COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC 4789-11

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

v

DUKE ENERGY KENTUCKY
dba DUKE ENERGY — RESPONDENT

* * * * * * * * * *

David N. Shattuck, Frankfort, for the secretary. Andrew R. Kaake, Cincinnati, for Duke Energy.

DECISION AND ORDER OF THIS REVIEW COMMISSION

This case is before us on Duke Energy's petition for discretionary review. 803 KAR 50:012, section 47 (3) (ROP 47 (3)). Our hearing officer in her recommended order sustained the serious citation and the proposed penalty of $1,626.[1] Labor's serious citation alleged a violation of the lock out/tag out standard, hazardous energy control.

KRS 336.015 (1) charges the Secretary of Labor with the enforcement of the Kentucky occupational safety and health act, KRS chapter 338. When a compliance officer conducts an inspection of an employer and discovers violations, the

[1] Compliance Officer Parris found the severity of an injury would be high (possible electrocution) with high, medium and low being the choices according to his compliance manual. He then found the probability of an injury would be lesser because of Duke's "good written safety procedures." Greater or lesser are the CO's options. He said Duke got no credit for size, number of employees, but did quality for a history of violations credit, 10 %, which is the maximum permitted and the maximum of 25 % for good faith. A gravity based penalty based on high serious and lesser probability is a $2,500 gravity based penalty. $2,500 with a 35 % credit yields a penalty of $1,625. RO 4, TE119 – 212.

commissioner of the department of workplace standards issues citations. KRS 338.141 (1). If the cited employer notifies the commissioner of his intent to challenge a citation, the Kentucky Occupational Safety and Health Review Commission "shall afford an opportunity for a hearing." KRS 338.141 (3).

The Kentucky General Assembly created the Review Commission and authorized it to "hear and rule on appeals from citations." KRS 338.071 (4). The first step in this process is a hearing on the merits. A party aggrieved by a hearing officer's recommended order may file a petition for discretionary review (PDR) with the Review Commission; the Review Commission may grant the PDR, deny the PDR or elect to call the case for review on its own motion. Section 47 (3), 803 KAR 50:010. When the Commission takes a case on review, it may make its own findings of fact and conclusions of law. In *Brennan, Secretary of Labor v OSHRC and Interstate Glass*,[2] 487 F2d 438, 441 (CA8 1973), CCH OSHD 16,799 page 21,538, BNA 1 OSHC 1372, 1374, the eighth circuit said when the Commission hears a case it does so "de novo." See also *Accu-Namics, Inc v OSHRC*, 515 F2d 828, 834 (CA5 1975), CCH OSHD 19,802, page 23,611, BNA 3 OSHC 1299, 1302, where the court said "the Commission is the fact-finder, and the judge is an arm of the Commission..."[3]

Our supreme court in *Secretary, Labor Cabinet v Boston Gear, Inc*, Ky, 25 SW3d 130, 133 (2000), CCH OSHD 32,182, page 48,639, said "The review commission is the ultimate decision-maker in occupational safety and health cases...the

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[2] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), the supreme court said because Kentucky's occupational safety and health law is patterned after the federal, it should be interpreted consistently with the federal act.

[3] See federal commission rule 92 (a), 29 CFR 2200.

Commission is not bound by the decision of the hearing officer." In *Terminix International, Inc v Secretary of Labor*, Ky App, 92 SW3d 743, 750 (2002), the court of appeals said "The Commission, as the ultimate fact-finder involving disputes such as this, may believe certain evidence and disbelieve other evidence and accord more weight to one piece of evidence than another."

Duke Energy operates its East Bend power plant in Union, Kentucky. At East Bend, Duke uses electrical breaker switches throughout the plant. Kenneth Zak, resource manager for East Bend plant, said he had 900[4] of the 480 volt General Electric 7700 breakers at the plant. Transcript of the evidence, pages 161, 172 and 189 (TE 161, 172 and 189). These breakers control electrical power to various machines, for example, valves, motors, conveyors and pumps. When maintenance is needed for one of these machines, individually or in combination, Duke is required by the lock out/tag out standard to turn the power off at the breaker and take steps to isolate the machine to be worked on so it is electrically neutral. This is the purpose of the lock out/tag out standard as it is applied to electrical work: to protect employees from electrocution while performing maintenance. Workers are then alerted to the fact the breaker is turned off, and the machine rendered electrically inactive, by placement of a tag on the breaker.

