweights would and did fall down to a zero degree position, making the likelihood of injury very high for any individual present and off the designated walkway during the counterweight de-energization process<sup>9</sup> (Exh. C-10).

Although the fans and counterweights had separate lockouts, Gerdau safety manager Ecky Hall testified the cooling bed needed to be locked out before working on the fans, and more generally that there was "not any place underneath the cooling bed that you [could] go off of that designated walkway without locking everything out" (Tr. 119-20). The maintenance technician similarly explained that pieces of cooling bed equipment "overlap so much that you can't work on one specific piece without locking out other equipment as well," and that employees must "physically...crawl up in between the rakes in order to remove the fans" (Tr. 228-29, 322-23, 408). Even in the event the counterweights were de-energized, the maintenance technician testified "several hazards" existed away from the designated walkway, including numerous pinch points, moving chains, turning sprockets, rotating equipment, and dim lighting (Tr. 232). Action Electric took few precautions against injury, necessitating a higher penalty.

There is nothing in the record to reflect a prior history of OSHA violations by Action Electric.<sup>10</sup> And although Action Electric took several post-accident measures implemented in response to this Citation, such as placing "Danger" tape on the north side gate basement entrance that previously only featured an "Authorized Personnel Only" sign; erecting a chain link fence over the previous chains lining the designated basement walkway to further deter individuals to stray from the designated walkway, modifying its work permit language;<sup>11</sup> and re-training leadman

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<sup>8</sup> CSHO Cruz testified that per her investigation, the apprentice was found 20-25 feet from the designated walkway (Tr. 423).

<sup>9</sup> Action Electric's "Incident Inspection Form" additionally listed the probability of injury as "Moderate- Occasionally, chance for weekly to monthly exposure." (Exh. C-10). Safety manager Hall additionally testified he usually goes through 300-400 permits at Gerdau's Cartersville plant per month for contractors, showing contractors including Action Electric employees frequently come in and out of the facility for a variety of inspections (Tr. 32).

<sup>10</sup> CSHO Cruz noted she did not believe there was any record of any prior history of OSHA violations prior to this incident involving Action Electric (Tr. 456).

<sup>11</sup> Following the December 9, 2011 incident, Action Electric modified its work permit language to include bold language that "no work or entry to the work area may be permitted until the permit is completely signed off by both parties, Gerdau, and the contractor," and added the cell maintenance worker and leadman into the permit language (Tr. 215-16).

Harrison on Action Electric's LOTO procedures (Tr. 215-16, 370-71, 380-81), these ameliorative efforts in response to the Citation do not warrant a penalty reduction for good faith. Having considered the evidence in the record regarding the four penalty factors, the undersigned finds the high gravity-based penalty factor far outweighs any other factors in this case. *See State Sheet Metal*, 16 BNA OSHC 1155, 1162 (No. 90-1620 and 90-2894, 1993) (finding no reduction in proposed penalty when gravity of the violation was high), *citing Natkin*, 1 BNA OSHC 1204, 1205 (No. 401, 1973); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128 (No. 76-2644, 1981) (finding no reduction in penalty proposed is proper when the violation is of high gravity). Accordingly, the undersigned finds the Secretary's full proposed penalty to be appropriate. Citation 1, Item 2 is affirmed as serious and the proposed penalty of \$7,000.00 is assessed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

#### **ORDER**

Based upon the foregoing decision, it is ORDERED that:

Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1910.147(f)(3)(ii)(D) is reinstated and a \$7,000.00 penalty is assessed.

SO ORDERED.

Date: **April 23, 2018**

/s/  
**SHARON D. CALHOUN**  
Administrative Law Judge  
Atlanta, Georgia