

No. 22-60399

In the United States Court of Appeals
for the Fifth Circuit

TNT CANE & RIGGING, INCORPORATED,

Petitioner,

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION; MARTIN WALSH,
SECRETARY, U.S. DEPARTMENT OF LABOR,

Respondents.

On Petition for Review of Orders of the
Occupational Safety and Health Review Commission
OSHC No. 16-1587

BRIEF OF PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

Petitioner certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

1) Petitioner:

TNT Crane & Rigging, Inc.

TNT Crane & Rigging LLC (Parent of TNT Crane & Rigging, Inc.)

2) Respondents:

Occupational Safety and Health Review Commission

Martin Walsh, Secretary, U.S. Department of Labor

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Honorable Brian A. Duncan

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner TNT Crane & Rigging, Inc. (“TNT”) requests oral argument as this appeal raises significant issues that will likely impact the interpretation of Occupational Safety and health Administration (“OSHA”) regulations and affect the entire crane industry. As such, TNT believes that oral argument of counsel would significantly aid the decisional process in this case.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS2

STATEMENT REGARDING ORAL ARGUMENT4

TABLE OF CONTENTS5

JURISDICTIONAL STATEMENT11

ISSUES PRESENTED11

STATEMENT OF THE CASE12

SUMMARY OF THE ARGUMENT19

ARGUMENT20

 I. Standard of Review20

 II. The Commission’s Finding that 29 C.F.R. § 1926.1407 Applied to TNT
was an Abuse of Discretion and is Not Supported by Substantial Evidence.20

 A. *The Plain Meaning of the Term “Disassembly” Applies and “Disassembly”
Does Not Begin Until the Crane is Physically Disassembled.*21

 B. *The Commission Abused its Discretion When it Found that the Secretary’s
Interpretation of the Term “Disassembly” was Reasonable and Entitled to
Deference.*28

C. The Commission’s Conclusion that the Citations Applied to TNT’s Work is Not Supported by Substantial Evidence.32

II. The Commission’s Decision that Benson’s Violative Conduct Was Foreseeable to TNT was an Abuse of Discretion and Not Supported by Substantial Evidence.....35

A. The Secretary was Required to Establish That Benson’s Conduct was Foreseeable.....35

B. Benson’s Conduct was Not Foreseeable Because the Substantial Evidence Shows that TNT Had Robust a Safety Program.39

1. TNT Established Work Rules.40

2. TNT Communicated its Policies to its Employees.41

3. TNT Takes Steps to Discover Violations and Enforces the Rules.42

III. The Commission’s Conclusion that TNT Failed to Prove that Benson Engaged in Unpreventable Employee Misconduct Was an Abuse of Discretion and Unsupported by Substantial Evidence.....43

A. TNT Had Clear and Specific Work Rules Designed to Prevent the Violations. 44

B. TNT Effectively Communicated its Power Line Safety Policies.46

C. TNT Took Steps to Discover Violations and Enforce the Rules.....47

CONCLUSION.....48

CERTIFICATE OF SERVICE.....50

CERTIFICATE OF COMPLIANCE51

TABLE OF AUTHORITIES

CASES

Angel Bros. Enters. v. Walsh, 18 F.4th 827 (5th Cir. 2021) ----- 36, 37

Auer v. Robbins, 519 U.S. 452 (1997)----- 28

Austin Indus. Specialty Servs., L.P. v. OSHRC, 765 F.3d 434 (5th Cir. 2014) ---- 19

Carlisle Equip. Co. v. Sec. of Labor, 24 F.3d 790 (6th Cir. 1994)----- 35

Chemical Mfrs. Ass’n v. U.S.E.P.A., 870 F.2d 177 (5th Cir. 1989)----- 22

Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc., 467 U.S. 837 (1984)----- 28

Christensen v. Harris County, 529 U.S. 576 (2000)----- 28

Christopher v. Smith-Kline Beecham Corp., 132 S. Ct. 2156 (2012)----- 28

Diamond Roofing Co. v. Safety & Health Review Commission, 528 F.2d 645 (5th
 Cir. 1976) ----- 21, 30

EMCON/OWT, Inc. v. Secretary of Labor, 224 F. App’x 875 (11th Cir. 2007) --- 20

Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980)----- 31

Hood v. Keller, 229 Fed.Appx. 393, 398, n. 5 (6th Cir. 2007) ----- 26

Horne Plumbing Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976)----- 36

Kisor v. Wilkie, 139 S. Ct. 2400 (2019) ----- 21

Roberto v. Department of Navy, 440 F.3d 1341 (Fed. Cir. 2006)----- 20, 21, 22

Sec’y of Labor v. Southwestern Bell Tele. Co., 19 BNA OSHC 1097, 2000 WL
 1424806 (OSHRC No. 98-1748, 2000) ----- 20

Sec’y of Labor v. Steel Constructors, Inc., 8 O.S.H. (BNA) 2136, 1980 WL 10389
(O.S.H.R.C.A.L.J. 1980)----- 26, 27

Trinity Indus., Inc. v. OSHRC, 206 F.3d 539 (5th Cir. 2000)----- 35

United States v. Stafford, 721 F.3d 380 (6th Cir. 2013)----- 26

*WG Yates and Sons Constr. Co. Inc. v. Occupational Safety and Health Review
Comm’n*, 459 F.3d 604 (5th Cir. 2006) ----- passim

STATUTES

29 U.S.C. § 660----- 10

29 U.S.C. § 660(a)----- 19

29 U.S.C. § 666(k) ----- 35

5 U.S.C. § 706(2)(A)----- 19

REGULATIONS

29 C.F.R. § 1926.1401 ----- 21, 22

29 C.F.R. § 1926.1402----- 22, 25

29 C.F.R. § 1926.1404(f)----- 24

29 C.F.R. § 1926.1404(h) ----- 24

29 C.F.R. § 1926.1404(h)(4)----- 23, 24

29 C.F.R. § 1926.1405----- 24

29 C.F.R. § 1926.1407----- passim

29 C.F.R. § 1926.1407(a) -----21, 23, 24
29 C.F.R. § 1926.1407(b) -----44
29 C.F.R. § 1926.1407(b)(3)-----16, 45, 46
29 C.F.R. § 1926.1407(d) ----- 17, 46
29 C.F.R. §1926.1408-----17

FEDERAL REGISTER

Cranes and Derricks in Construction; Final Rule, 75 Fed. Reg. 47905, 47936 (Aug.
9. 2010)-----25

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to 29 U.S.C. § 660 because it is an appeal of a final order of the Occupational Safety and Health Review Commission (“Commission”) in OSHRC Docket No. 16-1587. The violations are alleged to have occurred in the Fifth Circuit and TNT’s principal office is within the Fifth Circuit. TNT timely appealed by filing its Petition for Review within 60 days following the issuance of the Commission’s June 2, 2022 Decision.

ISSUES PRESENTED

1. Whether the Commission abused its discretion in concluding that the plain meaning of the term “disassembly” as used in 29 C.F.R. § 1926.1407 includes the preliminary process to disassemble a crane.
2. Whether the Commission’s finding that 29 C.F.R. § 1926.1407 was applicable to TNT’s activity at the time of the accident was supported by substantial evidence when TNT’s employees were lowering the crane’s boom and the crane had not been physically disassembled when the accident occurred.
3. Whether the Commission abused its discretion in concluding that the TNT supervisor’s knowledge of his own malfeasance is automatically imputable to TNT without further analysis when the supervisor actively and physically engaged in the violative conduct that is the basis of the citations.

4. Whether the Commission’s finding, that the TNT supervisor’s violative conduct was foreseeable as a result of TNT’s deficient safety policy, training, or discipline, was supported by substantial evidence.