Mr. Zak explained how Duke's tag out process at East Bend works. When a piece of machinery, or several working in concert, is selected for maintenance, a "tagging request" identifies the work needed to be done. This request goes to the production

[4] Mr. Zak testified East Bend had 900 GE breakers "at the facility." TE 172. Jeff Conner said there were approximately 20 at the plant. TE 99. Our hearing officer accepted Mr. Conner's count. RO 2.

team known as the "owner control group." The owner control group assesses the work required and determines the "points of isolation" where electrical power to the machine will be disconnected "to remove the hazards from the equipment." A computer generated form spells out how to isolate the machine. Production workers, operators, then consult with employees assigned to perform the tag out in order to reach an agreement on the effectiveness of the isolation points identified. The machine selected is removed from service, isolated and tagged at the breaker and the isolation points. Zak said the employees refer to the isolation points as devices. TE 177 – 178.

> ...basically what that standard is, it's orderly steps that the operator or owner control group person will follow to shut down the equipment, remove it from service, isolate it and attach the tag.
>
> TE 178

Electric power generating plants have their own OSHA standards; and within this power generating subpart is a lock out-tag out standard specifically designed for the electrical power generating industry. This cited standard reads as follows:

> When a tagout device is used on an energy isolating device which is capable of being locked out, **the tagout device shall be attached at the same location that the lockout device would have been attached**, *and the employer shall demonstrate that the tagout program will provide a level of safety equivalent to that obtained by the use of a lockout program.*
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> 1910.269 (d) (2) (ii) (B) (1) (emphasis added)

This standard sets out two distinct requirements: one, the warning tag shall be attached at the same location as a lock would have been and, two, the tag out program must provide protection equivalent to a lock out program. For any case

which comes before the Commission, the Labor Cabinet must prove each element found in the cited standard; for this two part standard, if the Cabinet proves only one element, either same location or safety equivalent, we must dismiss the citation.

In *Ormet Corporation*, CCH OSHD 29,254, page 39,199, BNA 14 OSHC 2134, 2135 (1991), the federal review commission said:

> In order to prove that an employer violated a standard, the Secretary must show that: (1) the standard applies 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,[5] or with the exercise of reasonable diligence, could have known of the violative conditions.

Faced with this two element standard, perhaps the better practice would have been to write two separate citations and group them to set a penalty.

Labor sought to rectify this two element dilemma, in its citation, by asserting that attaching a tag at the same location as a lock is equivalent protection. Here is the citation:

> 1910.269 (d) (2) (ii) (B) (1): When a tagout device is used on an energy isolating device which is capable of being locked out, the tagout device shall be attached at the same location that the lockout device would have been attached, and the employer shall demonstrate that the tagout program will provide a level of safety equivalent to that obtained by the use of a lockout program.
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> a. The **employer failed to demonstrate full employee protection by the use of a tagout system** in that the tags are not attached at the same location *the lockout device would have been attached*. Including, but not

[5] The comma should come after the word "or," not before it. Nevertheless this is how it is punctuated by OSHRC on line as well as CCH and BNA.

limited to the 480 Volt General Electric 7700
Motor Control Center.

(emphasis added)

At the trial, Labor first called Jeffrey Conner as its witness. Mr. Conner works as a production team member at East Bend; he began working for Duke in 1980. Conner holds a bachelor of science degree in electronics and computer science. TE 19. Through Mr. Conner Labor introduced exhibit 1 which is a photograph of a bank of GE electrical breaker switches; Mr. Conner said this bank of switches is known as a GE 7700 Motor Control Center.[6] TE 20. Conner drew a line on exhibit 1 and wrote the words "rotary switch" next to it. TE 22. His line on exhibit 1 leads to a rotating switch which is better depicted in exhibits 2 and 4. When he was shown exhibit 2, Mr. Conner said it was a photo of a "rotary switch with a danger tag and a red tag on it." TE 33. In exhibit 2 the switch points to off; a tab at the opposite end of the switch is pulled out and a plastic wire tie which holds the two tags is run through a hole in the tab. When he was handed exhibit 4, Conner said it showed a GE switch which also points to off; Mr. Conner said the photograph depicted a wire tie placed around the switch rather than through the hole as shown in exhibit 2. Mr. Conner said Duke's placement of the tag's wire tie around the switch, exhibit 4, led to the citation issued by the Labor Cabinet. Labor's citation alleges the tag's tie must be placed through the hole in the tab. Exhibit 2.

