

# No. 22-3524

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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**MIDWEST EQUIPMENT COMPANY,**

**Petitioner,**

**v.**

**SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,**

**Respondent.**

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On Petition from the Decision of the Occupational Safety and  
Health Review Commission, OSHRC Docket No. 19-0723

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**BRIEF OF RESPONDENT SECRETARY OF LABOR**

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## **STATEMENT REGARDING ORAL ARGUMENT**

Respondent believes that the briefs in this case constitute a thorough presentation of the facts and legal issues and does not think oral argument would significantly assist the Court in deciding the issues before it.

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## STATEMENT OF JURISDICTION

This matter arises from an Occupational Safety and Health Administration (OSHA)<sup>1</sup> enforcement proceeding before the Occupational Safety and Health Review Commission (Commission). Midwest Equipment Company (Midwest) has petitioned this Court for review of a final order of the Commission affirming three of four items of a citation issued to Midwest under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (OSH Act or Act). The Commission had jurisdiction over this proceeding under section 10(c) of the OSH Act, 29 U.S.C. § 659(c).

The Commission issued its final decision and order on April 15, 2022. Midwest filed its petition for review with this Court on June 14, 2022, within the sixty-day period prescribed by the OSH Act. *See* 29 U.S.C. § 660(a). This Court has jurisdiction over the petition for review under 29 U.S.C. § 660(a).

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<sup>1</sup> With limited exceptions not relevant here, the Secretary has delegated his authority and responsibilities under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. Delegation of Authority and Assignment of Responsibility to the Assistant Secretary for Occupational Safety and Health, 85 Fed. Reg. 58393 (Sept. 18, 2020). The terms “Secretary” and “OSHA” are used interchangeably in this brief.

## STATEMENT OF THE ISSUES

1. Whether the Commission correctly concluded that Midwest violated 29 C.F.R. § 1926.1403(a) by failing to comply with the crane manufacturer's procedures during crane assembly where:

(a) the procedures required the user to fasten a lifting strap or similar device to the crane's jib and superstructure during jib deployment to hold the jib to the crane, but Midwest's crew admittedly did not do so, and

(b) the procedures required the jib's pivot pin to be engaged, and Midwest to ensure that it was engaged, until the jib was attached to the boom head, but the pivot pin was not engaged, and Midwest's assembly/disassembly (A/D) director did not verify pin engagement, when Midwest's crew tried to attach the jib to the boom head.

2. Whether the Commission correctly concluded that Midwest violated 29 C.F.R. § 1926.1404(d)(1) where Midwest's A/D director did not ensure that his crew understood their tasks and potential hazards before assembling the crane and provided only minimal pre-assembly instruction to an inexperienced crew member.

3. Whether the Commission correctly concluded that Midwest violated 29 C.F.R. § 1926.1400(f) where Midwest did not have, communicate, or enforce work rules to ensure that, prior to beginning the crane work, the A/D director would ensure that his crew understood their tasks and how to avoid potential hazards.

## STATEMENT OF THE CASE

### I. Procedural History

This case arises from an OSHA inspection conducted after a 3400-pound jib fell from a crane and severely injured a Midwest employee at a worksite in Graysville, Ohio. App’x 0772.<sup>2</sup> Compliance Safety and Health Officer (CSHO) Matthew Marcinko inspected the worksite and OSHA subsequently issued Midwest a citation alleging four serious violations of OSHA crane construction safety standards, 29 C.F.R. §§ 1926.1403(a), 1926.1404(b), 1926.1404(d)(1), and 1926.1400(f). App’x 0770–0771. OSHA proposed total penalties of \$15,912. App’x 0771, 0792.

Midwest timely contested the citation, and a hearing on the merits took place before ALJ Sharon D. Calhoun on February 20 and 21, 2020. App’x 0771. On August 28, 2020, the ALJ issued a decision and order affirming all citation items and penalties. *Id.* On October 14, 2020, Midwest timely petitioned the Commission for review of the ALJ’s decision. App’x 0795–0922. On October 23, 2020, the Commission directed review, and subsequently requested that the parties brief whether the ALJ correctly determined that Midwest violated the terms of each

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<sup>2</sup> Citations to “App’x” refer to the Appendix filed by Midwest on October 4, 2022, and use the Appendix’s internal pagination. Citations to “Midwest Op. Br.” refer to Midwest’s Opening Brief simultaneously filed on October 4, and use the Brief’s internal pagination.

cited standard. On April 15, 2020, the Commission issued a decision affirming three of the four items in the citation. App’x 0823–0835. This appeal followed.

## II. Statutory Background

Congress enacted the OSH Act “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.” 29 U.S.C. § 651(b). The fundamental objective of the OSH Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). To achieve that goal, the Act authorizes the Secretary to promulgate and enforce mandatory occupational safety and health standards. 29 U.S.C. §§ 652–66. OSHA enforces the Act by inspecting workplaces and issuing citations when it believes that an employer has violated a standard. 29 U.S.C. § 658. OSHA citations “describe with particularity the nature of the violation,” require the employer to abate the violation, and, where appropriate, assess a civil penalty. 29 U.S.C. §§ 658–659, 666. A violation of the Act may be classified as “serious,” “other-than-serious,” “willful,” or “repeated.” 29 U.S.C. § 666.

When an employer timely contests a citation or penalty, the Commission must “afford an opportunity for a hearing,” and “thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary’s citation or proposed penalty.” 29 U.S.C. § 659(a), (c). Hearings are presided over by a Commission ALJ. 29 U.S.C. § 661(j). A party dissatisfied with the decision of the

ALJ may petition the Commission for discretionary review. 29 U.S.C. §§ 659(c), 661(j); 29 C.F.R. § 2200.91(a). Either the Secretary or an aggrieved party may seek judicial review in a United States Court of Appeals of a Commission final order. 29 U.S.C. § 660(a)–(b).

### **III. Statement of Facts**

#### **A. A Midwest Employee Is Severely Injured When His Crew Attempts to Assemble a Crane at a Worksite in Graysville, Ohio.**

Midwest is a crane rental and operation services company based in Cleveland, Ohio. App’x 0027–0028, 0257. Midwest has approximately twenty-five employees, most of whom are crane operators. App’x 0267. In December 2018, Midwest was hired to perform construction work on a cellular tower in Graysville, Ohio. App’x 0027–0028, 0275–0276. Midwest assigned three employees—assembly/disassembly (A/D) director and crane operator Jon Rogers, assistant crane operator Dennis Hosler, and oiler Bob Bednar—to perform the project using Midwest’s Tadano ATF 200G-5 all-terrain hydro mobile crane. App’x 0027–0028, 0052, 0055, 0406–0407. Rogers was in charge of the crew. App’x 0027, 0271.