5. Whether the Commission’s finding and conclusion that TNT failed to establish its unpreventable employee misconduct defense was an abuse of discretion and was supported by substantial evidence.

STATEMENT OF THE CASE

I. Background Facts

On May 15, 2016, TNT’s employees, Jeff Benson and Mark Ryan, had completed installing antennas on a communications tower in Georgetown, Texas, using a 275-ton mobile crane. (Vol. 1, Tr. 210:2–6; Vol. 2, 312–14.) Once the installation was complete, TNT needed to disassemble the crane and reload it back onto a semi-truck trailer. (Vol. 1, Tr. 96:15–22.) Additional TNT employees, Joseph Larison and Freddie Ray, had arrived at the worksite to assist with the disassembly. (Vol. 1, Tr. 202:10–19; Vol. 4, R-4.)

In preparation to begin disassembling the crane, Benson created a job safety analysis (“JSA”). (Vol 1, Tr. 203:20–206:24; Vol.4, R-4.) The crew discussed a plan to lower and disassemble the boom of the crane while avoiding the nearby power lines. (Vol. 1, Tr. 213:23–14:11; Vol. 2, Tr. 323:9–25.) To do so, the truck and trailer was to be positioned near the crane such that, as the boom came down, the truck

would be driven forward, and the boom would lay on the trailer. (Vol. 1, Tr. 206:1–17.) This would allow the crew to take pressure off the pins holding the jib to begin disassembling the crane. (Vol 1, Tr. 207:21–208:4.)

Specifically, Benson was to reposition the crane near the semi-truck and lower the boom while Larison removed the block from the becket¹ on the end of the hoist line. (Vol. 1, Tr. 206:1–17, 210:10–12:8.) Larison was to keep the hoist line taught while Benson reeled the line onto the coil. (Vol. 1, Tr. 206:1–17, 210:10–12:8; Vol. 2, 315:6–17:2.) Once the block was removed and the hoist line retracted, the boom would be lowered and a separate helper crane would be used to take off sections of the jib and place them on the trailer. (Vol. 1, Tr. 262:7–13; Vol. 2, Tr. 315:6–16:1; Vol 4, R-4.) Based on the plan Benson created and his representation that the plan was safe, Larison and Ray agreed. (Vol 1, Tr. 216:4–23.)

However, as Benson was lowering the boom and retracting the hoist line, the crane contacted the nearby powerline. (Vol. 1, Tr. 211:2–12:8.) Larison, who was holding the becket, experienced an electrical shock. (Vol.1, Tr. 267:12–16.) TNT reported the accident and employee hospitalization to OSHA, which prompted the investigation. (Vol. 1, Tr. 55:3–6; Vol. 2, Tr. 379:18–80:14.)

II. TNT Has a Robust Safety Program

¹ The becket is a metal connection device that is pinned to connect the block and the crane's wire rope. (Vol. 1, Tr. 209, 328.)

Employee safety is paramount at TNT. (Vol. 2, Tr. 394:10-14.) TNT has a detailed and extensive written safety program, which includes safe operating procedure guidelines. (Vol. 2, Tr. 395:15–96:7; Vol. 4, R-1.) TNT’s Safe Operating Guidelines ensure, among other things, that crane operators have read and implement the pre-job meetings, or JSAs, and that they perform their assigned tasks in a safe and proper manner. (Vol. 4, R-1 at TNT000116.) TNT also has a specific, detailed policy regarding operating near electrical hazards, such as power lines. (Vol. 4, R-2 at TNT000132.) The safety policy states that work near power lines must be performed outside of the ten-foot minimum approach distance (“MAD”), dictates what the MAD is for power lines, requires supplemental actions for activities occurring within 20 feet, and identifies what those requirements are. (*See* Vol. 4, R-1 at TNT000125, Ex. R-2 at TNT000132, Ex. R-3 at TNT000148–49.)

TNT communicates its safety program and safety protocols to its employees. (Vol. 2, Tr. 405:8–10.) The safety protocols are communicated during employees’ onboarding and on an annual basis. (Vol. 1, Tr. 249:19–25; Vol. 2, Tr. 407:23–408:21, 596:17–22; Vol. 4, R-12.) A majority of this training covers power line safety and encroachment around energized power lines. (Vol. 1, Tr. 250:9–15.) Safety meetings are also held three times per week where a wide variety of safety topics are routinely discussed. (Vol. 2, Tr. 419:12–22:5.) Pre-job meetings also include discussions of safety hazards for jobs and, where applicable, working in

proximity to power lines and adequate clearance distances is covered. (Vol. 2, Tr. 422:6-1.) In fact, the main topic of the JSA for the job where the accident occurred was power line safety encroachment distances. (Vol. 1, Tr. 255:15.18; Vol. 4, R-4.)

Prior to the accident, Benson had received electrical safety policy training from TNT repeatedly. (Vol. 2, Tr. 412:1.6; 596:13-97:2.) Benson also acknowledged receipt of TNT handbooks, including its safety handbooks. (Vol. 2, Tr. 406:22-07:14; Vol. 4, R-47.) According to TNT employees, TNT's robust safety policies and practices made Benson's violative conduct unforeseeable. (Vol. 1, Tr. 269:6-10; Vol. 2, Tr. 377:3-4; 439:2-14; 588:14-21.)

TNT conducts field safety audits where compliance with safety procedures for working around power lines are reviewed. (Vol. 2, Tr. 418:1-9; Vol. 4, R-49.) In addition, branch managers, project managers, and safety professionals are deployed to conduct surprise and planned audits of worksites. (Vol. 2, Tr. 416:9-23.) At the hearing of this case, TNT introduced samples of audits performed at various worksites. (Vol. 4, R-49.)

TNT has a progressive disciplinary policy laid out in its orientation packet. (Vol. 4, R-12 at TNT00055.) TNT disciplines its employees for violating its safety policies consistent with the progressive disciplinary policy. (Vol. 4, R-27, R-29.)

III. The Citations

Certified Safety and Health Official Darren Lee Beck conducted OSHA's investigation. (Vol. 1, Tr. 57:1–61:6.) Beck had little to no knowledge of the crane industry or how cranes are operated. (Vol. 1, Tr. 145:2–46:6.) Prior to this investigation, Beck had never investigated an accident involving a crane or issued citations under the two standards at issue in this case. (*Id.*) At the hearing, Beck testified that he did not know that TNT's plan was to swing the boom away from the power lines, lower the boom, and bring the boom back toward the trailer where disassembly would begin. (Vol. 1, Tr. 175:20–24.) In fact, Beck testified that he did not know whether 1) another crane was required to disassemble the subject crane, 2) the crane had to be moved again to begin disassembly, or 3) any pins on the crane had been removed at the time of the accident. (Vol. 1, Tr. 141:6–18.) Beck did not know if the subject crane was disassembled at the time of the accident. (Vol. 1, Tr. 133:18–21.)

Beck's investigation also consisted of pro forma interviews with TNT employees in which he failed to abide by OSHA's Field Operations Manual and showed little interest in the responses provided by TNT's employees. (Vol. 1, Tr. 132:16–22.) Beck failed to ask pertinent questions about the accident while interviewing TNT employees and TNT employees testified that Beck did not seem interested. (Vol. 1, Tr. 147:13–19, 132:20–22, 220:15–16, 229:17–19, 234:1–15, 226:6–13, 269:3–5.) Beck's conclusion, that the crane was being disassembled at the

time of the accident, was wholly based on these perfunctory witness interviews and reliance on a not-to-scale, unverified model of the accident scene. (Vol. 1, Tr. 134:15–21, 150:20–51:4, 173:9–18.)

