

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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Mr. Tod T. Morrow  
Morrow & Meyer  
6263 Frank Avenue, N.W.  
North Canton, OH 44720

Re: Case No. 22-3524, *Midwest Equipment Co v. OSHRC*  
Originating Case No. : 19-0723

Dear Counsel,

The Court issued the enclosed Order today in this case. Judgment to follow.

Sincerely yours,

s/Roy G. Ford  
Case Manager  
Direct Dial No. 513-564-7016

cc: Ms. Sarah Marie Tunney

Enclosure

Mandate to issue

**NOT RECOMMENDED FOR PUBLICATION**

No. 22-3524

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

**FILED**  
Jun 1, 2023  
DEBORAH S. HUNT, Clerk

MIDWEST EQUIPMENT COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	ON PETITION FOR REVIEW OF A
	)	DECISION OF THE UNITED
	)	STATES OCCUPATIONAL
OCCUPATIONAL SAFETY & HEALTH	)	SAFETY AND HEALTH REVIEW
ADMINISTRATION, U.S. DEPARTMENT OF	)	COMMISSION
LABOR,	)	
	)	
Respondent.	)	

**ORDER**

Before: MOORE, GRIFFIN, and READLER, Circuit Judges.

Midwest Equipment Company petitions for review of an Occupational Safety and Health Review Commission (Commission) decision affirming three out of four serious safety violations in a citation issued by the Occupational Safety and Health Administration (OSHA) after a crane seriously injured an employee at a construction worksite. The parties have waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the reasons discussed below, we deny the petition for review.

Midwest is a crane rental company that provides cranes with and without operators to its customers. In 2018, Midwest was hired to provide a crane and crew to install antennas on a cell tower in Graysville, Ohio. Midwest sent a three-person crew and a crane to the Graysville worksite. The crane was equipped with a swing-away jib, which is attached to its boom to extend its length. To attach the swing-away jib to the boom, a ramp is unfolded to support the jib, “a lifting strap . . . or a similar device” is attached to the top of the jib and the superstructure or base of the crane, the pins securing the jib to the boom are released, the top of the jib is rotated about

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10 inches to attach it to the top of the boom with pins, and finally the pivot pin is released after the jib is attached to the boom. The pivot pin is crucial because if it is prematurely released, the jib could fall.

The Graysville crew consisted of crane oiler Robert Bednar Jr., assembly/disassembly (A/D) director and lead crane operator Jon Rogers, and assistant crane operator Dennis Hosler. As the A/D director, Rogers was in charge of the Graysville worksite. To get there, Rogers drove the crane, Bednar drove a counterweight truck, and Hosler drove a boom truck. The crew walked the worksite and began to deploy the crane. Bednar began to attach the jib to the boom, but the jib stopped moving before it could be attached, so Rogers told Hosler to help Bednar. Before Hosler reached Bednar, the jib began to fall, making Hosler and Rogers run. Hosler and Rogers returned to find Bednar seriously injured by the jib.

Midwest reported the accident to OSHA, which issued Midwest a citation for four serious safety violations. The citation alleged that Midwest violated: (1(a)) 29 C.F.R. § 1926.1403(a), which requires employers to follow a crane manufacturer's procedures for assembly and disassembly; (1(b)) 29 C.F.R. § 1926.1404(b), which requires an A/D director to understand crane assembly and disassembly procedures; (2(a)) 29 C.F.R. § 1926.1404(d)(1), which requires an A/D director to ensure that the crew understands their tasks, associated hazards, and hazardous locations to avoid; and (2(b)) 29 C.F.R. § 1926.1400(f), which requires employers to "establish, effectively communicate to the relevant persons, and enforce, work rules" to ensure safe crane operation. Midwest contested the citation. Following a hearing, an administrative law judge (ALJ) affirmed the citation and assessed a total penalty of \$15,912, as proposed by OSHA. The ALJ determined that the pivot pin had not been in place when the crew attempted to attach the swing-away jib to the boom, discrediting Rogers's testimony that he had checked that the pivot pin was secure. The Commission granted Midwest's request for discretionary review then affirmed three violations and vacated one—(1(b)). It assessed a reduced total penalty of \$12,818.

Midwest filed a timely petition for review of the Commission's decision. Midwest challenges the Commission's affirmance of three violations in the OSHA citation, asserting that

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the Commission's findings of noncompliance as to each violation are not supported by substantial evidence.