Compliance Officer Aaron Parrish conducted a complaint inspection at East Bend. TE 113. He took the photographs presented through witness Conner. TE 114.

[6] On the upper left corner of exhibit 1, a sign says "General Electric Motor Control Center."

Mr. Parrish said he recommended the citation be issued because according to Duke's tag out procedure, "the tag was not placed in the same position where the lock would be placed." CO Parrish's testimony parallels the language found in the citation itself, "the tags are not attached at the same location the lockout device would have been attached," with one exception. While the citation and standard use the word location, Mr. Parrish said "same position." TE 115.

Our Hearing Officer's
Recommended order

Our hearing officer, in her recommended order[7] issued after the trial, sustained the citation and penalty of $1,625. She concluded Duke had failed to prove its greater hazard defense raised in its answer to Labor's complaint; she said Duke declined to prove the elements[8] of the defense but instead argued "it has complied with OSHA Directive Number CPL 02-00-147." Recommended order, page 9 (RO 9). We adopt our hearing officer's reasoning and deny Duke's greater hazard defense.

Hearing Officer Durant in her recommended order quoted from a section of the compliance officer's inspection report, admitted into evidence as exhibit 10; she said "Parrish's description of the violative conduct is concise and accurate." We would add the compliance officer's report also illustrates the tag out process. In order to illuminate the CO's report, the hearing officer inserted matters of clarification she

[7] We adopt our hearing officer's findings of fact to the extent they support our decision.
[8] Professor Rothstein in his *Occupational Safety and Health Law*, 2010, pages 222 - 224, listed the elements a respondent must prove for a greater hazards defense: one, the hazards of compliance are greater than the hazards of noncompliance, two, alternative means of protecting employees are unavailable and, three, a variance application would be inappropriate. See *Dole v Williams Enterprises, Inc*, 876 F2d 186, 188 (CADC 1989), CCH OSHD 28,554, page 37,891. We find Duke made no effort to prove these elements.

obtained from other witnesses. We will indicate in our quote of the CO's report the source of these clarifications.

> On the breakers [of the 480 volt GE 7700 Motor Control Center] there is a slide tab that can be pulled out that does not allow the door to be opened or the switch to be turned on. The tagout procedure, currently implemented, is a request is sent to an operator to tagout a particular breaker. The operator proceeds to print out tagout instructions and then performs the actual tagout procedure. Once the breaker is tagged, the mechanic/maintenance/electrician [follows the procedures set forth by the instructions],[9] verifies zero energy, and signs off on the tag, taking control of the tag. When the operator is tagging the breaker, a zip tie is slid behind the handle and not through the slide tab. According to Mr. Zak and Mr. Betz the tag is placed behind the handle to enable the electrician/mechanic to verify zero energy. [Operators do not verify zero energy.][10] If the tag is placed through the slide tab the door cannot be opened and the on/off switch cannot be turned. According to employee interviews the placement of the tag behind the handle allows for zero energy verification [by the maintenance/electricians][11] at the breaker. Although this allows for zero emery verification the handle can still be turned and energize the component while it is being worked on.
>
> RO 3[12]

Duke employees who run the plant are called operators; they regularly identify pieces of equipment which need to be maintained and thus must be rendered electrically neutral and tagged out. Operators are responsible for obtaining tag out instructions from a computer. These instructions specify the breaker to be turned off and tagged and at what points the devices down the line electrically from the breaker to the machines requiring maintenance must also be turned off, rendered electrically inert and tagged as well. A second operator, also referring to the

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[9] TE 56.
[10] TE 183.
[11] TE 181.
[12] Exhibit 10, page 11. See matters found at TE 55-56, 177-183, 246-256. See also photographic exhibits 1 and 4.

computer generated instructions, verifies that the first operator has turned off the breaker and devices and placed the tags at the proper points. RO 3 – 5. Once the breaker and devices have been turned off and tagged, a maintenance work leader, also known as an electrician, uses a volt meter to verify the breaker and the devices electrically down the line from the breaker in the direction of the machinery to be maintained are at zero electrical energy. Operators are not trained to perform zero energy verification. RO 3 and 4.