Pursuant to Beck’s investigation, OSHA issued two citations to TNT under 29 C.F.R. § 1926.1407 which is entitled, “Power line safety (up to 350 kV) – assembly and disassembly.”

In Citation 1 Item 1, OSHA alleged that TNT violated 29 C.F.R. § 1926.1407(b)(3)² by allegedly failing to put in place additional measures—such as

² 29 C.F.R. § 1926.1407(b)(3) provides in relevant part:

Where encroachment precautions are required under Option (2), or Option (3) of this section, all of the following requirements must be met . . .

(3) At least one of the following additional measures must be in place. The measure selected from this list must be effective in preventing encroachment.

The additional measures are:

(i) Use a dedicated spotter who is in continuous contact with the equipment operator. The dedicated spotter must:

(A) Be equipped with a visual aid to assist in identifying the minimum clearance distance. Examples of a visual aid include, but are not limited to: A clearly visible line painted on the ground; a clearly visible line of stanchions; a set of clearly visible line-of-sight landmarks (such as a fence post behind the dedicated spotter and a building corner ahead of the dedicated spotter).

(B) Be positioned to effectively gauge the clearance distance.

(C) Where necessary, use equipment that enables the dedicated spotter to communicate directly with the operator.

(D) Give timely information to the operator so that the required clearance distance can be maintained.

(ii) A proximity alarm set to give the operator sufficient warning to prevent encroachment.

(iii) A device that automatically warns the operator when to stop movement, such as a range control warning device. Such a device must be set to give the operator sufficient warning to prevent encroachment.

(iv) A device that automatically limits range of movement, set to prevent encroachment.

(v) An elevated warning line, barricade, or line of signs, in view of the operator, equipped with flags or similar high-visibility markings.

use of a dedicated spotter, a proximity alarm, a range-of-motion limitation device, a range-control warning device, or an elevated warning line—during disassembly of the crane to prevent encroachment of power lines. OSHA classified the alleged violations as serious and assessed a penalty of \$12,471.

In Citation 1 Item 2, OSHA alleged that TNT violated 29 C.F.R. § 1926.1407(d)³ by allegedly disassembling the crane without the minimum approach distance identified in Table A of 29 C.F.R. §1926.1408. OSHA classified the alleged violation as serious and assessed a penalty of \$12,471. TNT timely contested the citations.

IV. Procedural History

On September 14, 2018, after a two-day hearing, Administrative Law Judge Brian A. Duncan issued a Decision and Order in favor of TNT, finding that the cited regulations did not apply to the work performed. (Vol. 6, No. 50.) The Secretary of Labor filed a Petition for Discretionary Review with the Commission, and, on March 27, 2020, the Commission reversed and remanded Judge Duncan’s Decision and Order. (Vol. 7, No. 62.) On remand, Judge Duncan again found in favor of TNT,

³ 29 C.F.R. § 1926.1407(d) provides:

Assembly/disassembly inside Table A clearance prohibited. No part of a crane/derrick, load line, or load (including rigging and lifting accessories), whether partially or fully assembled, is allowed closer than the minimum approach distance under Table A (see § 1926.1408) to a power line unless the employer has confirmed that the utility owner/operator has deenergized and (at the worksite) visibly grounded the power line.

holding that the Secretary had failed to show that the violative conduct of the crane operator was foreseeable. (Vol. 7, No. 69.) On June 2, 2022, after the Secretary filed a Petition for Discretionary Review, the Commission again reversed Judge Duncan's Decision and Order. (Vol. 7, No. 78.) TNT timely petitioned this Court for review of the Commission's Decisions.

SUMMARY OF THE ARGUMENT

The Commission's Decisions should be reversed because the Commission abused its discretion in determining that the plain meaning of the term "disassembly" as used in 29 C.F.R. § 1926.1407 includes any preparatory action taken to disassemble a crane. The Commission also erroneously found that the Secretary's interpretation of the standard was reasonable and therefore entitled to deference. The Commission improperly found that the citations applied to TNT's work at the time that the accident occurred. The citations do not apply because the plain meaning of the term "disassembly," as used in the regulation means the actual and physical disassembling of equipment, and TNT was not disassembling the crane at the time of the accident. However, even if this Court finds that the term "disassembly" is ambiguous, the Secretary's interpretation of the term is unreasonable and not entitled to any deference.

Assuming arguendo that the citations do apply to TNT's work at the time of the accident, the Secretary failed to prove that Benson's violative conduct was

foreseeable to TNT. Under this Court’s precedent, Benson’s knowledge of his own misconduct cannot automatically be imputed to TNT without further analysis. As such, the Commission erred by failing to conduct any analysis of foreseeability and imposing a strict liability standard.

Lastly, the Commission abused its discretion when it found that TNT had not proven its employee misconduct affirmative defense and its findings to the contrary were not supported by substantial evidence.

ARGUMENT

I. Standard of Review

This Court reviews the Occupational Safety and Health Review Commission’s findings of fact under a substantial evidence standard. Under 29 U.S.C. § 660(a), the Commission’s factual findings are conclusive only if they are “supported by substantial evidence on the record considered as a whole. . . .” The Commission’s legal conclusions are reviewed under the “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” standard. 5 U.S.C. § 706(2)(A); *Austin Indus. Specialty Servs., L.P. v. OSHRC*, 765 F.3d 434, 438–39 (5th Cir. 2014).

II. The Commission’s Finding that 29 C.F.R. § 1926.1407 Applied to TNT was an Abuse of Discretion and is Not Supported by Substantial Evidence.

To establish a prima facie case that a standard under the Occupational Safety and Health Act was violated, the Secretary must prove the following four elements: (1) the standard applied to the cited condition; (2) the terms of the standard were violated; (3) one or more employees had access to the violative condition; and (4) the cited employer had actual or constructive knowledge of those conditions. *EMCON/OWT, Inc. v. Secretary of Labor*, 224 F. App'x 875 (11th Cir. 2007) (quoting *Sec'y of Labor v. Southwestern Bell Tele. Co.*, 19 BNA OSHC 1097, 1098, 2000 WL 1424806 (OSHRC No. 98-1748, 2000)).

This Court should reverse the Commission's March 27, 2020 Decision because the Secretary failed to establish the first element of its prima facie case. (Vol. 7, No. 62). Under the plain meaning of "disassembly," 29 C.F.R. § 1926.1407 did not apply to the facts in this case.

A. The Plain Meaning of the Term "Disassembly" Applies and "Disassembly" Does Not Begin Until the Crane is Physically Disassembled.

In construing a regulation, the plain meaning of the regulatory language should be examined first. *Roberto v. Department of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006). The Court is bound to give effect to the plain and natural meaning of a regulation's words. *Diamond Roofing Co. v. Safety & Health Review Commission*, 528 F.2d 645, 649 (5th Cir. 1976). "If the regulatory language is clear and unambiguous, the inquiry ends with the plain meaning." *Roberto*, 440 F.3d at 1350.

If, however, the regulation is silent or genuinely ambiguous, then the court must undertake additional analysis to determine whether the agency’s interpretation is reasonable and entitled to deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2404 (2019).