We review the Commission's factual findings for substantial evidence. 29 U.S.C. § 660(a). Substantial evidence "is less than a preponderance of the evidence, but 'more than a scintilla.'" *Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 279 (6th Cir. 2016) (quoting *R.P. Carbone Constr. Co. v. Occupational Safety & Health Rev. Comm'n*, 166 F.3d 815, 818 (6th Cir. 1998)).

§ 1926.1403(a)

First, Midwest takes issue with the Commission's finding that it violated § 1926.1403(a) by failing to follow the crane manufacturer's instructions to use a lifting strap when deploying the swing-away jib and to refrain from releasing the pivot pin before attaching the jib to the boom. Midwest primarily argues that its use of a tag line was equivalent to and served the same purpose as a lifting strap. It points to Rogers's testimony that he instructed Bednar to attach a tag line to the top of the jib and pull it tight in the direction opposite from the direction in which "the jib could move when the securement pins were released." It also notes testimony that a tag line allows an employee to "control the jib" while its securement pins are removed and is actually safer than a strap because an employee holding a tag line stands farther from the jib.

Regarding the pivot pin, Midwest argues that the Commission allowed the respondent to amend its position without fair notice. It notes that the Commission found that it did not verify engagement of the pivot pin before rotating the jib in contrast to the citation's allegation that the pivot pin was prematurely released before the jib was rotated. Midwest also argues that the Commission "flipped the burden of proof" and required it to prove that it did not commit the alleged pivot-pin violation rather than requiring the respondent to prove that the violation occurred.

The crane's operating manual requires that "a lifting strap . . . or a similar device" be attached to the swing-away jib and the crane's superstructure before the pins securing the jib to the boom are released. Substantial evidence supports the Commission's finding that Midwest did not follow the instructions in the operating manual because it did not (1) use a lifting strap or

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similar device when deploying the swing-away jib and (2) ensure that the pivot pin was engaged before attaching the jib to the boom head. Rogers and Hosler knew that the manual required the use of a lifting strap (or “similar device”) but did not use one during jib deployment at the Graysville worksite. Hosler testified that the use of a strap did not “make much sense” to him. And Rogers testified that a strap was “really worthless.” But as discussed by the Commission, a tag line is not “similar” to the strap required by the manual because it does not attach to both the jib and the superstructure. Additionally, Bednar and Rogers testified that the tag line was used to pull the swing-away jib out from the boom to line it up with the boom head for attachment, rather than to hold it in place while its securement pins were released.

Midwest argues that employers are permitted to deviate from manufacturer’s procedures and that § 1926.1403 allows employer-developed procedures. But it did not show that any deviation from the manufacturer’s procedures satisfied the requirements of 29 C.F.R. § 1406. *See* 29 C.F.R. § 1403(b); *id.* § 1406.

The Tadano manual and decals affixed to the crane itself require the pivot pin to be engaged until the jib is connected to the boom. The fact that the jib fell during the deployment procedure is evidence that the pivot pin was not engaged and that engagement had not been verified before deployment. Rogers testified that the pivot pin was not in place when the swing-away jib fell, but he could not explain why. Contrary to Midwest’s contention, the respondent did not change its position by arguing that Midwest failed to ensure that the pivot pin was engaged before the swing-away jib was attached to the boom head. The OSHA citation alleged that Midwest did not follow the operating manual for assembling the swing-away jib in part because the “pivot pin had been released prior to fastening the top jib with base section to the main boom head.” We see no meaningful difference between the language in the citation and the Commission’s finding that Midwest did not ensure that the pivot pin was engaged before attachment of the jib to the boom.

Additionally, the Commission did not flip “the burden of proof” to Midwest to prove that it did not release the pivot pin before attaching the jib to the boom. The evidence showed that the pivot pin was not in place before the jib was attached to the boom. Rogers testified that he checked

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the pivot pin three times and that it was engaged all three times that he checked it, yet he also testified that the pivot pin was not engaged when the jib fell and he could not explain why. Notably, the Commission deferred to the ALJ's determination that Rogers's testimony that he checked the pivot pin three times was not credible. In sum, substantial evidence supports the Commission's finding that Midwest violated § 1926.1403(a) by failing to follow the operating manual for assembling the crane because it did not use a lifting strap or similar device and the pivot pin was released before the jib was attached to the boom.