Bednar was the least experienced crew member; he had worked for Midwest for about seven months, and as an oiler, his job was to assist the crane operator and maintain the crane. App’x 0049–0050, 0263–0265, 0407. He had no formal crane training from Midwest and was “green,” *i.e.*, still learning how to do his job. App’x 0085, 0102–0106, 0236–0237, 0263–0267, 0274, 0407, 0415. New oilers like

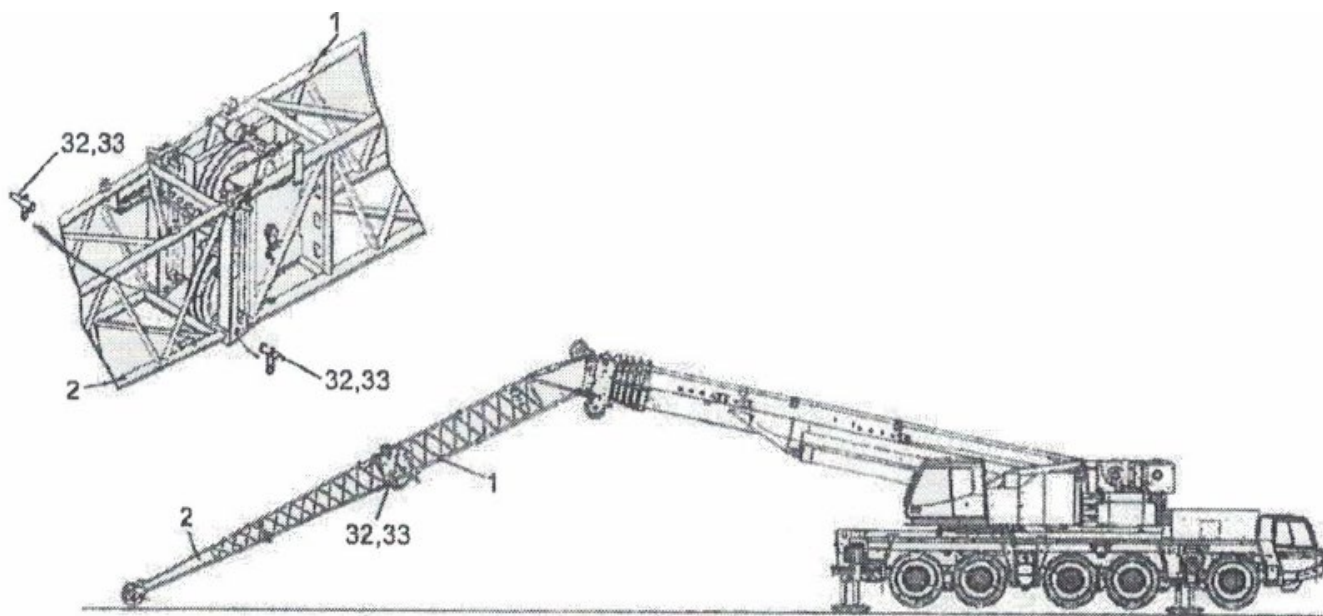
Bednar were expected to strictly follow operators' directions and never make independent on-the-job decisions. App'x 0263, 0386.

The Graysville job was expected to take three days, and on the first day, December 18, 2018, the crew planned to assemble the crane. App'x 0064, 0220–0222. Rogers and Bednar first met with Midwest's Field Superintendent, Michael Simerale, in Cleveland, and then the two met again hours later at a "lay-down yard" near the Graysville worksite. App'x 0051–0057, 0086, 0276–0280, 305–06, 364–68. Rogers did not discuss with Bednar his tasks during assembly work, or the hazards associated with them, at either meeting. App'x 0052–0054, 0057. Rogers and Bednar then met Hosler at the worksite and formed a "game plan" to address ground unevenness and where to place the crane to avoid obstacles (such as trees and a fence). App'x 0058–0061, 0365–0367, 0375, 0406. The crew did not discuss other hazards or tasks before starting the assembly. App'x 0366–0367, 0375.

Midwest's crew began assembling the crane. App'x 0065, 0406. The crew relied exclusively on procedures in the Tadano manual and warning labels on the crane; Midwest did not have other crane assembly procedures or written work rules. App'x 0158–0159, 0231–0232, 0273–0275, 0416. They leveled the crane, extended the outriggers and set them on pads, and put counterweights on the crane. App'x 0065–0066, 0128, 0281, 0408.

The next step was to deploy the crane's "swing-away jib." A "swing-away jib" is a lattice extension of a crane's boom that is attached to the side of the boom when not in use. The jib is attached to the boom by three securement pins as well as the critical "pivot pin," which secures the jib to the boom at the pivot point. When needed to improve the crane's reach, the jib can be swung into position and pinned to the boom head by following the steps in the Tadano 220G-5 Manual at section 11.4.6. App'x 0248, 0259, 0360–0361, 0468–0469; App'x 0672–0686.

As illustrated below, the jib had two connected sections, a top jib (identified as no. 2) and a base section (identified as no. 1), which are joined at the midsection:



App'x 0688. The base section could be separated from the top jib and used on its own, or the top jib and base section could be used together or combined with

additional sections for longer reach. *See* App’x 0222–0223; App’x 0572–0574. For this operation, Midwest planned to use the top jib, the base section, and two additional sections.<sup>3</sup> App’x 0222–0223, 0248–0249, 0296.

Deploying the jib entailed completing a number of steps, as follows: First, it required rolling out a ramp to support the jib. App’x 0128, 0243, 0292–0294, 0397, 0408–0409; App’x 0685; *see* App’x 0594, 0588 (showing the ramp in stowed position). Second, it required fastening “a lifting strap . . . or a similar device” to hold the jib against the crane superstructure. App’x 0135, 0138–0139, 0153–0154, 0163; App’x 0685. Third, it required removing three securement pins that hold the jib against the side of the boom (but the pivot pin, which secures the jib to the boom at the pivot point, would remain in place). App’x 0397, 0409–0410; App’x 0686. Fourth, it required swinging the jib away from the boom about ten inches so that the “ears” at the bottom of the base section of the jib line up with the “ears” at the boom head, and then inserting a pin through the ears to attach the jib to the boom head. App’x 0081–0082, 0087–0089, 0282, 0285–0290, 0397; App’x 0679–

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<sup>3</sup> The cell tower was 285 feet tall, so the crane needed to reach over 300 feet for the crew to perform its work. App’x 0128–0129. The telescopic boom of the Tadano crane, without the jib, was 222 feet tall, so use of the jib was required to reach the top of the tower. App’x 0129, 0222–0223; *see* App’x 0670 (showing what the crane would look like once fully assembled). The top jib and base section together were forty-three feet long and the additional sections were each twenty feet long. App’x 0168, 0295.

0681, 0686; *see* App’x 0592 (showing the boom head, bottom of the base section of the jib, and “ears” prior to jib deployment). Fifth, it required releasing the “pivot pin.”<sup>4</sup> App’x 0089, 0128, 0290–0292, 0396–0397 *see* App’x 0593, 0598–0599 (showing the sight holes through which one could verify the pivot pin was engaged). After releasing the pivot pin, the crew would then swing the jib 180 degrees to so that the two remaining ears on the base section align with the two remaining ears on the boom head. A pin would then be inserted through the remaining ears, which fully attaches the jib to the boom head.<sup>5</sup> App’x 0089, 0091, 0287–0290.

The pivot pin was the most important pin for securing the jib to the boom because, if released prematurely, the 3400-pound jib could fall to the ground. App’x 0153–0154, 0224–0225, 0289, 0380, 0396–0398, 0408–0411. The Tadano manual and decals on the side of the crane warned about the importance of ensuring the pivot pin was in place before disconnecting the jib from the stowing

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<sup>4</sup> The crew was following section 11.4.6 of the Tadano manual (“[m]ounting the top jib and the base section to the boom head.” App’x 0685–0687. Those procedures incorporate steps from section 11.4.2 (“[m]ounting the base section to the boom head”). App’x 0677–0684; *see* App’x 0686 (“To mount the jib to the boom head, proceed analogously as described under item 11.4.2”).