Maintenance workers perform maintenance on the machines rendered electrically inert and tagged out; they are known individually as the "protected person." RO 4. All maintenance workers involved in a particular maintenance project must sign the tag form and "own it." "If work leaders have maintenance employees working under them, each maintenance employee must sign off on a work permit which stays with the tag." RO 4.

Mr. Conner said when a maintenance man-electrician verifies zero electrical energy at the breaker, as part of the tag out process, he must open the door to the breaker and then uses his volt meter to test the electrical parts: "A phase to B phase; B phase to C phase; A phase to C phase; then A phase to ground; B phase to ground; C phase to ground." TE 40. Conner said "a small percentage of the time" a plastic part in the GE breaker switch mechanism will break, rending it impossible to turn the breaker off at the switch. TE 39. This is a second reason to use a volt meter at the breaker switch.

Mr. Conner said photographic exhibit 2 shows a tag's wire tie placed through the hole in the tab where a lock would be placed. This, Conner said, would put Duke in compliance with the citation as written. TE 33. In exhibit 4, however, the tag's wire tie is wrapped around the switch; this permits a maintenance man/electrician to open the breaker door to verify the breaker has been turned off and is electrically neutral. TE 45.

Keith Betz was Duke's last witness; he works at East Bend as a safety specialist. TE 243. He said each work leader, a maintenance man-electrician, must walk down the line from the breaker to the machine to be worked on so he can verify the points of isolation, the devices, referenced in the Isolation Instruction form have been rendered electrically neutral. TE 255. Once each work leader has done this, he can sign onto the tag out form and is then able to begin working on the machine.

Mr. Betz said, and this is Duke's problem with the citation and Labor's interpretation of the standard, if the tag wire tie is placed through the hole in the tab where a lock would be placed, this prevents a maintenance man-electrician from opening the door to the breaker to verify zero energy at the breaker when a new maintenance man joins the team. Mr. Betz said to cut the tag off the breaker switch tab, and permit the door to be opened, all employees who have already signed off on the tag have to be notified that the tag has been removed. Betz said that could mean obtaining the signatures of, for his example,[13] 20 people working on several shifts. Then, once zero energy had been again verified at the breaker for the new worker, Duke would need all 20 employees individually to go through the tag out

[13] TE 245, 253, 256.

procedure a second time, verifying zero energy at each device which has been rendered electrically neutral. TE 256. Our hearing officer found up to 40 employees, often on different work shifts and engaged in the same maintenance project, would have to be contacted and told the tag has been cut off so they could repeat the tag out process. RO 5, TE 67 and TE 147.

Now that we have reviewed Duke's tag out procedure and its complex system for protecting its maintenance workers from the hazard of electrocution while they are working on a machine or machines operating at 480 volts of electricity, we will take up the two issues presented by this case. They are, one, whether the tag's wire tie must be placed at the same location as a lock would be if one were used and, two, whether Duke has demonstrated that its tag out program provides a level of safety equivalent to that obtained by the use of a lock out program?

The Alleged Violation of
29 CFR 1910.269 (d) (2) (ii (B) (1)[14]

"In all proceedings commenced by the filing of a notice of contest, the burden of proof shall rest with the commissioner [of work place standards]." 803 KAR 50:010, section 43 (1). According to *Ormet Corporation, supra*, the Labor Cabinet must prove the standard applies, the standard was violated, an employee was exposed to the hazard and the employer had knowledge, actual or constructive, of the violative condition. Electrical power generating companies have their own general industry standard, 1910.269. Section (d) of 1910.269 is directed to the procedures for lock out/tag out and so the standard applies. To verify a GE 7700 breaker has been

[14] According to 803 KAR 2:317, section 2 (1), general industry shall comply with 29 CFR 1910.269.

turned off and rendered electrically neutral, a maintenance man/electrician must open the breaker door to gain entrance to its interior so he can use a volt meter to test whether the electrical parts are carrying 480 volts or whether the breaker has been turned off and is electrically neutral. Once the worker has done this he moves down the line from the breaker and toward the machinery which has been scheduled to receive maintenance. Using his volt meter, the worker tests the prescribed isolation point to ascertain if it has been effectively neutralized. At each stage of this process, the maintenance man/electrician tests electrical components which may or may not be carrying 480 volts of electricity; this is the purpose of his volt meter testing. Labor has proved employee exposure to the hazards presented by 480 volt current and the tag out process.