Although the Commission correctly found that the term “disassembly” is not ambiguous in the standard, the Commission abused its discretion in its conclusion as to the plain and natural meaning of that word. Both citations at issue fall under 29 C.F.R. § 1926.1407, which applies to power line safety for assembly and disassembly of equipment. 29 C.F.R. § 1926.1407(a) states, “Before assembling or disassembling equipment, the employer must determine if any part of the equipment, load line, or load (including rigging and lifting accessories) could get, in the direction or area of assembly/disassembly, closer than 20 feet to a power line during the assembly/disassembly process. . . .” The definition section of the standard defines “Assembly/Disassembly” and states:

Assembly/Disassembly means the assembly and/or disassembly *of equipment* covered under this standard. With regard to tower cranes, “erecting and climbing” replaces the term “assembly,” and “dismantling” replaces the term “disassembly.” Regardless of whether the crane is initially erected to its full height or is climbed in stages, the process of increasing the height of the crane is an erection process.

29 C.F.R. § 1926.1401 (emphasis added).

The Commission’s interpretation of the first line of the definition of assembly/disassembly is not in accordance with the well-established principles of regulatory interpretation. According to the Commission, “the first line of the

definition simply identifies the slash used in the term ‘Assembly/Disassembly’ as meaning ‘and/or’. (Vol. 7, No. 62 at 4). The Commission’s interpretation completely ignores the remaining part of that definition: “. . . disassembly of the equipment covered under this standard.” 29 C.F.R. § 1926.1401. This is fundamentally a flawed interpretation of the regulation because the Commission’s interpretation effectively nullifies that part of the regulation. *Chemical Mfrs. Ass’n v. U.S.E.P.A.*, 870 F.2d 177, 259 (5th Cir. 1989) (“It is axiomatic that statutes must be read as an integral whole and that no part should be read to render inoperative another part of the statute.”).

Furthermore, the regulation’s definition of “disassembly” includes the phrase “of equipment,” which should not be conveniently ignored. By inserting “of equipment” into the definition, “disassembly” plainly refers to the physical disassembly of the crane and does not include ancillary tasks such as setting up the crane after assembly (which is discussed in a separate regulation focusing on ground conditions, 29 C.F.R. § 1926.1402) or positioning the crane so that it can be disassembled. As the regulatory plain language is clear and unambiguous, the inquiry ends here. *Roberto*, 440 F.3d at 1350.

Yet, the Commission’s Decision continues by erroneously finding that, “the meaning of ‘disassembly’ is not limited to the time during which crane components are being physically separated.” (Vol. 7, No. 62 at 5.) The Commission found that

various regulations within the Crane and Derricks subpart discuss processes that must take place “as part of the assembly/disassembly process before pin or component removal even begins.” (Vol. 7, No. 62 at 5). For example, the Commission cites to 29 C.F.R. § 1926.1404(h)(4), which states, “When using an assist crane, the loads that will be imposed on the assist crane at each phase of assembly/disassembly must be verified . . . before assembly/disassembly begins.” Additionally, the Commission cites to 29 C.F.R. § 1926.1407(a) which states that, “Before assembling or disassembling equipment, the employer must determine if any part of the equipment . . . could get, in the direction or area of assembly/disassembly, closer than 20 feet to a power line during the assembly/disassembly process...”

The Commission emphasizes that these regulations’ requirements for actions to take place before assembly/disassembly begins, supports its conclusion that the term “disassembly” is inclusive of the preparatory action to disassemble a crane. (Vol. 7, No. 62 at 5-6). To the contrary, § 1926.1404(h)(4) and § 1926.1407(a) support TNT’s assertion that “disassembly” refers to the physical disassembly of the crane itself. The regulations distinguish the actions needed to be taken before “disassembly.” Thus, there is a clear dividing line between the actions required “before assembly/disassembly begins” and “[b]efore assembling or disassembling equipment . . .” 29 C.F.R. § 1926.1404(h)(4); 29 C.F.R. § 1926.1407(a)).

The Commission failed to understand the difference between a crane's normal operations and its disassembly. There are a multitude of situations in which the block or ball would be removed during the normal operation of a crane. (Vol. 1, Tr. 264:11–25, 301:7–21; Vol. 2, Tr. 347:17–22, 457:23–58:6). Dropping the ball and moving the boom do not constitute disassembly and “disassembly” as used within the regulation does not encompass actions taken during a crane's normal operations. (*Id.*)

As Judge Duncan noted, regulations within the Crane and Derricks subpart support a clear dividing line between assembly/disassembly and normal operations. (Vol. 6, No. 50 at 8). First, 29 C.F.R. § 1926.1405—which regards additional disassembly requirements pertaining to booms and jibs—repeatedly instructs crane operators not to remove the crane's pins while the pendants are in tension and the boom is supported. *See* 20 CFR § 1926.1405(a)-(d). Similarly, in 29 C.F.R. § 1926.1404—which provides general requirements for assembly/disassembly—removal of pins is repeatedly highlighted as part of the disassembly process. *See* 29 C.F.R. § 1926.1404(f), (h).

The Commission also erroneously rejected consideration of the final rule preamble. The preamble states:

Irrespective of whether the crane is initially erected to its full height, or is “jumped” in stages, the process of increasing the height of the crane is an assembly/erection process. Section 1926-1403 through 1924-1406 apply whenever the crane's height is modified. To ensure that this intent

is reflected in the standard, OSHA has added a sentence to the definition of “assembly/disassembly” in § 1926.1401 to this effect.

Cranes and Derricks in Construction; Final Rule, 75 Fed. Reg. 47905, 47936 (Aug. 9, 2010) (emphasis added). The preamble’s note, that modification of the height of the crane connotes disassembly underpins the definition in § 1926.1402, focuses on changes in the equipment’s actual structure. As Judge Duncan aptly found, the preamble’s “language focuses on the addition or removal of structural components, i.e., pins, and provides a strong indication that mere removal of the block and lowering of the boom is insufficient for the application of the cited standards.” (Vol. 6, No. 50 at 10.)

The Commission chose to ignore this preamble, making the distinction that the statement was in response to a commenter’s question specific to tower cranes. (Vol. 7, No. 62 at 7.) However, that does not invalidate the Secretary’s prior interpretation of the term “disassembly.” The preamble states that the physical process of changing the crane’s height is part of its assembly/disassembly. The Commission drew an arbitrary distinction between the types of cranes involved and improperly disregarded the preamble.

Similarly, the Commission erroneously dismissed the sole case discussing crane disassembly, *Sec’y of Labor v. Steel Constructors, Inc.*, 8 O.S.H. (BNA) 2136, 1980 WL 10389 (O.S.H.R.C.A.L.J. 1980). The Commission dismissed any consideration of *Steel Constructors* because the case “predate[d] the existence of the

crane standard at issue here, so it did not involve the term ‘disassembly’ within the context of that standard. . . .” (Vol. 7, No. 62 at 9). Although the case does not hold precedential value, the case should have been considered for its persuasive authority. *Cf. United States v. Stafford*, 721 F.3d 380, 397 (6th Cir. 2013) (“Although unpublished decisions are not binding precedent on subsequent panels, their reasoning may be instructive or helpful especially where there are no published decisions which will serve as well[.]”) (quoting *Hood v. Keller*, 229 F. App’x 393, 398 n. 5 (6th Cir. 2007)).

In *Steel Constructors*, the employer had taken more steps to prepare for disassembly than TNT’s crew took in this case: the jib had been removed, the motor had been shut down, the controls had been locked out, and the boom was suspended off the ground. The accident occurred when an employee unexpectedly began knocking out the pins of the boom. Under those facts, the ALJ noted that the crew was merely in the preparatory stages in order to begin disassembly, but disassembly had not yet begun because the boom was normally disassembled after it was lying safely upon the ground. *Steel Constructors*, 1980 WL 10389 at *5 The case speaks to the plain and natural meaning of the term “disassembly” as it relates to cranes and what that term means in the context of the rest of § 1926.1407, in particular, § 1926.1407(a)—“disassembling equipment.” As such, the Commission erred in wholly disregarding *Steel Constructors*.

