BEFORE THE NORTH CAROLINA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
RALEIGH, NORTH CAROLINA

COMMISSIONER OF LABOR OF THE STATE OF NORTH CAROLINA, COMPLAINANT, v. BERRY GLOBAL, INC and its successors, RESPONDENT.	)	**ORDER** OSHANC NO: 2020-6283 INSPECTION NO.: 318190550

THIS MATTER was duly noticed and came on for hearing before the undersigned on April 19 and 20, 2022 via the Lifesize video platform. The Commissioner of Labor ("Complainant") was represented by Assistant Attorney General Stacy A. Phipps. Berry Global, Inc. ("Respondent") was represented by Travis W. Vance and Brandon Cranier, Fisher & Phillips LLP, Charlotte, N.C.

STIPULATIONS

Prior to the hearing the parties stipulated to the following facts:

1. The Commission has jurisdiction over this proceeding pursuant to N.C.G.S. § 95-135.

2. Complainant is an agency of the State of North Carolina charged with the administration and enforcement of the provisions of the Occupational Safety and Health Act of North Carolina, including making inspections and issuing citations and other pleadings, and brings this action pursuant to N.C.G.S. §§ 95-133 et seq.

3. Respondent is an employer within the meaning of the Occupational Safety and Health Act of North Carolina, N.C.G.S. § 95-126 et seq.

4. Respondent maintains an establishment at 3414 Wesley Chapel Stouts Road, Monroe, North Carolina 28110 (the "worksite").

5. On February 24, 2020, NC OSHA opened a partial-scope Inspection 318190550 after receiving a report of an injury.

6. The inspection was assigned to Compliance Safety and Health Officer Ted Hendrix.

7. On February 27, 2020, CSHO Hendrix conducted an on-site inspection of the worksite.

8. CSHO Hendrix returned to the worksite on February 28, 2020 and March 24, 2020.

9. On April 1, 2020, Complainant issued a Citation and Notification of Penalty ("Citation") to Respondent.

10. Respondent timely filed a Notice of Contest regarding the Citation and Notification of Penalty in which it contested all issues and matters relating to the Citations, including abatement dates and proposed penalties

EXHIBITS ADMITTED AT HEARING

The following exhibits were admitted into evidence:

For the Complainant: Exhibit #1, including the photographs attached thereto and identified by their Bates numbers, 001-102.

For the Respondent: Exhibits #1, #2, #2A, #12, #14-#17, #19-#41, #44

WITNESSES

The following witnesses testified at the hearing:

For the Complainant: Ted Hendrix, N.C. Department of Labor, Certified Health & Safety Officer
Samuel "Chip" Carter, Jr., Former Employee, Berry Global, Inc.
Anthony Ugone, Manager, Berry Global, Inc.
Cody Price, Employee, Berry Global, Inc.

For the Respondent: Anthony Ugone, Manager, Berry Global, Inc.
Brian Morris, Employee, Berry Global, Inc.
David Brani, Ph.D., David Brani Engineering, LLC

POST-HEARING MOTION AND ORDER

On June 29, 2022 Respondent filed a motion captioned "Respondent's Motion to Strike Commissioner of Labor of the State of North Carolina's Post Hearing Brief." Complainant's response was filed July 11, 2022. Respondent's motion is denied. Post-hearing briefs are permitted pursuant to Rule .0516 of the Rules of Procedure, Safety & Health Rev. Bd. of N.C.

These are allowed at the discretion of the hearing examiner and, in the instant matter, were submitted upon the parties' request in lieu of oral closing arguments. A "motion to strike" is appropriate in circumstances where refinement of legal claims or defenses is required as a matter of law. Respondent addresses its motion to the quality of the arguments advanced in Complainant's post-hearing brief. It is for the fact-finder to make determinations as to the credibility and sufficiency of evidence. As such, Respondent's filing is more in the nature of a "reply brief" which is not permitted.