Duke has actual knowledge of this hazard. Duke trains its maintenance men/electricians to perform this task with their volt meters. In order for Duke at East Bend to comply with the lock out/tag out standard, 1910.269 (d), Duke requires its workers to perform these tests with a volt meter. *Ormet, supra*, element four.

What remains for us to decide is whether Labor has proved Duke failed to comply with the cited standard. *Ormet, supra*, element two.

A level of safety
equivalent to that
obtained by the use
of a lockout program.

Labor's citation repeats the language of the cited standard and then in its instance description says "full employee protection" requires placement of the tag at the same location as a lock. This requirement for full employee protection, however,

is not found in the cited standard; the term is not found in the definitions section[15] either. This term, full employee protection, is found in the standard directly preceding the cited standard and the standard immediately following the cited standard. These three standards, (B), (B) (1) and (B) (2), must be read in concert to understand the case before us and an employer's duty:

> 1910.269 (d) (2) (ii) **(B)** If an energy isolating device is capable of being locked out, the employer's programs shall use lockout, unless the employer can demonstrate that the use of a tagout system will provide full employee protection as follows:
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> 1910.269 (d) (2) (ii) **(B) (1)** When a tagout device is used on an energy isolating device which is capable of being locked out, the tagout device shall be attached at the same location that the lockout device would have been attached, and the employer shall demonstrate that the tagout program will provide a level of safety equivalent to that obtained by the use of a lockout program.[16]
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> 1910.269 (d) (2) (ii) **(B) (2)** In demonstrating that a level of safety is achieved in the tagout program equivalent to the level of safety obtained by the use of a lockout program, the employer shall demonstrate full compliance with all tagout-related provisions of this standard together with such additional elements as are necessary to provide the equivalent safety available from the use of a lockout device. Additional means to be considered as part of the demonstration of full employee protection shall include the implementation of additional safety measures such as the removal of an isolating circuit element, blocking of a controlling switch, opening of an extra disconnecting device, or the removal of a valve handle to reduce the likelihood of inadvertent energizing.
>
> (emphasis added)

Section (B) gives the electric power generating employer, Duke, the option of using lock out or tag out procedures. Lock out, as the name suggests, means a padlock is

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[15] 1910.269 (x).

[16] The cited standard.

used to prevent employees from turning the electric power on during scheduled maintenance. Tag out means a tag is placed to warn employees the switch has been turned off. If the employer selects tag out, his program must provide full employee protection. Section (B) (1), the cited standard, does not define full employee protection but places emphasis on the idea that when a tag is used instead of a lock, employees must receive "a level of safety equivalent to that obtained by the use of a lockout program." Then, section (B) (2) spells out the definition of full employee protection. It is:

> implementation of additional safety measures such as the removal of an isolating circuit element, blocking of a controlling switch, opening of an extra disconnecting device, or the removal of a valve handle to reduce the likelihood of inadvertent energizing.
>
> (emphasis added)

Kenneth Zak, Duke's resource manager at the East Bend plant, said the employees refer to the isolation points as devices. TE 177 – 178. We find the word "device" found in (B) (2) refers to an isolation point as Mr. Zak explained.

> ...these are our points that we're going to isolate, or we refer to them as 'devices'...
> ...basically what that standard is, it's orderly steps that the operator or owner control group person will follow to shut down the equipment, remove it from service, isolate it and attach the tag.
>
> TE 178

Section (B) (2)'s definition of full employee protection lists measures an employer must implement, as needed, to protect employees; these are: "removal of an isolating circuit element," in other words removing a fuse, blocking of a switch and

opening a device. The word open is a term of art among electricians. The *Merriam-Webster* on- line dictionary's definition of open,[17] as applied to electricity, is "being an incomplete electrical circuit," "not allowing the flow of electricity" and "an open switch." Opening a device means, for our purposes, rendering it incapable of permitting the flow of electricity. This is what Kenneth Zak meant by isolation points.

Labor's citation first quotes the standard. Then in the instance description at subparagraph a, the citation equates full employee protection with placement of a tag "at the same location" where a lock would have been attached. Compliance Officer Parrish took the same approach at the trial. He said he recommended the citation be issued because according to Duke's tag out procedure, "the tag was not placed in the same position where the lock would be placed." He said it was a "direct violation of the standard." TE 115.

Labor's interpretation of the cited standard ignores the very specific definition of full employee protection found in (B) (2). What the cited standard requires is protection equivalent to a lock out program, not a lock out program. Section 1910.269 (d) (2) (ii) (B) (2) directs an employer to achieve full employee protection, depending on what is needed for the particular machine layout, by pulling fuses, blocking a controlling switch or opening a device – electrical isolation in other words.

Duke's procedure requires operators to electrically isolate the machines to be worked on according to Keith Betz, Duke's safety specialist at the East Bend plant.

[17] Conversely, if a switch is closed, it will permit electricity to flow.

TE 250 – 255. Mr. Betz, without contradiction, said after the GE breaker is turned off, the energy is confirmed to be at a zero point and a tag placed around the on-off switch. Then a Duke employee walks down the line from the GE breaker and isolates (cuts off power) the machines to be maintained. Compliance Officer Parrish found no fault with Duke's isolation procedures described by Mr. Betz:

> Q. And you know that per Duke's procedures, depending on what equipment is being tagged out, they take additional measures to ensure that lockout/tagout occurs?
> A. Correct.
> Q. And that's what's required by the standard when you use a tagout system; correct?
> A. Correct.
> Q. So in that sense they've applied the standard?
> A. Yes.
>
> TE 154 – 155

Our hearing officer in her recommended order's findings of fact said "Parish did not indicate that he found any problems with the LOTO procedure except for the location of the tag on the breaker handle." RO 4.

Labor as the enforcer of the act must follow the law; it cannot decide for itself what constitutes full employee protection for an employer who has properly elected to tag out the breakers rather than lock them out when the standards specify exactly what is meant by full employee protection.

We are mindful of the requirements of *Martin v Occupational Safety and Health Review Commission and C. F. and I. Steel Corp*, 499 US 144 (1991), CCH OSHD 29,257, BNA 14 OSHC 2097, where the US Supreme Court, resolving a split among the circuits, said a reviewing court must defer to the secretary of labor's reasonable

interpretation of an ambiguous OSHA standard rather than the Review Commission's reasonable but conflicting interpretation. We understand the secretary, when issuing a citation, is interpreting a standard. But the question for us is whether, according to the rules laid down by *C F & I Steel*, the cited standard, where it specifies a level of safety equivalent to that obtained by the use of a lock, was ambiguous. We find it was not. The cited standard said the employer could elect to tag out so long as he provided "a level of safety equivalent to that obtained by the use of a lockout program." While the cited standard does not define what was meant by "safety equivalent," the standard immediately following the cited standard, (B) (2) above, does. Section (B) (2) requires the removal of an isolating circuit (removal of a fuse), blocking of a control switch or the opening of disconnecting devices, again depending on the layout of the machine to be maintained. This language is well-defined, easy to understand and unmistakable. Duke, according to its witnesses and the compliance officer, has mastered the "safety equivalent" isolation procedures. Section (B) (2) says if an employer has implemented such safety measures, it has provided full employee protection. We find Duke demonstrated, in light of its election to tag out its GE 7700 breakers, its procedures to isolate the machine needing maintenance from the breaker provided full employee protection which afforded "a level of safety equivalent to that obtained by the use of a lockout program." 1910.269 (d) (2) (ii) (B) (1). Labor has failed to prove the "level of safety equivalent" element of the cited standard. ROP 43 (1).

Having ruled the Labor Cabinet failed to prove that Duke did not provide equivalent protection, we turn our attention to the second issue in this case: location.