Accordingly, the plain meaning of “disassembly,” as determined by the definition of the term and regulatory text is that disassembly does not begin until the crane is physically disassembled. The Commission’s legal conclusions were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

B. The Commission Abused its Discretion When it Found that the Secretary’s Interpretation of the Term “Disassembly” was Reasonable and Entitled to Deference.

As discussed above, the term “disassembly” is not ambiguous. Therefore, the Commission’s discussion and consideration of the Secretary’s interpretation of the term was wholly unnecessary and superfluous.

A regulation is genuinely ambiguous if there is more than one reasonable construction of a regulation. *Kisor*, 139 S. Ct. at 2415. When an agency is interpreting its own genuinely ambiguous regulation, it is owed deference unless the interpretation is “plainly erroneous” or inconsistent with the regulation. *See Auer v. Robbins*, 519 U.S. 452 (1997). Moreover, deference to the Secretary’s interpretation of his own standard is not required under *Auer* unless the interpretation is reasonable. *Kisor*, 139 S. Ct. at 2404. An interpretation is not reasonable if it does not reflect the agency’s fair and considered judgment. *Christopher v. Smith-Kline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012). This may occur, for instance, when the agency’s interpretation is merely a “convenient litigating position.” *Kisor*, 139 S. Ct. at 2404.

Because the Commission determined that the term “disassembly” was not ambiguous, the Secretary’s interpretation was entitled to no deference. Even if the language is genuinely ambiguous, the Secretary’s interpretation is not entitled to deference because it is not reasonable. Instead, it represents a convenient litigating position not based on the Secretary’s fair and considered judgment. *Cf. Christensen v. Harris County*, 529 U.S. 576, 587–88 (2000) (“To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.”).

The Secretary argued in his brief on appeal for the following interpretation to apply:

[I]t is reasonable and logical to interpret “disassembly” broadly to encompass all steps in the process of taking apart the crane that could result in a part of the equipment coming within 20 feet of a power line. This reasonably includes necessary preliminary steps, such as retracting the hoist line and lowering the boom, taken before the removal of the boom’s structural pins.

(Vol. 7, No. 57 at 8). The Secretary’s request for this interpretation is unsupported by the text of the regulations, their legislative history, by case law, or by any facts introduced as evidence at the hearing in this case. The interpretation also presents an incredibly vague standard, as “preliminary steps” are not defined by the Secretary either in his legal brief or by the applicable regulations, case law, or otherwise.

As recognized by Judge Duncan and not addressed by the Commission, “[OSHA’s] own Compliance Directive indicates that a mobile truck crane with a

fully assembled boom, which only needs to be unfolded and pinned, does not even go through the assembly/disassembly process covered by the cited regulations.” (Vol 6, No. 50 at 10; *see* Vol. 4, R-34 at 20.) That Compliance Directive, entitled “Equipment Set-up” states that, “if the equipment operator merely unfolds and pins the boom of a fully assembled truck crane, it would be inappropriate to apply [assembly/disassembly] requirements.” (Vol. 4, R-34 at 20.) Because the Secretary’s interpretation is unmoored by law and fact, it is inherently not reasonable.

The Commission essentially re-defined the term “disassembly” to include all actions taken pursuant to a plan to disassemble. However, as discussed above, that does not comport with the plain meaning of the word as used in the regulation. The Commission and Secretary’s interpretation unreasonably broadens the term to include *any* preparatory actions taken pursuant to a plan. *Diamond Roofing*, 528 F.2d at 650 (“To strain the plain and natural meaning of words for the purpose of alleviating a perceived safety hazard is to delay the day when the occupational safety and health regulations will be written in clear and concise language so that employers will be better able to understand and observe them.”).

The Secretary’s interpretation provides no clear rule and, instead, allows variances from employer to employer, job to job, and even from operator to operator depending upon what procedures the employers decide to implement and their

intended purpose for specific actions. Indeed, the Secretary, in an attempt to explain why his interpretation should be considered reasonable asserted that:

The Secretary is not arguing that lowering the boom and removing the block always constitute disassembly; **only that in the context of this particular case**, where the contracted work tasks had been completed, a crew had been called together to take the crane down and remove it from the job site, and the crew had taken the first several steps of its disassembly plan, the employees had begun disassembly within the meaning of the standard.

(Vol. 7, No. 57 at 13 (emphasis added).) The Secretary’s interpretation is unreasonable because it would require every inspection, citation, and dispute under this standard to be determined by an interpretation that the Secretary only now asserts in this litigation. *See Kisor*, 139 S. Ct. at 2413 (“Congress’s frequent preference [is] for resolving interpretive issues by uniform administrative decision, rather than piecemeal by litigation.”) (internal quotations omitted) (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980)). Such a rule would cause considerable confusion within the crane industry and provide no guidance on when swinging the boom or removing the block would constitute disassembly. As TNT’s witnesses testified at the hearing, swinging the boom and removing the block are routine actions that occur during operations. (Vol. 1, Tr. 264:11–19, 264:11–25, 301:7–21; Vol. 2, Tr. 347:17–22.)

The Commission abused its discretion when it unnecessarily decided that the Secretary’s interpretation was entitled to deference. Additionally, the Commission

abused its discretion when it determined that the Secretary's interpretation was reasonable.

C. The Commission's Conclusion that the Citations Applied to TNT's Work is Not Supported by Substantial Evidence.

Applying the plain meaning of the regulation, “[t]he facts presented at trial . . . clearly established that disassembly of the crane was *about* to begin, but had not actually started.” (Vol. 6, No. 50 at 6 (emphasis original).)

In preparing to disassemble the crane, Benson repositioned the semi-truck near the crane. The plan was to lower the boom onto the trailer and use a separate helper crane to begin physically dismantling sections of the jib. Each witness with knowledge of the crane industry and its operations testified at the hearing that disassembly of the crane would not begin until the actual removal of the first section of the jib. (Vol. 1, Tr. 207:23–08:4, 227:2–16, 264:11–65:6; Vol. 2, Tr. 467:17–19, 536:6–41:15.) TNT, however, never progressed to disassembly because, as Benson was lowering the boom and retracting the hoist line, the accident occurred.

When the accident occurred, none of the equipment necessary to disassemble the crane, including the helper crane, was in position. (Vol 1, Tr. 262:5-13; Vol. 2, Tr. 456:22–57:1.) Additionally, the TNT crew was never going to disassemble the crane under the power lines. (Vol. 2, Tr. 358:10–14.) It would have been physically impossible to do so because the helper crane would not have been able to drive underneath them. (Vol. 1, Tr. 261:1–12.) Lowering the boom of the crane and

retracting the hoist line after removing the block were all preparatory actions taken in order to begin disassembling the crane away from the power lines. Only after those steps were taken, could the crane disassembly begin. (Vol.1, Tr. 207:5–08:4.)

As Judge Duncan noted, “From operators to the expert, all of [TNT’s] witnesses testified that simply lowering the boom and disconnecting the block are normal operations that can occur multiple times over the course of a single day.” (Vol. 6, No. 50 at 4.) Accordingly, swinging the boom and dropping the ball do not constitute disassembly. (Vol. 1, Tr. 263:11–25; Vol 2, Tr. 347:1–5, 457:23–58:6.)