FINAL DECISION

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, judicially noticed information pursuant to N.C. Gen. Stat. §8C-1-201and the entire record in this proceeding, the Undersigned makes Findings of Fact and Conclusions of Law. In making the Findings of Fact, the undersigned has weighed all the evidence and assessed the credibility of the witnesses. The undersigned has taken into account the appropriate factors for judging credibility of witnesses, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have. Further, the undersigned has carefully considered the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. Based upon the foregoing, the undersigned makes the following:

FINDINGS OF FACT

1. This case was initiated by Respondent's Notice of Contest challenging a serious citation issued by Complainant on April 1, 2020 to enforce the Occupational Safety and Health Act of North Carolina, N.C. Gen. Stat. § 95-126 et seq. ("the Act").

2. The Complainant is responsible for enforcing the Act.

3. Respondent is a business corporation engaged in the manufacturing of polypropylene containers and lids at its facility in Monroe, North Carolina.

4. Respondent is an employer within the meaning of N.C. Gen. Stat. § 95-127(11) and is subject to the provisions of the Act.

5. On February 23, 2020 employee Samuel "Chip" Carter was working in Respondent's tooling department and suffered a severe injury to his right leg while cleaning a die set used for Respondent's production. The workplace accident causing Mr. Carter's injury occurred between 5:00 a.m. and 5:30 a.m. He was working alone. Compl. Ex. #1.

6. Mr. Carter had been an employee in the tooling department since April 15, 2019.

7. Mr. Carter worked a twelve hour shift that began on February 22, 2020 and was scheduled to end on the morning of February 23, 2020. Carter Test. 2:48:10.

8. In order to clean and service a die set that is used in the normal course of Respondent's injection molding process, the die set is removed from the mold injecting machine and, using an overhead crane, the die set is placed onto a Die-Sep Slip-N-Tip mold separator ("Die-Sep"). The Die-Sep, with the use of electrical power, separates the two halves of the die set for cleaning. At times when the two halves are separated, the employee performing the cleaning service must place his or her body between the two separated halves of the die set. Testimony of CSHO Hendrix ("Hendrix Test."), 20:28.

9. All die sets are quite heavy and large. In this case, the die set that Mr. Carter was cleaning was approximately forty-five inches tall but only fifteen inches wide, making it susceptible, when the two halves of the die set are separated, to tipping with little movement. The combined halves of the die set weighed over six thousand pounds. Hendrix Test., 20:28.

10. Although they are all heavy and large, die sets vary in height and width. Compl. Ex. #1

11. Large electro-magnets are used to keep the die sets in place for the servicing process. Hendrix Test. 23:09.

12. Large chains are also attached to each side of the die set to keep the die set from tipping in the event of unexpected de-magnitization. Hendrix Test. 23:09.

13. Mr. Carter began cleaning a die set on February 22, 2020 and was continuing to do so through his shift on February 23, 2020. Carter Test. 2:03:30.

14. Mr. Carter returned from a break at approximately 5:00 a.m.. He testified that he was "near the end" of the cleaning process. Carter Test. 2:03:30.

15. Mr. Carter stepped onto the Die-Sep facing one-half of the die set, with his back to the second half. That half of the die set facing Mr. Carter fell toward him, hitting his right leg, causing a de-gloving injury from his knee to his ankle and trapping his leg underneath the die set. An instant after the first half of the die set facing Mr. Carter fell, the other half behind him began to fall. Mr. Carter stopped the momentum of the second half with his back. Carter Test. 2:06:00; 2:14. Resp. Ex. #2.

16. By shifting his weight and using his left leg to create space underneath the die set half that had trapped his right leg, Mr. Carter managed to slowly maneuver himself and free himself from the weight of the heavy die set. Carter Test. 2:14

17. Mr. Carter was hospitalized for his injuries and underwent several surgeries to repair the injuries to his right leg. He sustained a permanent injury from the accident. Compl. Ex. #1, p 58.

18. Following receipt of a report of Mr. Carter's injury, CSHO Ted Hendrix conducted a partial scope inspection at Respondent's Monroe facility on February 27, 2020 and February 28, 2020. CSHO Hendrix was given permission to enter the site by Respondent's Manager Anthony Ugone. Hendrix Test.; Compl. Ex. #1.