Location

When called upon to interpret a statute, or here a regulation which is made enforceable by KRS 338.991 (2),[18] we must follow the rules laid down by our courts of appeals. We understand any decision we make will be subject to *de novo* review. *Jefferson County Board of Education v Fell*, Ky, 391 SW3d 713, 718 (2012). To decide the case before us we must interpret the meaning of the cited standard 1910.269 (d) (2) (ii) (B) (1) where it says:

> ...the tagout device shall be attached <u>at the same location</u> that the lockout device would have been attached...

In *Fell*, the court said a "Statutory enactment must be read as a whole and in context with other parts of the statute...read in light of the whole act.'" *Fall* also instructs that "statutes should be construed together, should be harmonized where possible and should result in the effectiveness of all provisions..." 391 SW3d at 719 and 720.

When asked to explain the citation, Compliance Officer Parrish reiterated the terms of the citation; he said he recommended a citation because "the tag is not placed at the same position where the lock would be placed." TE 115. Placing a tag's plastic wire tie through the hole in the switch tab where a lock would go prevents Duke maintenance men/electricians from opening the GE breaker door to verify zero

[18] *Camera Center, Inc v Revenue Cabinet*, Ky, 34 SW3d 39, 40 (2000).

electrical energy; this is why Duke contested the citation. In essence, the Labor Cabinet and its compliance officer want Duke's tag to perform the same function as a lock. As we shall demonstrate, this cannot be the intent of the cited standard.

Labor's interpretation of the cited standard, reflected in its citation, conflicts with several standards found within 1910.269 (d), the lockout/tagout portion of the electric power generation subpart. Because of the absence of case law analyzing the cited standard and because Labor has chosen not to offer, beyond its citation, an interpretation of the cited standard and these conflicting standards, we will set them out in detail:

> Tags are essentially warning devices affixed to energy isolating devices and do not provide the physical restraint on those devices that is provided by a lock.
>
> 1910.269 (d) (2) (vii) (A)

> Lockout devices shall be attached in a manner that will hold the energy isolating devices in a 'safe' or 'off' position.
>
> 1910.269 (d) (6) (iv) (A)

> Tagout devices shall be affixed in such a manner as will clearly indicate that the operation or movement of energy isolating devices from the 'safe' or 'off' position is prohibited.
>
> 1910.269 (d) (6) (iv) (B)

A lock prevents a switch from being turned or thrown. A tag serves as a warning. Labor, the enforcer of the act, has a duty to enforce the act as written. *C F & I Steel*[19] and *Fall, supra.*

[19] In *C F & I Steel*, the US Supreme Court said the enforcing agency may offer an interpretation of the contested standard during enforcement proceedings but not in "counsel's '*post hoc* rationalizations' for agency action" on review. 499 US at 156, CCH page 39,225, 14 OSHC 2101.

Labor has made no effort to explain and interpret these provisions. Because locks and tags perform different functions, we find Labor's position, requiring Duke's tag to perform the same function as a lock, to be unreasonable. *C F & I Steel, supra.* Because Labor's position is unreasonable and because Labor has elected not to offer an explanation for these standards, either within its citation or through the compliance officer testifying at the trial, we must construe the standards to decide the case before us. *C F & I Steel.* 499 US at 158, CCH page 39,225, 14 OSHC 2102, and *Fall, supra.*

We know Duke has complied with the standard which says a tag is a warning device as well as the standard which says the tag "shall be affixed in such a manner that will clearly indicate that the operation or movement" of the switch or device "is prohibited." We know Duke, to provide full employee protection, electrically isolates the machines identified as needing maintenance.

Duke affixes its tags on the GE 7700 breaker switches in such a way as to give warning to maintenance employees, and we so find. Because a tag is not intended to function as a lock and yet Labor's citation requires the tag to do just that, because the cited standard's use of the word location is not precisely defined and because Labor has not explained the apparent conflict between its citation and the standards defining locks and tags, we must interpret and harmonize these standards. *Fall, supra.* See exhibit 4 where the wire tie for the warning tag is wrapped around the switch in such a way as to permit a maintenance

man/electrician to open the door to the breaker to verify zero energy during a tag out procedure.