Notably, the Secretary’s unsupported argument is predicated on Beck’s investigation of the accident. Yet, Beck had no experience regarding cranes and had never investigated an accident involving a crane before. (Vol. 1, Tr. 145:2–46:6.) He had never operated a crane, never disassembled a crane, never worked as a crane rigger, did not have a commercial driver’s license, did not know what entity certifies crane operators, and had never issued citations under the two standards that are at issue in this case. (*Id.*) Moreover, the inspector did not visit the site where the incident occurred and conducted no research, other than interviewing TNT’s employees, regarding whether what was occurring at the time of the accident is considered disassembly by the crane industry. Instead, the inspector “read it out of [the] regulation,” which he admitted did not define disassembly. (Vol. 1, Tr. 155:3–12, 159:1–3, 174:12–14.)

The inspector's—and Secretary's—conclusion that the crane was being disassembled at the time of the accident was “wholly reliant upon witness interviews” where the witnesses “apparently used phrases like ‘began to disassemble’ and ‘started breaking down the crane,’ which led him to conclude they were engaged in crane disassembly at the time of the accident.” (Vol. 6, No. 50 at 5.) The inspector's interviews, however, were pro forma and characterized by his disinterest in the witnesses' answers as well as his ignorance of the crane industry. For example, when the inspector interviewed the injured worker, he failed to inquire into whether he was taking any medications as a result of the accident or whether he was being treated for psychosis, even though he had received a considerable electric shock. (Vol. 1, Tr. 147:13–19.)

Further, when the inspector interviewed Freddie Ray, a TNT employee at the site at the time of the accident, he did not ask many questions. (Vol. 1, Tr. 220:7–14.) Ray testified, “I tried to give him specifics, and he didn't seem interested.” (Vol. 1, Tr. 220:15–16, 229:17–19) (the inspector “didn't want to hear about” the details.) Beck cut off Ray when Ray tried to tell Beck what happened. (Vol. 1, Tr. 234:1–15.) The inspector did not ask Ray follow up questions, did not seem to care about what happened, and his questions seemed vague. (Vol. 1, Tr. 266:6–13.) Moreover, when Ray stated in his witness interview that “we started breaking down the crane as they

were lowering the boom,” he was using slang and did not mean that disassembly had actually begun. (Vol. 1, Tr. 225:19–26:12.)

The Secretary did not introduce any evidence that disassembly had begun when the accident occurred. The evidence is undisputed that the crane had not been structurally disassembled at the time of the accident. The Commission’s decision was, therefore, not based on substantial evidence and the cited standards, which apply only to disassembly, did not apply to TNT.

II. The Commission’s Decision that Benson’s Violative Conduct Was Foreseeable to TNT was an Abuse of Discretion and Not Supported by Substantial Evidence.

A. The Secretary was Required to Establish That Benson’s Conduct was Foreseeable.

The Commission abused its discretion when it decided that the Judge Duncan erred in applying *WG Yates and Sons Constr. Co. Inc. v. Occupational Safety and Health Review Comm’n*, 459 F.3d 604, 609 (5th Cir. 2006), and found that the Secretary was not required to establish that Benson’s conduct was foreseeable. According to the Commission, because all the crew members were engaged in the violative conduct under each citation item, Benson’s knowledge of his crew’s misconduct is automatically imputed to TNT. (Vol. 7, No. 78 at 5.) The Commission fundamentally misunderstood the applicability of *Yates*.

“As with each element required to establish a violation, employer knowledge must be established by the Secretary, as an element of § 666(k).” *Yates*, 459 F.3d at

609. “Knowledge is a fundamental element of the Secretary of Labor’s burden of proof for establishing a violation of OSHA regulations.” *Trinity Indus., Inc. v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000) (citing *Carlisle Equip. Co. v. Sec. of Labor*, 24 F.3d 790, 792-93 (6th Cir. 1994)). 29 U.S.C. § 666(k) imposes liability on the employer only if the employer knew, or “with the exercise of reasonable diligence, [should have known] of the presence of the violation.” *Yates*, 459 F.3d at 607 (quoting 29 U.S.C. § 666(k)).

“[I]mputing to the employer the knowledge of a supervisor of his own violative conduct without any further inquiry would amount to the imposition of a strict liability standard, which the Act neither authorizes nor intends.” *Id.* (quotation marks omitted). “[A] supervisor’s knowledge of his own malfeasance is *not* imputable to the employer where the employer’s safety policy, training, and discipline are sufficient to make the supervisor’s conduct in violation of the policy unforeseeable.” *Id.* at 608–9. This is because “fundamental fairness requires that one charged with and penalized for violation be shown to have caused or at least to have knowingly acquiesced in that violation.” *Id.* at 608 (quoting *Horne Plumbing Heating Co. v. OSHRC*, 528 F.2d 564, 568-69 (5th Cir. 1976) (internal brackets and ellipses omitted)).

As this Court explained in *Angel Bros. Enters. v. Walsh*, 18 F.4th 827 (5th Cir. 2021), “[t]he rationale for the *Yates* exception is a concern that a strict liability

regime, rather than one requiring knowing misconduct, would result if one supervisor were the source of both the underlying violation and the company's awareness of it." *Id.* at 831. "Consequently, the Secretary, [not TNT], bears the burden to establish that the supervisor's violative conduct was foreseeable." *Id.* at 609. On the facts of this case, TNT can be charged with knowledge only if Benson's alleged knowledge of his own misconduct is imputable to TNT. *Yates*, 459 F.3d at 609.

Benson alone engaged in the conduct that violated the cited standards. Benson created the work plan and JSA. Benson told to the crew how the disassembly would be carried out and assured the crew that his plan was safe. (Vol. 1, Tr. 214--17.) Benson "planned the process of disassembly and dictated to the other employees how it would be carried out, from where the crane and trucks would be located to having Larison hold the becket at the end of the hoist cable while he moved the boom into position." (Vol 7, No. 69 at 15.) Furthermore, "it was Benson who failed to comply with the plan when he lowered the boom before swinging over the adjacent field, which sent the hoist cable into the power lines." (Vol 7, No. 69 at 15-16.)

The case of *Angel Brothers* is distinguishable from the facts of this case. In *Angel Brothers*, the company's safety manager told its foreman that the crew needed to start using a trench box. Regardless, the very next day, the foreman admittedly allowed a crew member to work without a trench box. The foreman and another

employee stood by while the crew member worked in the trench without the trench box in violation of OSHA's cave-in protection rules. The Court held that the *Yates* exception did not apply because the violation was committed by the crew member while the foreman allowed the violation to happen. *Angel Bros.*, 18 F.4th at 831. Importantly, the Court held that, "authorizing another's violation is not the same as committing the violation oneself." *Id.*

As Benson himself actively engaged in committing the violative conduct, the facts of this case are dissimilar to *Angel Brothers* and more akin to *Yates*, where the foreman physically committed the violation. Automatically imputing Benson's knowledge of his *own* misconduct to TNT would violate this Court's concerns of fundamental fairness and impose a strict liability scheme. This Court repeated its fairness concerns in *Yates*, stating that:

OSHA is not a strict liability statute; the mere fact that violative conduct occurred is not, of itself sufficient to establish employer liability; knowledge, actual or constructive, of the unsafe condition is an element of an employer violation; the burden is on the government to prove the elements of its case; **in this case we address only the situation in which it is the supervisor himself who engages in unsafe conduct and who does so contrary to policies of the employer.** Thus, a supervisor's knowledge of his own rogue conduct cannot be imputed to the employer; and consequently the element of employer knowledge must be established, not vicariously through the violator's knowledge, but by either the employer's actual knowledge, or by its constructive knowledge based on the fact that the employer could, under the circumstances of the case, foresee the unsafe conduct of the supervisor. This rule places only the initial burden on the government to prove its alleged violation against the employer, which it can do by showing the inadequacy of the employer's program and/or its failed enforcement.

Yates, 459 F.3d at 610, n.8 (emphasis added).