19. As part of his inspection, CSHO Hendrix interviewed seven employees and took formal statements from two employees, Casey Price and Samuel "Chip" Carter. Compl. Ex. #1.

20. CSHO Hendrix returned to Respondent's facility on March 24, 2020 to retrieve video evidence. Hendrix Test.

21. The credible evidence presented at the hearing indicated that the electro-magnets were not engaged at the time that the die set fell onto Mr. Carter. Hendrix Test. 23:09; 1:26:08. See also Ugone Test. Although there was no definitive video evidence or other eye witness testimony, it is more likely than not that Mr. Carter either disengaged or failed to engage the electro-magnets when he returned from his break to complete the servicing of the die sets. Compl. Ex. #1; Ugone Test.

22. CSHO Hendrix's investigation also found that the chain which was intended to keep the die set from falling if there was unexpected de-magnetization failed to work as intended – that is, to prevent the unexpected force of gravity from causing injury to an employee who was engaged in the servicing of the die sets. Hendrix Test. 23:09. See also Ugone Test. regarding "root cause" analysis.

23. The chains intended to prevent gravitational force from causing injury were connected from the Die-Sep to each half of the die set using an eye hook. The chain was threaded through a "V-block" to control the side-to-side movement of the chain as it engaged and to create friction to constrain the gravitational force of a falling die set. Compl. Ex. #1, photo #78, photo #99. Price Test.

24. There are three V-blocks on the Die-Sep. However, only one V-Block above and centered between each set of electro-magnets is intended to control gravitational force when each side of the die set is seated against the electro-magnets. Hendrix Test. 42:00; Resp. Ex. #5; Compl. Ex. #1, photo #51.

25. CSHO Hendrix's investigation produced two of the three V-blocks which had been used on the Die-Sep on the morning of Mr. Carter's accident. The third V-block – which was the V-block through which the chain was threaded on the side of the Die-Sep that Mr. Carter faced as the die set fell toward him – was thrown in a trash can before CSHO Hendrix arrived for his inspection and was not recovered. Hendrix Test. 42:00; 43:09.

26. CSHO Hendrix's investigation revealed that the recovered V-Blocks were bent and had evidence of gradual wear on the sides of the "V." CSHO Hendrix also found that the gap through which the chain was threaded widened from one-half inch to five-eighths of an inch, indicating that there was degradation of the V-Block over time. Hendrix Test.

43:09; 44:29. Compl. Ex. #1, photos #52, #99, #100, #101, #102. See also, Price Test. (incidating that he had seen bent V-Blocks as early as December of 2018).

27. As part of his investigation, CSHO Hendrix asked Respondent to provide its general Lock Out / Tag Out ("LOTO") policy as well as the machine specific policy to be used when servicing die sets with the Die-Sep. Compl. Ex. #1; Hendrix Test. 52:40.

28. Respondent's Exhibits #1, #41 and #42 were produced in response to CSHO Hendrix's request for general and machine specific LOTO policies.

29. Respondent's Exhibit #1 is the machine specific safety policy for the use of the Die-Sep machines. Anthony Ugone, who was Respondent's Plant Manager at the time of Mr. Carter's accident, testified that Respondent's procedure to prevent gravity hazards during servicing of the die sets with the Die-Sep machine was covered by Respondent's Exhibit #1.

30. Respondent's Exhibit #1 instructs employees to "attach safety chains to both halves of all molds [die sets]." Respondent's Exhibit #1 does not instruct employees to make certain the chains are taut, nor does it instruct employees on how to adjust the tautness of the chains for die sets of varying sizes. Hendrix Test. 1:12:43; 1:38:40.

31. CSHO's inspection and testimony at the hearing indicated that there had been a prior failure of the electro-magnets at a time proximate to Mr. Carter's accident. Compl. Ex. #1; Price Test. The most credible evidence suggested that the failure had occurred weeks before Mr. Carter's accident and was the result of a sudden and unexpected loss of electrical power which was addressed after the incident. Price Test.

32. As a result of CSHO Hendrix's investigation, Respondent was issued a citation for one serious violation:

> 29 CFR 1910.147(c)(4)(i): Procedures were not developed, documented and utilized for the control of potentially hazardous energy when employees were engaged in the activities covered by this section:
>
> a) tooling department – where energy control procedures were not developed, documented, and utilized for the control of hazardous stored energy (gravity) when employees were engaged in servicing die molds. On or about February 23, 2020 an employee sustained injuries requiring hospitalization when a safety chain slipped from a damaged V-block on the Die-Sep Split-N-Tip mold separator, allowing an approximately 4,400-pound mold to fall onto the employee.

33. Respondent presented evidence that Mr. Carter was using his cell phone at a time prior to the accident. Respondent's evidence did not indicate for what purpose the cell phone was being used. Mr. Carter testified that he used his cell phone as a radio to listen to radio talk shows while working. Resp. Ex. 39. Carter Test.

34. Respondent had a policy prohibiting the use of cell phones. It did not have a policy prohibiting the use of radios. Resp. Ex. #40. Ugone Test.

35. Respondent employed the services of David Brani, Ph.D. as an expert witness. Dr. Brani opined that the Die-Sep was not a machine intended to be covered by the LOTO standard and that the die sets were not equipment intended to be covered by the LOTO standard. Dr. Brani opined that the Die-Sep was a material handling tool which he analogized to a fork lift. For reasons described in the Conclusions of Law, Dr. Brani's analysis is unpersuasive.

CONCLUSIONS OF LAW

1. To the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011). *Warren v. Dep't of Crime Control*, 221 N.C.App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012). The foregoing Findings of Fact are incorporated by reference as Conclusions of Law to the extent necessary to give effect to the provisions of this Order.

2. Complainant has the burden to demonstrate by the preponderance of evidence that the OSHA Standard that is the basis for the citation issued applies to the cited condition or conduct. *N&N Contrs., Inc. v. OSHRC*, 255 F.3d 122, 126 (4th Cir. 2001).

3. Complainant has demonstrated by the preponderance of the evidence that the LOTO standard applies to the accident of February 23, 2020 where the Secretary of Labor's interpretation of the agency's standards is consistent with the purpose of the Act, the plain language of the regulations, consistent with earlier pronouncements and is not otherwise arbitrary or capricious. *Sec'y United States DOL v. Action Elec. Co.*, 868 F.3d 1324, 1333 (11th Cir. 2017); *Total Renal Care of N.C., LLC v. N.C. Dep't of Health & Hum. Servs.*, 171 N.C. App. 734, 740, 776 S.E.2d 81, 85 (2005) (the weight given to an agency's interpretation of its regulations depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.")

4. The purpose of the Act is "to ensure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions and to preserve our human resources." N.C. Gen. Stat. § 95-126(b)(2). The LOTO standard serves the purpose of the Act by requiring employers to "disable machines or equipment to prevent unexpected energization, start-up ***or release of stored energy*** in order to prevent injury to employees." *Sec'y United States DOL v. Action Elec. Co.*, 868 F.3d 1324, 1333 (11th Cir. 2017), citing 29 C.F.R. § 1910.147(a)(3)(i). *Emphasis supplied.*

5. By its plain language, the LOTO standard applies to the February 23, 2020 accident. 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." 29 C.F.R. § 1910.147(a)(1)(i). *Emphasis supplied.* See also 29 C.F.R. § 1910.147(a)(2)(i) ("This standard applies to the control of energy during servicing and/or maintenance of machines and equipment").

6. Respondent's employee Carter was servicing equipment, the die sets used in Respondent's mold injection process. Furthermore, the Die-Sep is a single integrated machine system which has but one function which is to service die sets. This is unlike a forklift which is used for many different tasks.

7. To "lockout" or "tagout" a piece of equipment or machinery means to affix a device, or to otherwise take steps to disable equipment or machinery during maintenance or repair. See 29 C.F.R. § 1910.147(a)(3)(i)(b). Material used to accomplish LOTO include: "Locks, tags, ***chains***, wedges, key blocks, adapter pins, self-locking fasteners, or other hardware" 29 C.F.R. §1910.147 (c)(5)(i). *Emphasis supplied.*

8. Requiring Respondent to disable the mold die sets during cleaning in order to prevent the release of stored energy in the form of gravity is a reasonable interpretation of the LOTO standard and its application to the February 23, 2020 accident is consistent with earlier pronouncements regarding the LOTO standard and not an otherwise arbitrary or capricious interpretation.

a) The U.S. Secretary of Labor has defined the control of hazardous energy to include "Any energy, including mechanical (e.g., power transmission apparatus, counterbalances, springs, pressure, ***gravity***), pneumatic, hydraulic, electrical, chemical, nuclear, and thermal (e.g., high or low temperature) energies, that could cause injury to employees." CPL 02-00-147, Sec. IX, L (p 1-6). *Emphasis supplied.*

b) The standard has been previously applied where an elevator repair mechanic failed to block up a gate mechanically in order to prevent unexpected gate movement. *Otis Elevator Co. v. Sec'y of Labor*, 762 F.3d 116, 119 (D.C. Cir. 2014). Here the Commission found, and the appellate court affirmed, that "there was stored kinetic energy in the elevator's jammed chain assembly due to the weight of the partially open gate" and that the repair involved "unexpected energization" as contemplated by 29 C.F.R. § 1910.147(a)(1)(i). *Id.*, at 121; 122.

c) As early as 1989, OSHA recognized that one of "the most effective method[s] to prevent employee injury caused by the unanticipated movement of a component of a

machine" is to "utilize a restraining device to prevent movement," such as "by blocking material or components." 54 Fed. Reg. at 36,647.[1]

9. Under these circumstances, it is appropriate to afford deference to the Secretary of Labor's interpretation of the LOTO standard. The Secretary's interpretation is owed deference as long as it "sensibly conforms to the purpose and wording of the regulations." *Martin v. OSHRC*, 499 U.S. 144, 150-151 (1991). See also *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (agency's interpretation of its own regulation is entitled to deference). Even if the interpretation is offered in the context of litigation, it is entitled to deference if it is a reasonable reading of the text and purpose of the regulation. *Sec'y United States DOL v. Action Elec. Co.*, 868 F.3d 1324, 1331 (11th Cir. 2017). Here the plain language of the regulation includes affixing mechanical devices to prevent the unexpected release of stored energy, not limited to electrical energy. 29 C.F.R. § 1910.147(a)(3).

10. Complainant also has the burden of proof to demonstrate by the preponderance of evidence that: a hazard existed; to which employees were exposed; that the hazard created the possibility of an accident; that the substantially probable result of an accident could be death or serious physical injury; and that the employer knew or should have known of the condition or conduct which created the hazard. Rule .0514(a) of the Rules of Procedure, Safety & Health Rev. Bd. of N.C. (eff. April 1993); *Comm'r of Labor v Liggett Group, Inc.*, OSHANC 94-3175 (Nov. 1 1996).

11. Complainant proved by the preponderance of the evidence that there was a hazard associated with cleaning the die sets in the Die-Sep and Respondent did not disagree. The employer's recognition of the hazard is described in its own instructions to employees regarding the safe operation of the Die-Sep. Resp. Ex. #1. Furthermore, at least one employee involved in the cleaning process would be exposed to the hazard of the die sets falling during the servicing of the equipment. Compl. Ex. #1.

12. Given the size and weight of the die sets there was a possibility of an accident that could result in death or serious injury. Compl. Ex. #1. Mr. Carter's serious injury is evidence that the probability of death or serious injury from the falling die sets is high.

13. Complainant also proved by the preponderance of the evidence that the hazard and consequential probability of injury was the result of a violation of the LOTO standard. The standard requires that procedures be "developed, documented, and utilized for the

[1] "OSHA believes that the most effective method to prevent employee injury caused by the unanticipated movement of a component of a machine or equipment, or of the material being handled, is either to dissipate or minimize any residual or potential energy in the system, or to utilize a restraining device to prevent movement. This can be accomplished by moving machine or equipment components to a point at which springs are at or near a neutral state, by moving components so that liquids or gases reach or approximate atmospheric pressure, and by blocking material or compenents or moving them to a point of minimum potential energy (moving components to a stable, resting position)."

control of potentially hazardous energy when employees are engaged in the activities covered by this section." 29 CFR §1910.147(c)(4)(i).

14. Complainant proved that Respondent failed to develop, document and utilize effective controls for the release of stored energy that could result from a failure of the electro-magnets which would require the die sets to be immobilized manually.

a) Respondent's machine specific instructions for the use of the Die-Sep did not contain procedural steps for securing the die sets by the chains threaded through the V-block on the Die-Sep. There were no instructions to employees that chains were to be "taut" or describing specific steps to ensure that the chains were placed in a manner that would control the release of stored energy in the event of electro-magnet failure. See also §§ 1910.147(d)(2), (d)(3) and (d)(5); CPL_02-00-147, IX ("the procedures must clearly and specifically outline the steps to be followed, techniques to be used, and measures to be applied by the employee to ensure that the procedure is used.")

b) Here, Respondent's instructions only stated that employees should "attach safety chains to both halves of the mold." Resp. Ex. #1.

c) OSHA used the word "specific" in the standard to describe the elements of the procedure in order to emphasize the need for detailed procedures because over-generalization does not provide authorized employees sufficient information to effectively control the hazardous energy to which they are exposed. CPL_02-00-147, IX, D.

d) Respondent's failure to provide written machine specific LOTO procedures to employees servicing the die sets created the hazard of unexpected energization of the equipment because merely attaching the chains was insufficient to disable the equipment. See *Comm'r of Labor of State of N.C. v. Trinity Industries Inc.*, Docket No. OSHANC 97-3577, Dec. of Rev. Bd., July 30, 1999) (Finding of Fact #20).

15. The use of the electro-magnets to control the movement of the die sets is not a permissible alternative to effective LOTO procedures. Safeguarding devices that rely on control circuitry and are used for employee protection purposes may not be used in lieu of LOTO during machine servicing/maintenance activities because control circuit devices are not, by definition, energy isolating devices. See 29 C.F.R. §1910.147(b); CPL_02-00-147, IV D2. See also 29 C.F.R. § 1910.147(c)(1) which prohibits the use of push buttons, selector switches, and other control circuit type devices as energy isolating devices. Thus, pursuant to the standard, such mechanisms cannot be used to control hazardous energy. CPL_02-00-147, IV, E. Machine guarding procedures may complement but not replace LOTO procedures. CPL_02-00-147, IV, A (LOTO and other industry standards are intended to supplement each other).

16. Complainant also proved by the preponderance of the evidence that Respondent failed to utilize a LOTO procedure that was consistent with the standard in that Respondent either failed to inspect, failed to test, or failed to maintain the LOTO devices used (e.g., the chains and V-block system) in good working order so as to ensure that LOTO could be

accomplished. The standard requires that LOTO devices be durable enough to withstand conditions in the workplace environment. CPL_02-00-147 V, A. The evidence presented at the hearing was that the V-blocks had been damaged and weakened over time and that their condition was open, obvious and well-known. Compl. Ex. #1, esp. p 64 (identifying seven employees who reported observing weaknesses in the V-block)[2] and pp 71-72 (written statements of Mr. Carter and Mr. Price. See also, Compl. Ex. #1, photos #52, #99, #100, #101, #102. Hendrix Test. 43:09; 44:29; Price Test. (incidating that he had seen bent V-Blocks as early as December of 2018).

17. The above-cited evidence also established the employer's knowledge that its LOTO procedure was deficient. *Southern Hens, Inc. v. OSHRC*, 930 F.3d 667, 676 (5th Cir. 2019) (The showing required to establish knowledge is of the physical conditions constituting the violation, not of the specific OSHA regulation or of the probable consequences of the violation.)

18. There was also evidence at the hearing that the specific V-block that was intended to control the unexpected release of stored energy by the die set that injured Mr. Carter failed. Carter Test., 2:06:00 (as the die set was falling Mr. Carter heard the chain "running through the V-block"). Furthermore, where Respondent's agent has admitted that it anticipated litigation as soon as it began its investigation (Statement of attorney Crainer to the Court, Resp. Transcript at pp 198-199) but failed to preserve evidence pertinent to determining the cause of the accident (Compl. Ex. #1, p 63; Hendrix Test. 42:00; 43:09, indicating that the third V-block where Mr. Carter heard the chain "running through the V-block" had been thrown in the trash prior to CSHO Hendrix's arrival following the accident), the fact-finder is entitled to assume that the physical condition of the lost V-block would be damaging to Respondent's case. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 527, 613 S.E. 2d 274, 281 (2005) (where a party fails to preserve evidence within its control there is a presumption that the lost evidence would injure that party's case).

19. Finally, based on the previous failure of the eletro-magnets described by witnesses, Respondent is charged with knowledge of the need to maintain and effective LOTO procedure with the chains. Respondent's testimony that it lacked knowledge of any deficiency of the V-block / chain system because employees had not reported it on specific forms maintained by the employer is not credible where seven employees identified for CSHO Hendrix a history of damage and weakening of the V-block / chain system.

20. Respondent has not met its burden to prove that employee misconduct was the cause of the accident. Respondent's contention is that Mr. Carter inadvertently disengaged the electro-magnets which then created the unexpected release of stored energy.

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[2] This is competent evidence pursuant to Fed. R. Evid. 801(d)(2)(D) (exception to hearsay rule for admissions of employees concerning matters within the scope of their employment) and Rule 803(6) (business records exception).

a) An employee's inadvertent movement of an electric switch, inattentiveness, distractedness and/or memory failure are all reasonably foreseeable workplace behaviors and, in fact, are the precise reasons for OSHA standards, especially the use of LOTO procedures that override human error. *Southern Hens, Inc. v. OSHRC*, 930 F.3d 667, 677-78 (5th Cir. 2019) ("Occupational safety regulations exist because people are distractible. Functioning with less than perfect focus and control is our ordinary condition. OSHA standards serve to protect workers from common human errors such as neglect, distraction, inattention or inadvertence.) *Internal Citations and Quotations omitted.*

b) The employer's defense also fails because it cannot credibly establish that there was a specific work rule instructing an employee servicing the die sets to make sure the chain was taut when connected to the die set nor a rule instructing employees on how to adjust the chain if there was a lack of tension. The self-serving testimony of Respondent's management witnesses is outweighed by the employer's own written instructions which lack specific rules for attaching the chains. *Southern Hens, Inc. v. OSHRC*, 930 F.3d 667, 678 (5th Cir. 2019) (unavoidable employee defense rejected where did not have an established work rule that, if followed, would have prevented employee's injury).

21. A judge is not required to find all the facts shown by the evidence, but only sufficient material facts to support the decision. *Green v. Green*, 284 S.E.2d 171, 174, 54 N.C. App. 571, 575 (1981); *In re Custody of Stancil*, 179 S.E.2d 844, 847, 10 N.C. App. 545, 549 (1971). Specific findings are not required on each piece of evidence presented. See *Flanders v.Gabriel*, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612 (1993) (stating that the tribunal "need only find those facts which are material to the resolution of the dispute.")

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED that Citation 01, Item 001, in violation of 29 CFR 1910.147(c)(4)(i) is AFFIRMED as a Serious Violation with a penalty of $5,000.00 imposed.

This the 21st day of July 2022.

Mary-Ann Leon

Mary-Ann Leon
Hearing Examiner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this date served a copy of the foregoing ORDER upon:

TRAVIS W VANCE
FISHER & PHILLIPS
PO BOX 36775
CHARLOTTE NC 28236

By depositing a copy of same in the United States Mail, Certified Mail, return receipt requested, at Raleigh, North Carolina, and upon:

STACEY PHIPPS
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

By depositing a copy of same in the United States Mail, First Class, postage prepaid at Raleigh, North Carolina, and upon:

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH, NC 27699-1101

By email to carla.rose@labor.nc.gov .

THIS THE 25 DAY OF July 2022.

KBSluss

Karissa B. Sluss
Docket and Office Administrator
NC OSH Review Commission
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