<sup>5</sup> The jib fell off of the crane before Midwest reached this step. App’x 0091, 0223, 0242. Had the incident not occurred, the crew would have next added sections to the end of the jib until the crane could reach the top of the 285-foot cellular tower. App’x 0091, 0128–0129, 0305, 0406–0407.

bracket on the boom. App’x 0224–0227, 0253; App’x 0672–0689;<sup>6</sup> *see, e.g.*, App’x 0712 (“Ensure jib pivot pins are installed at boom head before disconnecting jib from stowing bracket.”).

To remove the pivot pin, an employee would turn a hand crank about twenty times over two minutes. App’x 0080, 0273, 0398. However, the pivot pin could become unpinned during crane transport or due to vibrations. App’x 0403, 0502–0503. Rogers told Bednar at the lay-down site that the pivot pin was installed but did not instruct his crew not to prematurely remove the pivot pin because he believed it was unnecessary. App’x 0431.

After the crew set up the ramp, they removed the three securing pins from the jib, but without first affixing a lifting strap (or other device) to hold the jib to the superstructure. App’x 0139, 0226–0227, 0425–0428. Thus, there was no restraint to hold the jib against the crane and help prevent the jib from rolling off the ramp if a procedural step was missed or unexpected movement occurred (such as the jib jolting away from the crane when its three securing pins were removed, or an employee prematurely pulling the jib away from the crane). App’x 0138–0139, 0163, 0177–0178, 0433.

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<sup>6</sup> *See, e.g.*, App’x 0672 (“DANGER. For safety reasons . . . all pin connections, securing devices, and fasteners on the jib . . . must be checked”); App’x 0683 (“Always make sure . . . pivot pins are in position before starting any operation. . . . Without these pins in position, the jib may fall off when an operation is started.”).

To swing the jib ten inches away from the boom and allow for the base of the jib to be pinned to the boom head, Rogers instructed Bednar to pull on a twenty-foot tag line (*i.e.*, a rope or strap) attached to the tip of the jib. App’x 0067–0069, 0081–0082, 0089, 0369, 0410–0411; *see* 0596 (showing the tag line). When pulling on the tag line, Bednar was initially positioned approximately fifteen-to-twenty feet from the top of the jib. App’x 0369–0370, 0411; *see* App’x 0082 (Bednar stating that “in order to get [the jib] to flex, I had to be pretty close [to the jib]”).

While pulling on the tag line, the jib became stuck. App’x 0067–0069, 0370, 0411–0412. Bednar had never experienced such difficulty when swinging a jib. App’x 89. Rogers instructed Hosler to help Bednar pull on the tag line, but as Hosler approached Bednar, he saw that the jib was starting to move and ran to get away. App’x 0370, 0411–0413. When Rogers saw Hosler run, he ran away too, but Bednar kept pulling on the tag line. App’x 0412–0413. Moments later, the jib landed on and crushed Bednar, resulting in severe, life-threatening injuries. App’x 0025–0028, 0071, 0115. Bednar did not remember how the jib landed on him, but Hosler and Rogers believed that Bednar must have run toward the jib, rather than away from it. App’x 0069, 0071–0077, 0371, 0413. Bednar denies running toward the jib. App’x 0069.

After the incident, Midwest conducted an internal investigation but did not determine what caused the jib to fall from the crane. App’x 0303–0304. Midwest did not discipline any employees as a result of the investigation. *Id.*

**B. OSHA Issues a Citation to Midwest for Serious Violations of Crane Safety Requirements.**

OSHA initiated an inspection of the Graysville worksite on December 19, 2018. App’x 0028, 0115. OSHA ultimately issued Midwest a citation on April 9, 2019, alleging four serious violations of crane construction safety standards. App’x 0623–0633.

OSHA cited Midwest for violating 29 C.F.R. § 1926.1403(a)<sup>7</sup> by failing to comply with the manufacturer’s crane assembly procedures, because a lifting strap or similar device was not used to secure the jib to the crane superstructure, and because the pivot pin was not engaged when the crew tried to pin the jib to the boom end. App’x 0135–0137; App’x 0628, 0677–0687. OSHA also cited Midwest for violating § 1926.1404(d)(1)<sup>8</sup> because Rogers did not ensure that his crew

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<sup>7</sup> 29 C.F.R. § 1926.1403(a) provides: “When assembling or disassembling equipment (or attachments), the employer must comply with all applicable manufacturer prohibitions and must comply with either (a) Manufacturer procedures applicable to assembly and disassembly, or (b) Employer procedures for assembly and disassembly.”

<sup>8</sup> 29 C.F.R. § 1926.1404(d)(1) provides: “Before commencing assembly/disassembly operations, the A/D director must ensure that the crew members understand all of the following: (i) Their tasks; (ii) The hazards associated with their tasks; [and] (iii) The hazardous positions/locations that they need to avoid.”

understood their tasks, associated hazards, and how to avoid them, and for violating § 1926.1400(f)<sup>9</sup> because Midwest did not establish, effectively communicate, and enforce work rules to make sure that Rogers would fulfill that obligation.<sup>10</sup> App’x 0143–0146, 0157–0159; App’x 0630, 0631.

**C. The ALJ Affirms OSHA’s Citation.**

After Midwest contested the citation, a hearing was held before ALJ Sharon D. Calhoun on February 20 and 21, 2020. App’x 0771. On August 28, 2020, the ALJ issued a decision and order affirming the citation. App’x 0770–0794. In her decision, the ALJ first determined the crane assembly requirements in 29 C.F.R. §§ 1926.1400, 1403, and 1404 applied to the work that Midwest performed on December 18, 2018. App’x 0779. The ALJ then concluded that Midwest violated all four cited standards.

The ALJ determined that Midwest violated § 1926.1403(a) by ignoring the requirement in the manufacturer’s procedures to use a lifting strap or similar device to hold the jib to the superstructure. App’x 0780–0781. The ALJ rejected

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<sup>9</sup> 29 C.F.R. § 1926.1400(f) provides: “Where provisions of this standard direct an operator, crewmember, or other employee to take certain actions, the employer must establish, effectively communicate to the relevant persons, and enforce, work rules to ensure compliance with such provisions.”

<sup>10</sup> OSHA also cited Midwest for violating § 1926.1404(b), but the Commission vacated this item, and it is no longer at issue in this appeal.

Midwest's argument that it had used a tag line as a "similar device" because Midwest had used the tag line to shift the jib's position, not to provide stability and safety. App'x 0781. The ALJ also concluded that Midwest violated § 1926.1403(a) because it did not ensure that the pivot pin was in place before trying to attach the jib to the boom head. *Id.* The ALJ found that, had the pivot pin been in place, the jib would not have fallen. *Id.* She also discredited Rogers' claims that he verified the pivot pin was in place before the crew swung the jib.<sup>11</sup> App'x 0781, 0781 n.5.

The ALJ also determined that Midwest violated § 1926.1404(d)(1) because, though Rogers discussed ground unevenness and the need to avoid trees and a fence at the worksite with the crew, he "failed to inform the crew of their tasks, the hazards associated with the assembly process, or where the crew needed to be to stay out of harm's way." App'x 0787. Finally, the ALJ determined that Midwest violated § 1926.1400(f) because "Midwest did not have, effectively communicate, or enforce any work rules at the Graysville worksite."<sup>12</sup> App'x 0789.

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<sup>11</sup> Rogers testified that it was his job to verify the pivot pin was in place and functioning properly, and claimed that he visually inspected the pivot pin three times: at the Cleveland yard, at the laydown site, and at the Graysville worksite. App'x 0399, 0403–4004, 0408, 0420–0421, 0429. The ALJ found that Rogers' testimony appeared "provided to absolve him of any responsibility," "lacked confidence and believability," and that Rogers appeared "nervous and hesitant." App'x 0781, 0781 n.5.

<sup>12</sup> The ALJ also determined Midwest's employees had access to the violative conditions, Midwest had knowledge of the conditions as imputed from Rogers, and Midwest did not establish the unpreventable employee misconduct defense. *See*

**D. The Commission Reviews OSHA’s Citation and Affirms Violations of 29 C.F.R. §§ 1926.1403(a), 1926.1404(d)(1), and 1926.1400(f).**

Midwest petitioned the Commission for discretionary review of the ALJ’s decision. The Commission granted the petition, directing review of whether the ALJ correctly concluded that Midwest violated the terms of each cited standard. The Commission subsequently issued a decision and order on April 15, 2020, affirming three citation items for violations of §§ 1926.1403(a), 1926.1404(d)(1), and 1926.1400(f).<sup>13</sup>

The Commission affirmed the ALJ’s conclusion that Midwest violated § 1926.1403(a) by ignoring the requirement in the manufacturer’s procedures to use a lifting strap or similar device to hold the jib to the superstructure. App’x 0825–0826. The Commission rejected Midwest’s argument that it did not violate the standard because the absence of a lifting strap played no role in the incident, finding that it was undisputed that a lifting strap was not used, and that noncompliance “is not dependent on how the incident precipitating the OSHA inspection occurred.” App’x 0826. The Commission also rejected the argument that Midwest had used a tag line as a “similar device,” concluding that the

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App’x 0781–0786, 0788–0791. Additionally, the ALJ determined that Midwest violated § 1926.1404(b), but this citation item is not at issue in this appeal.

<sup>13</sup> The Commission vacated one citation item alleging a violation of 29 C.F.R. § 1926.1404(b).

manufacturer's procedures required a lifting strap or "similar device" to be fastened to both the jib and the crane structure before removing the securement pins, and Midwest's tag line was fastened only to the jib. App'x 0827.

The Commission also affirmed the ALJ's conclusion that Midwest violated § 1926.1403(a) because Midwest did not ensure that the pivot pin was in place before trying to attach the jib to the boom head. App'x 0828–0830. The Commission concluded that the ALJ's decision to place little weight on Rogers' claims that he verified the pivot pin was in place before the crew swung the jib was well-supported and consistent with the record. App'x 0829.

Additionally, the Commission affirmed the ALJ's determination that Midwest violated § 1926.1404(d)(1) because the record showed the company failed to ensure that crew members understood the jib deployment tasks and associated hazards. App'x 0832. The Commission also affirmed the ALJ's determination that Midwest violated § 1926.1400(f) because testimony showed that even if Midwest had established a rule that crew members must stay clear of the jib's fall zone, it was not adequately communicated. App'x 0834.

### **SUMMARY OF THE ARGUMENT**

The Commission correctly determined that Midwest violated the terms of §§ 1926.1403(a), 1926.1404(d)(1), and 1926.1400(f). First, Midwest plainly failed to comply with the manufacturer's procedures when assembling its crane, in

violation of 29 C.F.R. § 1926.1403(a). Midwest's A/D director, Rogers, admittedly ignored the procedure to use a lifting strap or similar device to secure the jib against the crane superstructure. Midwest also deviated from the procedures because the pivot pin was not engaged when Rogers attempted to attach the jib to the boom end. The Commission correctly found that Rogers did not verify that the pin was engaged before that attempt.

Second, Midwest violated § 1926.1404(d)(1) because Rogers did not ensure that his crew understood their specific tasks, the hazards associated with those tasks, and the hazardous locations to avoid, before they started the assembly work. Rogers failed to discuss with Bednar his specific tasks and how to avoid the hazard of a falling jib, even though Bednar was an inexperienced oiler.

Finally, Midwest violated § 1926.1400(f) because it did not have, enforce, or effectively communicate work rules to ensure that Rogers fulfilled his duty under § 1926.1404(d)(1). Midwest did not have a work rule requiring A/D directors to ensure that their crew understood how to do their tasks and how to avoid the associated hazards before beginning the work. Moreover, even though Midwest expected A/D directors to discuss those topics with their crews, the events surrounding the December 18, 2018, incident establish that that expectation was not effectively communicated or enforced.

## ARGUMENT

### I. Standard of Review

This Court’s review of the Commission’s decisions “is a limited one.” *Mountain State Contractors, LLC v. Perez*, 825 F.3d 274, 279 (6th Cir. 2016). The Commission’s findings of fact must be upheld so long as they are supported by substantial evidence in the record. 29 U.S.C. § 660(a); *Mountain State Contractors*, 825 F.3d at 279. The Commission’s legal conclusions must be affirmed unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *CME Elec., Inc. v. OSHA*, 221 F.3d 861, 865 (6th Cir. 2000).

### II. **The Commission Correctly Concluded that Midwest Violated 29 C.F.R. § 1926.1403(a) Because It Did Not Follow the Manufacturer’s Procedures to Use a Lifting Strap or Similar Device to Hold the Jib to the Crane and Did Not Ensure the Pivot Pin Was Engaged Before Attaching the Jib to the Boom End.**

When assembling or disassembling a crane, § 1926.1403(a) provides that “the employer must comply with all applicable manufacturer prohibitions and . . . [m]anufacturer procedures applicable to assembly and disassembly . . . .” 29 C.F.R. § 1926.1403(a). Here, the Commission correctly concluded that Midwest violated § 1926.1403(a) by failing to follow the Tadano procedures for assembling the crane at the Graysville worksite. App’x 0825–0830. As explained below, Midwest deviated from Tadano’s procedures in two respects: (1) by declining to

use a lifting strap or similar device to hold the jib to the crane superstructure before removing the jib's securing pins, and (2) by failing to ensure that the pivot pin was engaged before swinging the jib to attempt to attach it to the boom end. *Id.*

**A. Midwest Did Not Use a Lifting Strap or Similar Device to Hold the Jib to the Crane Before Removing the Jib's Securing Pins.**

The Commission correctly determined Midwest violated § 1926.1403(a) because it did not follow the manufacturer's procedure requiring the use of a lifting strap or similar device to hold the jib to the superstructure. App'x 0827. The Tadano manual requires users to fasten a "lifting strap . . . or a similar device" to both the top of the jib's base section and the crane superstructure before removing the pins securing the jib to the side of the boom. *Supra* p. 8; App'x 0138–0139, 0166, 0226–0227, 0247–0248; App'x 0677, 0685, 0691. The strap serves a safety function by restraining the jib against the crane while the jib's securing pins are removed. App'x 0138–0139, 0163, 0177–0178, 0428.

Midwest admits it did not use—and in fact never used—a lifting strap or other device to hold the jib to the superstructure. Midwest Op. Br. 16; *see* App'x 0139, 0226, 0425; App'x 0780; App'x 0826. Although Rogers knew the Tadano manual required this procedure, and that it was intended to prevent the jib from swinging away from the boom while the jib's securing pins were removed, he intentionally disregarded the procedure because, in his opinion, it was "worthless." App'x 0425–0428. As a result, Midwest's crew removed securing pins without a

strap or other restraint. App’x 0190–0191, 0224; *see* App’x 0780–0781. In doing so, Midwest plainly violated § 1926.1403(a).

Midwest’s claim that it complied with the Tadano manual because the crew used a “similar or equivalent procedure” to stabilize the jib by having Bednar pull on the tag line attached to the tip of the jib (Midwest Op. Br. 17; *see* App’x 0725–0728) necessarily fails because the Tadano manual unambiguously requires that a lifting strap or similar device be fastened to *both* the jib and superstructure before removing the securing pins from the jib. App’x 0685; *see* App’x. 0827. As the Commission notes, Midwest’s own expert acknowledged this requirement, stating that, “[i]n the case of the tag line, you’re eliminating one step of tying it to the superstructure, and removing it from the superstructure.” App’x 0473; App’x 0827. Because Midwest’s tag line did not fasten to the jib and superstructure, it did not meet the Tadano manual’s requirement.<sup>14</sup> *Supra* p. 10–11; App’x 0067–0069, 0369, 0427; App’x 0827. Nowhere does the manual support Midwest’s suggestion that employers may skip the step of securing the jib to the crane superstructure if they use some other procedure of their own devising.<sup>15</sup>

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<sup>14</sup> For this reason, it is not necessary to determine if a tag line is a “similar device” to a lifting strap. Even if a tag line is a “similar device,” Midwest admittedly did not fasten the tag line to the jib and superstructure, thus clearly deviating from the Tadano manual.

<sup>15</sup> Both Rogers and Midwest’s expert witness, Jocko Vermillion, admitted in their testimony that pulling on a tag line in lieu of affixing a lifting strap to the jib and

And, even assuming *arguendo* that (as Midwest alleges) the Tadano manual permitted users to substitute their own methods for the lifting strap procedure, and that Bednar was actually “holding [the tag line] taut toward the boom” while Rogers removed the jib’s securing pins, Midwest Op. Br. 19, that action would not be “equivalent” to the procedure that the Tadano manual required.<sup>16</sup> Affixing a lifting strap or similar device to the jib and the superstructure imposes a restraint that stabilizes the jib and prevents it from unexpectedly swinging or rolling off the ramp. App’x 0138–0139, 0163, 0177–0178, 0428. Midwest’s tag line approach instead relied on an individual on the ground pulling the jib’s tip with a rope. App’x 0427. Midwest’s approach did not physically secure the jib to the crane and thus did not provide the same stabilizing effect as the manual’s procedure.

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superstructure was a deviation from the Tadano manual. App’x 0426 (Rogers claiming he was “allowed to deviate a little bit from the manufacturer’s [procedures]” because following the lifting strap requirement was “not going to do anything”), App’x 0473 (Vermillion stating that using a tag line in this manner would “eliminat[e] one step of tying [the jib] to the superstructure”).

<sup>16</sup> The functional equivalency of Midwest’s use of the tag line is not relevant to whether Midwest complied with the Tadano manual, but even if it were, Midwest, not the Secretary, would have the burden of proving that its approach provided equivalent protection to the manual’s requirement. *Cf. Dick Corp.*, 7 BNA OSHC 1951, 1953, 1953 n.7 (No. 16193, 1979) (employer had the burden of proving that its guardrails offered equivalent protection because, “when a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception”).

Further, the record does not support that Bednar actually used the tag line to stabilize the jib while Rogers removed the jib’s securing pins. Bednar explained that he pulled on the tag line to “shimmy the pins” and make the jib “flex” while Rogers attempted to pin the jib to the boom end, but he did not suggest that he used the tag line to stabilize the jib while Rogers removed the securing pins. App’x 0067–0069, 0081–0082, 0089. Indeed, Rogers testified that, while removing the jib’s securing pins, Bednar was “out by the outriggers . . . watching, learning,” and then, “[o]nce we got to that point, *the three pins were removed*, [Bednar’s] holding the 20-foot tag line.” App’x 0410 (emphasis added). Once it was time to swing the jib ten inches and attempt to pin the jib to the boom end, Rogers told Bednar, “go ahead and pull it out.” App’x 0411. Although Rogers later claimed that “holding tension on [a tag line], while you pull those three pins” is a better procedure than fastening a strap to the jib and the superstructure, App’x 0427–0428, he did not testify that Bednar actually used the tag line to stabilize the jib while he removed the securing pins. Rather, Midwest only used the tag line at the Graysville worksite to pull and shift the crane’s jib into place. *See* App’x 0781.

Midwest’s alternative claim—that the preamble to the final rule that promulgated the standard indicates that employers are *allowed* to deviate from the manufacturer’s procedures in certain circumstances—also lacks merit. Midwest Op. Br. 18 (citing *Cranes and Derricks in Construction*, 75 Fed. Reg. 47906, 47937

(Aug. 9, 2010)). As the preamble passage that Midwest cites makes clear, employers are only permitted to deviate from the manufacturer's procedures by complying with § 1926.1403(b), which, as an alternative to § 1926.1403(a), permits employers to establish and follow their own assembly procedures "where the employer can demonstrate that the procedures used meet the requirements of 1926.1406." 29 C.F.R. § 1926.1403(b); *see* 75 Fed. Reg. at 47937 ("Employer procedures may be used only where the employer can demonstrate that the procedures used meet the requirements in 1926.1406"). Midwest has not argued at any point in the litigation that it developed and followed its own procedures in compliance with § 1926.1403(b), rendering the argument waived. *See Plessey, Inc.*, 2 BNA OSHC 1302, 1304 (No. 946, 1974). In fact, both Simerale and Rogers testified that Midwest's crew relied only on Tadano's procedures. App'x 0274, 0416.

Also meritless is Midwest's claim that use of the tag line is sufficient because the regulation and the citation itself "specifically allow for the employer to develop their own procedures." Midwest Op. Br. 18. Section 1926.1403 unambiguously requires employers to either comply with the manufacturer's procedures or with procedures of their own development that meet the requirements of § 1926.1406. 29 C.F.R. § 1926.1403. The standard plainly does not permit employers to take a third option in which they forgo developing

sufficiently protective procedures of their own and then only partially follow the manufacturer's procedures.

Finally, Midwest erroneously claims that because the lifting strap was not intended to prevent the jib from falling to the ground, the Secretary abandoned the allegation in the citation that the absence of the lifting strap caused the jib to fall. Midwest Op. Br. 16. The Secretary never stated that Midwest's failure to follow the manual's lifting strap procedure caused the jib to fall, nor is such a finding necessary to conclude Midwest did not follow the manual's procedure. *See* App'x 0826; *see also S. Hens, Inc., v. OSHRC*, 930 F.3d 667, 679 (5th Cir. 2019) (the departure from the standard, not the accident, is the violation); *A. E. Burgess Leather Co.*, 5 BNA OSHC 1096, 1097 (No. 12501, 1977), *aff'd*, 576 F.2d 948 (1st Cir. 1978) (an absence of injuries does not negate objective evidence that conditions posed a hazard).

**B. Midwest Did Not Ensure the Pivot Pin Was Engaged Before Attempting to Attach the Jib to the Boom Head.**

The Commission also correctly concluded that Midwest deviated from the manufacturer's procedures, thereby violating 29 C.F.R. § 1926.1403(a), because Midwest's crew failed to ensure the pivot pin was engaged before the crew swung the jib and attempted to pin it to the boom head. App'x 0825–0826. It is undisputed that the Tadano manual required that the pivot pin remain engaged until the jib was pinned to the boom head, at which point it could be released. App'x 0397; App'x

0679, 0686. A crane decal further required the crew to “[e]nsure jib pivot pins are installed at boom head before disconnecting jib from stowing bracket.” App’x 0712; *see* 29 C.F.R. § 1926.1401 (“procedures” includes “diagrams” and “warnings”).

Further, it is undisputed that at the time of the incident, the pivot pin was not in place. App’x 0828, 0828 n.6. Midwest deviated from the procedures because the pivot pin was not engaged when the crew swung the jib to pin it to the boom head. Rogers admitted that “[a]t some point in time, [the pivot pin] got removed,” but did not know how it came out. App’x 0429. This is consistent with CSHO Marcinko’s conclusion that the pivot pin had been released prematurely. App’x 0157, 0182.

The fact that the jib fell off the boom while Bednar was pulling on it with the tag line confirms that the pivot pin was not engaged. It is undisputed that the pivot pin is what holds the jib to the boom and prevents the jib from falling to the ground. *See* App’x 0801; *supra* p. 9–10. Rogers testified that, if the pivot pin had been engaged, the jib would not have fallen from the boom, App’x 0430, and Eckstine similarly testified that the pivot pin not being in place is what allowed the jib to fall. App’x 0224–0225; *see also* App’x 0229 (the jib would not have fallen if the manufacturer’s procedures were followed); App’x 0777 n.3 (ALJ’s finding that Eckstine’s testimony was “highly credible”). The incident thus confirms that the pivot pin was not engaged when Bednar attempted to swing the boom, and that

Midwest did not follow Tadano's procedures.

Additionally, the Commission correctly determined that Midwest did not comply with the requirement on the crane decal to ensure that the pivot pin was in place before swinging the jib. *See* App'x 0828; App'x 0711–0712; *see also* App'x 0781. Again, this is clear from the fact the pivot pin was *not* in place when Rogers instructed Bednar to pull on the tag line and swing the jib, which is what allowed the jib to fall to the ground.

Midwest claims, confusingly, that the Secretary engaged in “sandbagging” by amending his position after the record was closed when he asserted in post-hearing filings that Midwest's failure to confirm the pivot pin was engaged before swinging the jib, rather than the premature release of the pivot pin before the crew swung the jib, was the basis for the violation. Midwest Op. Br. 19–20. Midwest asserts that because the citation alleged the pivot been had been prematurely released before the crew swung the jib, the Secretary effectively amended the citation after the hearing and subjected it to “unfair surprise.” *Id.*

This argument plainly fails. The citation alleges that “[t]he employer did not follow the manufacturer's instructions or develop instructions . . . for the assembly of the jib onto the main boom of the crane,” and “[t]he pivot pin had been released prior to fastening the top jib with base section to the main boom head . . . which caused the jib to fall.” App'x 0628. The Secretary's position throughout the

litigation has been consistent. Tadano's procedures and warnings required the pivot pin to remain engaged until after the jib was attached to the boom head. *Supra* pp. 9–10, 24–25. The pivot pin was not engaged at that point, and Rogers did not verify that the pivot pin was engaged before he instructed Bednar to swing the boom. *Supra* pp. 25. If he had, he would have seen that the pivot pin had been released and therefore swinging the boom would cause the jib to fall. The language of the citation provides notice that whether the pivot pin had been released prior to swinging the jib was at issue, and Midwest's failure to confirm the pivot pin was engaged is evidence of that release, in violation of the manufacturer's procedures and 29 C.F.R. § 1926.1403(a). *See Allis-Chalmers Corp.*, 3 BNA OSHC 1629, 1632 (No. 5599, 1975) (“[T]he Secretary satisfied the ‘fair notice’ test [because] . . . [t]he citation notified respondent as to the nature of the violation, the standard with which it allegedly failed to comply, and the location of the alleged violation.”).

Finally, Midwest argues that the Commission impermissibly “flipped the burden of proof” to the employer to prove it did not violate the Act, and claims that the Secretary presented no evidence to prove that the pivot pin was prematurely released, or that Rogers failed to check the pivot pin before swinging the jib. Midwest Op. Br. 21. This argument is meritless. The evidence clearly established that the pivot pin was not in place when Bednar pulled on the tag line to swing the

jib. App'x 0429–0430; *see* App'x 0828–0829. Although Rogers alleged that he checked the pivot pin three times on the day of the accident, App'x 0403–0404, 0408–0409, 0420–0421, 0429–0434, the ALJ concluded based on his demeanor at the hearing that Rogers was not credible when he testified that he checked the pivot pin before swinging the jib, and the Commission properly deferred to that determination. *See* App'x 0781, 0781 n.5; App'x 0828. The Commission found that the ALJ's credibility determination was well-supported by her assessment of Rogers' demeanor, and consistent with the undisputed fact that the pivot pin was not engaged at the time of the incident and Rogers' own testimony that he did not see anyone remove the pin. App'x 0829.

The Commission also explained that whether Rogers checked the pivot pin was ultimately irrelevant given the undisputed evidence that the pivot pin was not engaged when the jib was deployed, and concluded that the fact that the pin was not engaged established Midwest's noncompliance. App'x 0828–0829. Thus, the Commission clearly identified the evidence it relied on as proof of Midwest's violation of 29 C.F.R. § 1926.1403(a), and Midwest's failure to produce evidence to rebut that violation did not flip the burden of proof. *See Trinity Indus., Inc.*, 15 BNA OSHC 1788, 1789-90 (No. 89-1781, 1992) (noting that while “[t]he Secretary bears the burden of proving [his] case by a preponderance of the

evidence,” the Secretary’s evidence may “be balanced against [the employer’s] evidence”).

### **III. Substantial Evidence Supports the Commission’s Conclusion that Midwest Violated 29 C.F.R. § 1926.1404(d)(1) When It Failed to Ensure the Crew Understood the Tasks, Associated Hazards, and the Hazardous Locations to Avoid Before Assembling the Crane.**

The Commission’s determination that Midwest violated 29 C.F.R.

§ 1926.1404(d)(1) is supported by substantial evidence in the record. This standard requires that, “[b]efore commencing assembly/disassembly operations, the A/D director must ensure that the crew members understand . . . [t]heir tasks . . . [t]he hazards associated with their tasks . . . [and] [t]he hazardous positions/locations that they need to avoid.” 29 C.F.R. § 1404(d)(1). Rogers’ failure to ensure that his crew—particularly, the inexperienced Bednar—understood their specific tasks, the hazards associated with them, and how to stay in a safe location is clear from the minimal discussions that he had with the crew before starting the work.

Prior to beginning the crane assembly work, Rogers did not have a detailed discussion with his crew about their tasks, the hazards associated with them, and how to stay safe if something went wrong during the assembly process.<sup>17</sup>

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<sup>17</sup> See App’x 0143–0146 (CSHO Marcinko explaining that an A/D director should have a detailed discussion with the crew about each person’s tasks, relevant manufacturer requirements and warnings, safe locations to stand and unsafe locations to avoid, what to do if there is a “change in task” during the process, and “how to stay away from the jib, in case it does roll off”); see also App’x 0229–0230 (Eckstine similarly describing this duty).

Specifically, Rogers did not discuss with Bednar his tasks or the associated hazards prior to arriving at the worksite. App’x 0052, 0054, 0057, 0104 (Bednar stating that on the morning of the accident, “we never really got a chance to go over everything”). At the worksite, the crew only discussed ground unevenness and where to conduct the assembly process so as to avoid hitting anything (such as nearby trees and a fence). App’x 0058–0061, 0365–0367, 0375, 0431.

Providing detailed instruction to ensure that his crew understood their tasks and the associated hazards was particularly critical because the crane assembly process was highly complex, *see supra* at 6–10, and errors could result in a 3400-pound jib falling and crushing someone, as in fact occurred here.<sup>18</sup> Moreover, Midwest lacked its own written work rules, App’x 0158–0159, 0273–0275, 0416; *see* App’x 0231–0232 (Eckstine explaining that employers in the industry customarily have written work rules), and Bednar was a “green” and inexperienced oiler.<sup>19</sup> App’x 0049–0050, 0085, 0102–01065, 0236–0237, 0263–0267, 0386,

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<sup>18</sup> Midwest’s dismissive characterization of the jib deployment process as “not a complex process” (Midwest Op. Br. 9) is belied by the record in this case and ignores the seriousness of the hazards involved.

<sup>19</sup> As of December 18, 2018, Bednar had been employed with Midwest for about seven months and was still learning “on the job”; he had received no formal crane assembly training, had never attended a “toolbox talk,” and had been generally advised to review the Tadano manual “at his leisure.” App’x 0050, 0101–0106; *see also* App’x 0416 (Rogers advised Bednar that “it would be a good idea” to go

0407, 0415; *cf. W.G. Fairfield Co. v. OSHRC*, 285 F.3d 499 (6th Cir. 2002) (“the experience of the employees” is relevant to assessing reasonableness of employer’s instructions). Nonetheless, Rogers did not provide any specific instructions to Bednar on critical safety issues, including warning him that the jib could fall and crush him, or to avoid the hazardous position he was in when it later occurred. App’x 0382, 0436. Nor did Rogers instruct his crew to ensure the pivot pin was in place before attaching the jib to the boom head, App’x 0431, or to use a lifting strap or similar device to hold the jib to the crane. *Supra* pp. 19–29.

Midwest’s assertion that several parts of Bednar’s testimony established his full understanding of the tasks, hazards, and unsafe locations associated with the work that day is baseless. Midwest Op. Br. 23–24. This testimony merely noted Bednar’s participation in previous jib deployment jobs<sup>20</sup> and described the instructions Rogers gave him on how to manipulate the tag line and Bednar’s location in relation to the jib prior to the incident.<sup>21</sup> App’x 0833. Although Bednar

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through the Tadano manual if he “g[ot] a day where there’s not a whole lot going on”).

<sup>20</sup> See App’x 0052, 0084, 0090, 0267.

<sup>21</sup> See App’x 0068, 0369, 0387, 0410, 0411, 0437. The other transcript pages to which Midwest cites are related to Bednar’s understanding that the pivot pin could not be released until the base section of the jib was pinned to the boom head, App’x 0080, 0430–0431, and his understanding that he had no authority to perform a task unless directed by Rogers, App’x 0085, 0093, 0274, 0415, and are similarly insufficient to rebut the Secretary’s evidence that Midwest failed to ensure that the

testified that he had been trained to stand in a safe position from the jib, App'x 0082–0083, he admitted that when he was pulling on the tag line, “in order to get that thing to flex, [he] had to be pretty close.” App'x 0833; App'x 0082. Additionally, when asked whether he was “instructed where to stand,” he responded, “[n]ot really, just the front and pull it.” App'x 0068. Thus, the cited testimony fails to show that Bednar understood the tasks and associated hazards before starting the work.

Midwest also claims that Simerale met with the crew on the morning of the accident and specifically discussed the tasks and hazards associated with the job. Midwest Op. Br. 24. However, as the Commission pointed out, this argument finds little support in the record. App'x 0832. The portions of the record to which Midwest cites establish that Simerale generally discussed ground conditions and worksite obstructions with the crew, but did not discuss with Bednar his specific role during the jib assembly or how to avoid hazards like a falling jib during that work.<sup>22</sup> As the Commission concluded, this testimony fails to show that Simerale addressed any of the hazards identified in this citation item.

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crew, including Bednar, understood the tasks, associated hazards, and the hazardous locations to avoid before assembling the crane, as required by § 1926.1404(d)(1).

<sup>22</sup> See App'x 0086–0087 (Bednar explaining that Simerale showed them where the ground was not level or where there were obstructions); App'x 0271–0272 (Simerale explaining that it was “an everyday procedure” to “train [his] operators to

Midwest’s assertion that Rogers reviewed the tasks and hazards with the crew at the jobsite is similarly unsupported. *See* Midwest Op. Br. 24. In response to a question as to whether Rogers and Bednar “discuss[ed] the tasks [they] were going to undertake, steps [they] were going to follow,” Bednar responded, “[j]ust we would always discuss the four-handling setup, just setup and pretty much where to be, so that our eyes are always on each other,” and where to swing the boom so that “it’s not going to hit anybody or obstruct or be obstructed by anything.”<sup>23</sup> App’x 0059–0060. Although Bednar agreed that this meant that they discussed “staying out of the way,” App’x 0060, this testimony does not establish that Rogers discussed with Bednar, and ensured that he understood, his specific role in jib

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review the tasks and hazards of a particular job site with the crew”); App’x 0277–0278 (Simerale explaining that he would “relay [safety information] to [the crew on] the morning of the job”); App’x 0363–0364 (Hosler stating that Simerale discussed with the crew “the roles of each [crew member] in the process,” “potential safety hazards,” and the “ground conditions”); App’x 0399–0400 (Rogers stating that Simerale discussed a “packet” with “pictures and the layout of the job,” including “any safety thing that [the crew was] to be aware of, and “cover[ed] the tasks at hand”).

<sup>23</sup> Midwest’s claim that “setup” refers to the jib deployment process (Midwest Op. Br. 28) is belied by Bednar’s responses to follow-up questioning. The Secretary’s counsel asks what was “discussed specifically about the tasks,” and Bednar responds that the discussion included “where to park the crane and put the trucks,” and where to put the jib and swing the boom so that “it’s not going to hit anybody or obstruct or be obstructed by anything.” App’x 0059–0060. At no point did he testify that setup included jib deployment. *See generally* App’x 0047–0191.

deployment and how to avoid specific hazards (like an unexpectedly falling jib) during that work.<sup>24</sup>

**IV. Substantial Evidence Supports the Commission’s Conclusion that Midwest Violated 29 C.F.R. § 1926.1400(f) by Failing To Establish, Effectively Communicate, or Enforce Work Rules to Ensure that the A/D Director Would Make Certain that His Crew Understood How to Safely Assemble the Crane.**

Finally, substantial evidence supports the Commission’s determination that Midwest violated § 1926.1400(f) when it failed to establish, effectively communicate, and enforce work rules that would ensure that Rogers and his crew understood how to safely assemble the crane before starting the work. Section 1926.1400(f) requires that “[w]here provisions of [the cranes standard] direct an . . . employee . . . to take certain actions, the employer must establish, effectively communicate to the relevant persons, and enforce, work rules to ensure compliance with such provisions.” Here, the record shows that A/D director Rogers did not fulfill his duty under § 1926.1404(d)(1) to ensure that his crew

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<sup>24</sup> Nor do the other transcript pages to which Midwest cites establish that Rogers gave such detailed instructions to Bednar. *See* Midwest Op. Br. 28 (citing App’x 0271–0272, 0365–0366, 0404–0407). Hosler stated that they discussed the ground conditions and the need to position away from obstructions, but that was “pretty much it.” App’x 0365–0366. Rogers’ testimony also did not indicate that they discussed safety topics other than ground conditions and equipment positioning. App’x 0405–0406. Simerale testified that Midwest A/D directors are trained to review the tasks and hazards at a particular job site with the crew, but that does not establish that Rogers in fact discussed tasks and hazards with Bednar in detail on December 18, 2018. App’x 0271–0272.

understood their tasks, the hazards associated with them, and the hazardous positions and locations to avoid, *see supra* sec. III, and Midwest violated § 1926.1400(f) because it did not establish, communicate, and enforce work rules to ensure that Rogers would fulfill that duty.

First, Midwest did not have any work rules, let alone a work rule to ensure that Rogers would verify, prior to beginning the jib assembly process, that his crew fully understood their tasks and how to avoid potential hazards. Midwest did not have any written work rules of its own, and instead relied exclusively on Tadano's procedures to guide its crane assembly activities.<sup>25</sup> App'x 0158–0159, 0231–0232, 0273–0275, 0416. Simerale claimed that Midwest trained “operators to review the tasks and hazards of a particular job site with the crew,” App'x 0271–0272, but this testimony does not establish that Midwest had a work rule requiring A/D directors to ensure that all crew members understood their responsibilities and how to avoid hazards before starting each job. *See El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1425 n.6 (No. 90-1106, 1993) (“Employers must model their rules on the applicable requirements.”). Rather, Simerale's testimony suggested

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<sup>25</sup> Midwest claims that it had an unwritten work rule to stay out of a jib's fall zone, *see* App'x 0083, 0372, 0414, but that hortatory command is too general to be a work rule. *See, e.g., S. Hens, Inc. v. OSHRC*, 930 F.3d 667, 668 (5th Cir. 2019) (instruction to “keep hands off” moving machinery was not a work rule); *Modern Continental Const. Co., Inc. v. OSHRC*, 305 F.3d 43, 51 (1st Cir. 2002) (repeated instructions to “stay clear of the load” and “stay away from the hole” were not work rules).

that Midwest only expected A/D directors to discuss site-specific obstacles with their crews. App'x 0272 (pre-work talks were “important” because “when you . . . go to that job, there are obstacles to overcome . . . you’ve got to be aware of them”).

Even assuming *arguendo* that Midwest required Rogers to ensure before each job that his crew understood their tasks and how to stay safe while executing them, Rogers clearly did not understand that obligation. On December 18, 2018, Rogers only discussed with his crew ground unevenness and where to conduct the assembly process so as to avoid hitting anything (such as nearby trees and a fence). *Supra* pp. 29–30. He did not discuss with the crew the Tadano procedures that were applicable to the work—including the requirements to fasten a lifting strap to the jib and superstructure, and to keep the pivot pin in place until the jib was attached to the boom end—nor did he warn Bednar about the potential for the jib to fall or the need to avoid the hazardous position where he was crushed by the jib. *Supra* pp. 29–31.

Furthermore, Midwest did not equip Rogers with the knowledge necessary to fulfill his obligation under § 1926.1404(d)(1). Given that Midwest’s crew relied wholly on Tadano’s procedures to guide their work, Rogers was required to ensure that his crew understood those procedures. *See* App'x 0144–0145, 0230. Yet, Rogers erroneously believed he and his crew were allowed to deviate from the

Tadano manual “a little bit,” including by never complying with the lifting strap requirement. App’x 0425–0427.

Finally, even assuming *arguendo* that Midwest expected Rogers to verify his crew’s understanding of their tasks and how to avoid the associated hazards, Midwest did not enforce that expectation. Midwest did not discipline any crew members after the December 18, 2018, incident, App’x 0303–0304, even though Rogers did not verify that his crew understood the Tadano procedures and how to protect themselves from reasonably anticipated hazards, such as a falling boom, before they began the work. The Commission thus correctly determined that Midwest violated § 1926.1400(f).

Midwest’s assertion that it maintained a work rule regarding staying out of the fall zone of the jib, and that this rule was communicated to Bednar, lacks support in the record. Midwest Op. Br. 30; *see also* App’x 0082–0083, 0410, 0414. As the Commission noted, Rogers testified that “we don’t communicate [this rule] every time unless we have someone new with us,” and Bednar stated that he was “not really” told where to stand when he got “pretty close” to the jib as he was pulling on the tag line. App’x 0834; App’x 0068, 0082, 0414. Accordingly, even if Midwest had a rule requiring crew members to stay out of the jib’s fall zone, it was not adequately communicated to Bednar. Midwest’s claim that the Commission’s decision would require recitation of each and every work rule at every jobsite

before commencing work, Midwest Op. Br. at 32, is false. The standard requires work rules to be “effectively communicate[d],” and Bednar’s testimony makes clear that Midwest did not effectively communicate the alleged rule to Bednar.

Finally, Midwest’s argument that the Commission impermissibly “flipped the burden of proof” for this citation item is also meritless. Midwest Op. Br. 26. The Commission correctly concluded that Midwest violated § 1926.1400(f) and cited record evidence supporting this conclusion. App’x 0833–0834; *see, e.g.*, App’x 0068, 0082 (Bednar testifying that he was “not really” told where to stand when he got “pretty close” to the jib as he was pulling on the tag line). Midwest’s failure to adduce evidence rebutting the violation did not flip the burden of proof.

## CONCLUSION

For the foregoing reasons, the Court should deny Midwest's petition for review.

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**CERTIFICATE OF COMPLIANCE  
WITH FED. R. APP. P. 32(a)(7)(B)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,275 words, excluding the parts of the brief exempted by material referenced in Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 with 14-point Times New Roman.

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## CERTIFICATE OF SERVICE

I certify that on the 7th day of November, 2022, a copy of the foregoing Brief for Respondent was electronically filed and served via the Court's CM/ECF electronic filing system on counsel for Midwest Equipment Company, listed below:

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