A supervisor who defies his training and engages in misconduct has gone “rogue” and is no longer the eyes and ears of the company. Therefore, it would be illogical to impute a supervisor’s knowledge of his subordinates’ misconduct, alongside the supervisor’s own misconduct, to the employer when the supervisor has abandoned his role as the eyes and ears of the company. Automatically imputing Benson’s knowledge of his own violation to TNT would result in applying a strict liability standard. The Commission erred in holding that the Secretary was not required to establish that Benson’s conduct was foreseeable. It is, and always has been, the Secretary’s burden to prove the elements of his prima facie case. Application of the Commission’s Decision would improperly place on TNT the burden of defending a violation that has not been established. *See Yates*, 459 F.2d at 609.

The Commission abused its discretion in finding that the Secretary was not required to show foreseeability because *Yates* applies to this case. Therefore, its June 2, 2022 Decision should be reversed and vacated.

B. Benson’s Conduct was Not Foreseeable Because the Substantial Evidence Shows that TNT Had Robust a Safety Program.

The Secretary must establish that Benson’s conduct was foreseeable to TNT by showing a deficiency in TNT’s safety policy, training, or discipline. *See Yates*,

459 F.3d at 608–9. However, the Secretary did not and cannot show this because the evidence at the hearing of this case showed that TNT’s safety policy, training, and discipline was thorough and robust.

Safety is of a paramount importance to TNT. (Vol. 2, Tr. 394:10–14.) This is evidenced by its detailed and extensive written safety program, which includes safe operating procedure guidelines. (Vol. 2, Tr. 394:10–14, 395:15–21; Vol. 4, R-1.) As Judge Duncan correctly recognized, “[TNT’s] safety policy is extensive and has rules that specifically govern the conduct identified in the Citation. The policy tracks the language of the standard’s requirements but does not merely reproduce the standards themselves—it is specific so as to guide employee behavior.” (Vol. 7, No. 69 at 17; *see* Vol. 4, R-1 at TNT000125, R-2 at TNT000132, R-3 at TNT000148–49.)

1. TNT Established Work Rules.

TNT has a detailed and extensive written safety program, which includes safe operating procedure guidelines. (Vol. 2, Tr. 395:15–21; Vol. 4, R-1.) For crane operators, TNT’s Safe Operating Guidelines provide that they read and implement the JSA and that they perform their assigned tasks in a safe and proper manner. (Vol. 4, R-1 at TNT000116.) Additionally, “[t]he operator is responsible for the safe operation of his equipment at all times.” (Vol. 4, R-1 at TNT000125.)

Moreover, TNT has specific, detailed Standard Operating Procedure for cranes and for operating near electrical hazards, such as power lines. (Vol. 4, R-2 at TNT000132.) TNT's safety policy states that work near power lines must be performed outside of the ten-foot MAD, dictates what the MAD is for power lines, requires supplemental actions for activities occurring within 20 feet, and identifies what those requirements are. (See Vol. 4, R-1 at TNT000125, R-2 at TNT000132, R-3 at TNT000148-49.)

2. TNT Communicated its Policies to its Employees.⁴

TNT communicates its safety program to its employees. (Vol. 2, Tr. 405:8–10; Vol. 4, R-12.) TNT's safety protocols are communicated to its employees during their onboarding and annually. (Vol. 4, R-12.) From day one in the crane industry, TNT employees receive training regarding power lines. (Vol. 2, Tr. 586:3–20.) Additionally, TNT conducts safety meetings three times per week with its employees where a broad variety of safety topics are covered routinely. (Vol. 2, Tr. 419:12–422:5.) TNT also conducts JSAs, or pre-job meetings, where safety hazards for the job are discussed. Where applicable, JSAs cover working in proximity to power lines and adequate clearance distances. (Vol. 2, Tr. 422:6–14.) In fact, the main topic of

⁴ In its analysis of TNT's employee misconduct defense, the Commission correctly found that TNT adequately communicated its rules to its employees. TNT does not contest that portion of the Commission's finding.

the JSA for the job where the accident occurred was power line safety encroachment distances. (Vol. 1, Tr. 255:15–18, Vol. 4, R-4.)

Specifically, as to Benson, prior to the incident, Benson had received electrical safety policy training from TNT repeatedly. (Vol. 2, Tr. 412:1–6; 596:13–97:2.) Ray testified that TNT’s safety policies and thorough safety training were sufficient to render Benson’s conduct unforeseeable. (Vol. 1, Tr. 269:6–10.) Similarly, Troy Pierce testified that Benson’s act was totally unforeseeable to the company. (Vol. 2, Tr. 377:3–4, 439:2–14.) Finally, Jamie Arnold, who helped train Benson, did not foresee that Benson would act as he did because Arnold believed that Benson was a good crane operator and because he had received a substantial amount of training at TNT regarding power line safety. (Vol. 2, Tr. 588:14–21.) Benson putting the crane’s hoist line into the power line went against all his training from TNT. (Vol. 1, Tr. 259:22–24.)

3. TNT Takes Steps to Discover Violations and Enforces the Rules.

TNT conducts field safety audits where they review compliance with safety procedures for working around power lines. (Vol. 2, Tr. 418:1–9; Vol. 4, R-49.) TNT deploys branch managers, project managers, and safety professional to conduct surprise and planned audits of various worksites. (Vol. 2, Tr. 416:9–17:11; *see also* Vol. 4, R-49.) TNT also has an accredited strategic partnership with OSHA through

the Associated Builders and Contractors, which requires TNT to allow OSHA into its facility to inspect it for compliance with safety regulations. (Vol. 2, Tr. 399:1–9.) TNT has a progressive disciplinary policy laid out in its orientation packet. (Vol. R-12 at TNT00055.) TNT disciplines its employees for violating its safety policies consistent with the progressive disciplinary policy. (Vol. 4, R-27, R-29.)

As such, the Secretary did not and cannot establish that TNT’s safety policy, training, or discipline were deficient. Accordingly, and as properly held by Judge Duncan, Benson’s actions were not foreseeable to TNT. The Secretary cannot establish an element of his prima facie case and the citations should be dismissed.

III. The Commission’s Conclusion that TNT Failed to Prove that Benson Engaged in Unpreventable Employee Misconduct Was an Abuse of Discretion and Unsupported by Substantial Evidence.

Even if the Court finds that the citations applied to TNT’s work at the time of the accident and that Benson’s conduct was foreseeable to TNT, the Commission’s Decisions should be reversed because TNT established that Benson engaged in unpreventable employee misconduct. “The affirmative defense of employee misconduct requires a showing that the employer 1) has established work rules designed to prevent the violation, 2) has adequately communicated these rules to its employees, 3) has taken steps to discover violations, and 4) has effectively enforced the rules when violations have been discovered.” *Yates*, 459 F.3d at 609, n.7.

The Commission abused its discretion when it found that TNT had failed to prove its unpreventable employee misconduct defense because substantial evidence in this case showed that TNT established its defense. First, TNT established work rules—through issuance of its safety policies regarding crane operations and power line safety—that were designed to prevent any contact with power lines and any violation of the standards cited here. Second, TNT communicated these policies to its employees thoroughly. It did so when each employee was hired, routinely throughout each employee’s employment, and often during the JSA and pre-work planning meetings. Third, TNT took steps to ensure compliance with its policies and discover any violations by conducting audits of its crews’ work performance on a regular basis. Finally, TNT has enforced violations of its safety policies by disciplining employees who violate them.

A. TNT Had Clear and Specific Work Rules Designed to Prevent the Violations.

TNT has a detailed Standard Operating Procedure for cranes, including a specific policy regarding operating near electrical hazards, such as power lines. The Commission erred when it found that TNT’s work rules did not sufficiently address

the requirements of § 1926.1407(b) and its conclusion is unsupported by substantial evidence.⁵

TNT's safety rules expressly mandate that its employees implement encroachment prevention measures prior to crane operation near electrical hazards.

Section 13 of TNT's safety policy states:

For lines rated 50kV or below, minimum clearance between the lines and any part of the crane or load shall be 10 feet. During the pre-job meeting any power lines that are located in the work area will be identified and discussed. If it is determined that any part of the equipment, load line or load could get closer than 20 feet to a power line then at least one of the following measures must be taken: 1) Ensure the power lines have been de-energized and visibly grounded, 2) Ensure no part of the equipment, load line or load gets closer than 20 feet to the power line, or 3) Determine the line's voltage and minimum approach distance permitted.

When moving cranes around electrical equipment a spotter must be in place to assist Operator or have a back up alarm that is audible above the surrounding noise level.

If necessary a spotter will be designated to monitor the approach distance and alert Operator if that distance becomes compromised.

(Vol. 4, R-2 at TNT000132 (emphasis added).)

The Commission plainly erred when it stated that the work rule mentions “only one of the cited provision’s numerous encroachment prevention measures” (Vol. 7, No. 78 at 8.) Furthermore, the Commission erred when it found that

⁵ As the Commission correctly held that TNT's work rules addressed the requirements of § 1926.1407(d), TNT does not contest that portion of the Commission's decision and does not address it in this brief.

“nowhere does the policy identify when a spotter is ‘necessary’ or otherwise required.” (*Id.*) The above-cited policy dictates that “a spotter must be in place” when operating a crane near lines rated 50kV or below. In the alternative, a back up alarm is to be utilized in such situations. When the accident occurred, the crane was in fact moving near power lines during Benson’s violative conduct. Therefore, the Commission’s finding, that TNT’s work rule did not sufficiently address the requirements of § 1926.1407(b)(3), is not supported by substantial evidence.

Additionally, as mentioned above, TNT’s Safe Operating Guidelines ensure, among other things, that crane operators have read and implement the JSA. Crane operators are also to perform their assigned tasks in a safe and proper manner. (Vol. 4, R-1 at TNT000116.) Additionally, the “operator is responsible for the safe operation of his equipment at all times. (Vol. 4, R-1 at TNT000125.) TNT had specific, detailed Standard Operating Procedure for cranes and a specific, detailed policy regarding operating near electrical hazards, such as power lines. (Vol. 4, R-2 at TNT000132.)

B. TNT Effectively Communicated its Power Line Safety Policies.

As the Commission erroneously determined that TNT did not meet the first element of its unpreventable employee misconduct defense as to § 1926.1407(b)(3), it did not determine whether TNT communicates the requirements of its work rules to its employees. However, the Commission’s determination that TNT adequately

communicated its work rules related to § 1926.1407(d),⁶ should direct this Court to similarly find that TNT adequately communicated its work rules related to §1926.1407(b)(3). All the facts that were considered by the Commission in concluding that TNT adequately communicated its work rules related to § 1926.1407(d) to its employees apply to TNT’s communication of its work rules related to §1926.1407(b)(3).

C. TNT Took Steps to Discover Violations and Enforce the Rules.

The evidence in this case does not support the Commission’s determination that TNT failed to establish the sufficiency of its auditing program. As the basis for its decision, the Commission found that TNT did not establish “the frequency with which the audits occurred at each worksite and whether remote sites, like the one at issue here, were ever audited at all.” (Vol. 7, No. 78 at 11.)

The Commission relied on the fact that TNT did not audit the subject worksite but ignored the fact that TNT deploys branch managers, project managers, and safety professionals to conduct surprise and planned audits of various worksites. (Vol. 2, Tr. 416.) Moreover, jobsite audits occurred regularly and TNT introduced samples of audits performed at various worksites. (Vol. 1, Tr. 266–67; Vol. 4, R-49.) TNT’s VP of Health, Safety and Environment, Troy Pierce, testified further that “there are

⁶ TNT does not contest that portion of the Commission’s Decision and, therefore, does not address it in this brief.

plenty of jobs” where TNT will be at the worksite for an extended period of time and have “supervisors, foremen, superintendents, a number of people there as part of the hierarchy.” (Vol. 2, Tr. 417.) TNT also has an accredited strategic partnership with OSHA through the Associated Builders and Contractors, which requires TNT to allow OSHA into its facility to inspect it for compliance with safety regulations. (Vol. 2, Tr. 399:1–9.)

For these reasons, the Commission’s finding is not supported by substantial evidence and Judge Duncan correctly determined that “[s]imply because one worksite was not audited over the course of a one-week project (that was originally scheduled to be completed in one day), does not mean the audit program, as a whole, was deficient.”⁷ (Vol. 7, No. 69 at 19.)

Because the Commission’s findings of facts were not supported by substantial evidence, it abused its discretion when it found that TNT had failed to establish the employee misconduct affirmative defense.

CONCLUSION

For the foregoing reasons, TNT respectfully requests that this Court reverse the Commission’s March 27, 2020 and June 2, 2022 Decisions and hold that the citations do not apply to TNT, that Secretary has failed to prove that Benson’s

⁷ Judge Duncan’s decision regarding the foreseeability of Benson’s actions tracks the analysis of the employee misconduct affirmative defense and is therefore applicable to this analysis.

violative conduct was foreseeable to TNT, or, in the alternative, that TNT is entitled to the unpreventable employee misconduct affirmative defense. As such, Citation 1, Item 1 and Citation 1, Item 2 should be vacated and judgment should be entered in favor of Petitioner.

Respectfully submitted,

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& Rigging, Inc.

CERTIFICATE OF SERVICE

This is to certify that the foregoing instrument has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on September 28, 2022, on all registered counsel of record, and has been transmitted to the Clerk of the Court.

/s/ Travis W. Vance
Travis W. Vance

CERTIFICATE OF COMPLIANCE

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/s/ Travis W. Vance

Travis W. Vance

Counsel of Record for Petitioner TNT Crane
& Rigging, Inc.

Dated: September 28, 2022

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

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September 29, 2022

Mr. Travis Wayne Vance
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227 W. Trade Street
Suite 2020
Charlotte, NC 28202

No. 22-60399 TNT Crane & Rigging v. OSHC
Agency No. 16-1587

Dear Mr. Vance,

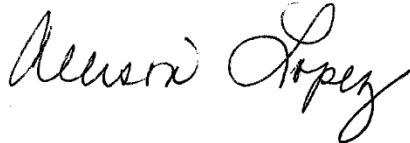
We have determined that your brief is deficient (for the reasons cited below) and must be corrected within 14 days.

An attorney who signs the brief must enter an appearance in the case. The attorney must electronically file a "Form for Appearance of Counsel." See **FED. R. APP. P. 12(b)**, **5TH CIR. R. 12** and **5TH CIR. R. 46.3**. The appearance form is available on our website at: "<http://www.ca5.uscourts.gov/docs/default-source/forms/formforappearanceofcounsel.pdf>".

Within 14 days, counsel must separately file a copy of the Record Excerpts in Portable Document Format (PDF) file, as required by **5TH CIR. R. 30.2(b)**, by using the docket event "Record Excerpts Filed," which is found under the "Briefs" category. Failure to do so may result in the dismissal of the petition for review.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Allison G. Lopez, Deputy Clerk
504-310-7702

cc: Mr. Brian Alan Broecker
Mr. John X. Cerveny
Mr. Charles Franklin James
Ms. Seema Nanda
Ms. Heather Renee Phillips
Mr. William W. Thompson