We find Duke's attachment of its warning tags at the same location on the breaker as a lock would go, on the breaker switch and adjacent to the tab where a lock would be placed, is therefore in compliance with the location element of the standard. An employee assigned to perform maintenance on a machine will inspect the breaker to see if it has been locked out. Duke's placement of tags adjacent to the tab where a lock would be positioned alerts employees that the GE breaker switch has been tagged instead of locked. Duke's employees are trained to know that when a GE breaker is tagged, devices electrically between the breaker and the machine to be maintained must be isolated and tagged as well.

Duke has complied with the location element of the cited standard. Our interpretation of the cited standard acknowledges the differences in a tag out and a lock out system, as set out in 1910.269 (d), and construes location to mean placing the tag where employees can readily see the GE breaker switch is tagged but not locked so they may act accordingly. Labor has failed to prove Duke violated the location element of the cited standard. *Ormet, supra*, element two.

We have construed these standards, including the cited standard, and harmonized them so the lock out/tag out standard, 1910.269 (d), is effective and can be understood as a whole. *Fell, supra.*

Duke has offered as a defense an OSHA instruction, CPL 02-00-147, exhibit 9, which it says provides for an alternative procedure for complying with a standard.

To insure that the administrative record is complete, we will now apply this instruction to the facts of the case before us.

OSHA instruction CPL 02-00-147, page 4-10, says in part:

> Under most circumstances, where servicing or maintenance is to be conducted during only one shift by a small number of persons, the installation of each individual's LOTO device would not be a burdensome procedure. When complex equipment is being serviced or maintained, when there are many sources of energy, and/or when servicing/maintenance work extends over more than one work shift, OSHA permits employers to utilize an alternative procedure to each employee locking out each energy isolating device...To permit implementation of a pragmatic system, while accommodating the special constraints of the standard's requirement for ensuring employees a level of protection equivalent to that provided by the use of a personal lockout or tagout device, an alternative procedure may be implemented...
>
> (emphasis added)

We find Duke's tag out procedures regularly involve 20 to 40 maintenance employees working on several work shifts. Our hearing officer has found Duke's East Bend facility is "large and complex." RO 5. We find when Duke employees place a tag's wire tie through the hole in the tab of a GE 7700 breaker switch, a maintenance man/electrician cannot open the breaker door to verify zero electrical energy. We find Duke's cited tag out procedure, exhibit 4 and Duke's isolation of devices, provides a level of protection equivalent to a lock out system. Therefore, we find Duke's tag out procedures qualify according to the terms of this directive.

We conclude that Duke's placement of its tag's wire tie around the GE 7700 breaker switch in such a way as to permit the breaker door to be opened and Duke's

isolation of electrical devices complies with OSHA instruction CPL 01-00-147 as an alternative, pragmatic procedure.

Labor has failed to prove Duke violated the terms of the cited standard. *Ormet, supra.*

We reverse our hearing officer who in her recommended order affirmed the citation and penalty.

We dismiss the citation and penalty for the reasons we have stated.

It is so ordered.

November 4, 2013.

Faye S. Liebermann
Chair

Paul Cecil Green
Commissioner

Joe F. Childers
Commissioner

Certificate of Service

I certify a copy of this decision was served on the following in the manner indicated on November 4, 2013.

By messenger mail:

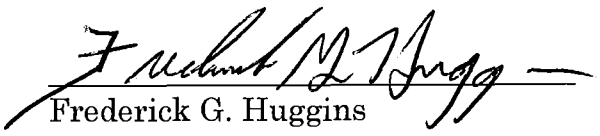
David N. Shattuck

Office of General Counsel
Kentucky Labor Cabinet
1047 US Highway 127 South, Suite 4
Frankfort, Kentucky 40601

Susan S. Durant
Hearing Officer
Administrative Hearings Branch
1024 Capital Center Drive, Suite 200
Frankfort, Kentucky 40601-8204

By US mail:

Andrew R. Kaake
Frost Brown Todd
3300 Great American Tower
301 East Fourth Street
Cincinnati, Ohio 45202



Frederick G. Huggins
Counsel
Kentucky Occupational Safety and
Health Review Commission
4 Mill Creek Park
Frankfort, Kentucky 40601
(502) 573-6892