§ 1926.1404(d)(1)

Next, Midwest takes issue with the Commission's finding that it violated § 1926.1404(d)(1) because its A/D director, Rogers, did not ensure that the crew understood their tasks, associated hazards, and hazardous locations to avoid. It argues that Bednar's testimony shows that he understood these matters, Midwest's field superintendent's testimony supports its position that the Graysville crew understood their tasks and associated hazards relative to the Graysville worksite, and Rogers "reviewed the tasks and hazards" with the Graysville crew at the worksite.

Substantial evidence supports the Commission's conclusion that Rogers failed to ensure that the Graysville crew understood their tasks, the hazards associated with their tasks, and hazardous locations to avoid. Bednar testified that his tasks and any hazards associated with them were not discussed with him before the crew left for the Graysville worksite or while he and Rogers were there. He testified that when the crew met at the worksite, they discussed where to park the crane, "staying out of the way" of the boom, leveling the crane, the location of a fence and trees, and keeping eye contact with each other. Bednar stated that he was taught not to stand in the jib's fall zone, but at the Graysville worksite Rogers did not tell him where to stand when holding the tag line even though Bednar "had to be pretty close" to get the jib to move. Nor did Rogers instruct Bednar to avoid the location he was in when the jib fell and hit him. Hosler testified that, at the worksite, the crew did not discuss their tasks or hazards other than the location of a fence and trees.

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Midwest points to portions of Bednar's testimony and argues that it shows that Bednar understood his tasks, associated hazards, and hazardous locations to avoid. But that testimony is taken out of context, is unrelated to the Graysville worksite, and fails to show that Rogers ensured that Bednar understood those matters. *See* 29 C.F.R. § 1404(d)(1). Bednar's testimony to which Midwest refers concerns jib-deployment procedures in which Bednar was involved at other worksites, his understanding of the importance of the pivot pin and standing outside of the jib's fall zone, and his understanding that Rogers was in charge of the Graysville worksite as the A/D director.

The evidence does not support Midwest's position that the superintendent instructed the Graysville crew regarding their tasks, hazards associated with their tasks, and hazardous locations to avoid before the crew departed for Graysville. As discussed by the Commission, the superintendent did not testify that he specifically instructed the crew relative to the Graysville worksite. Instead, he testified that he generally relayed information about a worksite to crews on the morning of their departure to a worksite. Hosler and Rogers also testified generally that the superintendent reviewed the Graysville project with the crew on the morning of their departure, discussing ground conditions, obstacles, their roles and tasks, and safety issues. Hosler testified that the crew discussed leveling the ground for the crane and a fence and tree obstructions but did not discuss any other hazards at the worksite. And Rogers testified that the crew discussed only the condition of the ground, where to park the crane, and a tree line at the worksite. The Commission emphasized that the record lacked any testimony that he discussed the crew members' tasks, associated hazards, and hazardous locations to avoid with respect to the lifting strap and pivot-pin violations. And the portions of Rogers's testimony on which Midwest relies do not support its position that Rogers ensured that the crew understood their tasks, associated hazards, and hazardous locations to avoid. The Commission's finding that Midwest violated § 1926.1404(d)(1) is supported by substantial evidence.

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§ 1926.1400(f)

Finally, Midwest takes issue with the Commission's finding that it violated § 1926.1400(f) by failing to "establish, effectively communicate to the relevant persons, and enforce, work rules" to ensure safe crane operation. It argues that the Commission "flipped the burden of proof" and required it to prove that it "effectively communicated both tasks and hazards" to employees. It also argues that its work rules requiring employees to stand outside of a jib's fall zone and emphasizing the crucial nature of the pivot pin were effectively communicated to its employees.

The Commission did not require Midwest to prove that it established, communicated, and enforced work rules, as it asserts. Instead, the Commission determined that OSHA presented evidence showing that Midwest lacked work rules related to jib deployment and that even if it did have work rules specifically related to a jib's fall zone and pivot pin, they were not effectively communicated and enforced.

Substantial evidence supports those determinations. The evidence shows that Midwest relied on the manual to the exclusion of its own procedures for crane operation. Midwest employees were generally instructed to stay outside of the jib's fall zone, but that instruction was not communicated every time unless a crew had a new employee. Case in point, Bednar testified that he was taught to stand outside of the jib's fall zone but that he was not instructed where to position himself when holding and pulling the tag line at the Graysville worksite. And as far as enforcement, Simerale testified that no disciplinary action was taken against any employees after the Graysville worksite accident.

For these reasons, we **DENY** the petition for review.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk