

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

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**CASE NO. 22-3524**

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**MIDWEST EQUIPMENT COMPANY,**

**Petitioner**

**vs.**

**OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, U.S.  
DEPARTMENT OF LABOR and OCCUPATIONAL SAFETY AND  
HEALTH REVIEW COMMISSION,**

**Respondents**

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**Petition for Review of an Order of the Occupational  
Safety and Health Review Commission  
OSHRC Docket No. 19-0723**

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**CORRECTED BRIEF OF PETITIONER,  
MIDWEST EQUIPMENT COMPANY**

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## **STATEMENT OF JURISDICTION**

### **A. OSHA REVIEW COMMISSION.**

The Petitioner, Midwest Equipment Company (“Midwest”), contested citations issued by the Occupational Safety and Health Administration (“OSHA”) with the Occupational Safety and Health Review Commission (“Review Commission”). The Administrative Law Judge (“ALJ”) affirmed the citations on August 28, 2020. Midwest filed a Petition for Discretionary Review with Review Commission on October 14, 2020. On April 15, 2022, the Review Commission issued a Final Order, which vacated one citation item and affirmed three citation items. Midwest then appealed the case to the Sixth Circuit Court of Appeals on June 13, 2022.

### **B. APPELLATE COURT.**

Jurisdiction in this Court of Appeals for the Sixth Circuit is proper, pursuant to the Occupational Safety and Health Act, 29 U.S.C. §651, et seq. and the Administrative Procedure Act, 5 U.S.C. §§701-706.

### **C. TIMELINESS OF APPEAL.**

The OSHRC issued its Final Order, on April 15, 2022. In accordance with Fed. R. App. P. 4(a)(1), the Petitioner timely filed its Notice of Appeal on June 13, 2022.

**D. FINALITY OF ORDER.**

The Review Commission's Final Order, issued on April 15, 2022, was final and appealable. 29 U.S.C. §660.

**STATEMENT OF THE ISSUES**

1. Whether the Review Commission erred in finding a violation of 29 C.F.R. § 1926.1403(a), where Midwest produced unrefuted evidence that its use of a tagline provided equivalent if not greater protection, and there was no evidence that a crew member prematurely released the pivot pin.
2. Whether the Review Commission erred in finding a violation of 29 C.F.R. §1926.1404(d)(1), where the finding that the Midwest crew did not understand their tasks or associated hazards is not supported by substantial evidence.
3. Whether the Review Commission erred in finding a violation of 29 C.F.R. § 1926.1400(f), where the finding that Midwest failed to effectively communicate work rules regarding the pivot pin and the lifting strap is not supported by substantial evidence.

## **STATEMENT OF THE CASE**

This case arises out of the Occupational Safety & Health Act, 29 U.S.C. 651, et seq. (hereinafter “the Act”). The Respondent, Secretary of Labor (“the Secretary”), alleges that the Petitioner, Midwest Equipment Company (“Midwest”), committed “serious” violations of the Act. These allegations were set forth in four citation items (Citation 1, Items 1a, 1b, 2a and 2b).

Midwest contested the citations with the Occupational Safety & Health Review Commission (“Review Commission”), and the matter was heard by Administrative Law Judge (“ALJ”) Sharon Calhoun on February 20 and 21, 2020 in Cleveland, Ohio. The parties filed Merit Briefs, and in a Decision dated August 28, 2020, the ALJ affirmed all four citation items. Midwest filed a Petition for Review with the Occupational Safety and Health Review Commission (“Review Commission” or “Commission”), and by Decision dated April 15, 2022, the Review Commission affirmed three citation items and vacated another (Item 1b).

## **STATEMENT OF FACTS**

Midwest is a full-service crane rental company. This entails owning and operating cranes on behalf of customers as well as leasing cranes without supplying a crane operator. The Company has approximately 25-30 employees. Most of the Company’s employees are certified crane operators and a few are oilers who assist the operator.

Midwest maintains a comprehensive safety program, and it has a good safety record. As is typical in the crane industry, the Company's crane operators and oilers receive the bulk of their safety training through their union. All of the Company's crane operators have either OSHA 10 or 30 hour training. The Company supplements the OSHA 10 and 30 hour training with in-house training from the Company itself or an outside third party. In addition, its crane operators have NCOO/CCCO certification, which requires both knowledge and demonstration of competent operation and safe work practices. (Petitioner's Appendix "PA" at pp. 0257-0258, 0356-0357, 0392).

**A. The Graysville Project.**

In December 2018, Midwest was hired to supply crane service to TelCom Construction, which was performing work on a cell phone tower near Graysville, Ohio, a rural location in Southeastern, Ohio. TelCom had been hired to install sector frames (antennas) to a 285-foot tower.

The job began with Midwest sending Michael Simerale out to the jobsite. Mr. Simerale is the Company's Field Superintendent, and has over 21 years of experience with Midwest. Prior to becoming a Field Superintendent, Mr. Simerale had worked as an oiler and a crane operator. He still retains his NCCO/CCCO crane operator's certification as well as his membership with the Operating Engineers, Local 18. (PA at pp. 0256-0258).

At the Graysville jobsite, Mr. Simerale inspected and photographed the area to ensure that it was level enough to safely operate the crane. (PA at p. 0277). He was also able to determine what type of crane and equipment was needed for the job. In this case, Simerale determined that the site needed to be more level, so he arranged to supply fill material, which was graded and leveled prior to beginning work. (PA at p. 0277).

To perform the work, Simerale determined that Midwest would utilize one of its two Tadano 220G-5 mobile cranes. A mobile crane, like the 220G-5, can travel over highways to reach the job site. The 220G-5 is equipped with a 220 foot telescoping boom and a 43 foot long “swing away” jib that is stowed alongside of the boom. To work at heights above the 285 foot tower, two 20 foot jib inserts would be added, which would allow the crane to reach a height of approximately 303 feet. (PA at p. 0129). The job also required the use of a boom truck (assist crane) as well as a flatbed truck to transport the counterweights.

**B. The Pre-Job Meeting With Mike Simerale.**

On the morning of December 18, 2018, Mr. Simerale met with a crew of Midwest employees to prepare them for the Graysville Project. He showed them the applicable drawings of the tower and photographs of the jobsite. The crew then reviewed the procedures they would employ in setting up and operating the crane, which included deployment of the jib. Specifically, they discussed the tasks

assigned to each crew member as well as potential safety hazards. (PA at pp. 0086-0087, 0272, 0278, 0363-0364, 0399-0400).

The crew for the Graysville Project consisted of three Midwest employees: Jon Rogers, Dennis Hosler and Bob Bednar. Hosler and Rogers were experienced crane operators with over 75 years of experience between them. (PA at pp. 0356, 0391). Jon Rogers operated the 220G-5 mobile crane and served as the Assembly/Disassembly (“A/D”) Director. At the jobsite, he would direct the work. (PA at p. 0271). Dennis Hosler operated an assist crane for when they attached and detached the jib inserts. (PA at p. 0362). Bob Bednar was the oiler who assisted Rogers in the setup of the 220G-5, as well as the maintenance and operation of the crane. (PA at pp. 0062, 0263-0264).

### **C. Preparations At The Jobsite.**

When the crew reached Graysville, they pulled over at a laydown yard approximately three-quarters of a mile from the jobsite and inspected the 220G-5 crane to ensure that nothing had been damaged or loosened during the transport of the crane from Cleveland to Graysville. (PA at pp. 0093-0094, 0402-0404). After inspecting the Tadano crane, the crew went up to the jobsite and surveyed the jobsite, examining the intended location of the crane and checking for obstacles. (PA at pp. 0405-0406, 0094-0095, 0366). The crew then met to discuss the “game plan” for the crane set up. (PA at pp. 0366, 0406). This included a discussion of

the tasks to be performed by each crew member, the order in which the work would be performed and the hazards associated with their tasks. (PA at pp. 0059, 0365-0366, 0404-0407).

The game plan for setting up the crane involved placing the crane at a level location, placing outrigger pads on the ground, deploying the outriggers and adding a 26,000 pound counterweight. (PA at pp. 0066, 0407). After that, the crew would deploy the swing away jib. Finally, the crew would utilize the boom truck's assist crane to add two 20-foot jib inserts. (PA at pp. 0248, 0249). Significantly, the crew was not rushed and had sufficient time to complete the setup, because the crane was not needed to perform work until the next day. (PA at pp. 0086, 0367).

#### **D. The Jib Deployment Process.**

An understanding of the jib deployment process is essential to understanding the facts and issues in this case. The swing away jib consists of two sections: the base jib and the top jib, which are joined at the midsection. The jib is 43 feet long and is secured to the side of the boom. The jib is attached at three locations (jib securement pins) along the length of the boom, as well as at a fourth and more critical location known as the "pivot point." The jib securement pins only hold the jib up against the boom, but the pivot pin is what actually secures the jib to the boom. There are two port holes that allow the crane to determine whether the pivot pin is engaged or disengaged. (PA at pp. 0248, 0290-0291).

To deploy the swing away jib on the Tadano 220G-5, the crane crew needed to perform the following tasks in the following order:

1. Roll out the ramp (aka the runway), which is a protrusion that supports the top jib at the end opposite the pivot pin;
2. Attach a tagline (lifting strap) at the end of the top jib;
3. While holding the tagline taut, toward the boom and thus keeping the jib tight against the boom, unpin the three jib securement pins that hold the jib flush against the side of the boom during transport;
4. Take the tagline and slowly pull the jib away from the boom so that the two ears at the bottom of the base section line up with the ears at the boom head. In total, the jib will move approximately ten inches before it lines up;
5. Once the base section ears and the boom head ears are lined up, the base section and the boom head are secured together by pinning them. This creates a fulcrum;
6. Once the base section and the boom head are pinned together, it is safe to release the pivot pin; and
7. Once the pivot pin is released, a crew member takes the tagline at the top jib and swings it around 180 degrees so that the two remaining ears on the base section will align with the two remaining ears on the boom head and those ears are pinned.<sup>1</sup>

The relevant procedures for deploying the jib are found in the Tadano 220G-5 Manual at Section 11.4.6. (PA at pp. 0242, 0244, 0283-0293, 0543, 0671).

The release of the pivot pin is the most important part of the jib deployment process. If the pivot pin were prematurely released, the 3400 pound jib could fall

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<sup>1</sup> An analogy can be made to a card table that is assembled by swinging the table legs around until they lock into place.

to the ground. For that reason, the pivot pin cannot be released until after the base section is pinned at the boom head. (PA at pp. 0279-0291). Releasing the pivot pin requires the use of a hand crank. From the ground, a worker will stand underneath the boom and engage the hand crank at an opening beneath the jib and the boom. It takes approximately 20-25 revolutions over two minutes to disengage the pivot pin. (PA at pp. 0080, 0398).

**E. The Accident.**

Once the crew covered the tasks and hazards of the job, they laid out the outrigger pads, activated the outriggers and deployed the counterweight. At that point, the crew was ready to deploy the swing away jib. This task would be performed by Bob Bednar and Jon Rogers, with Dennis Hosler standing by if needed.

As shown above, the jib deployment process is not a complex process, and the crew had performed it numerous times before, on the Company's 220G-5 cranes and other mobile cranes with similar swing away jib set ups. (PA at pp. 0083-0084, 0184). Jon Rogers began the process by swinging the boom around and lowering it slightly. He verified that the pivot pin was engaged and instructed Mr. Bednar to attach a 20-foot tagline at the top of the top jib section and directed him to a location well outside the fall zone of the jib. (PA at pp. 0410-0411). Rogers then deployed the jib ramp or runway, which supports the top jib. After

that, the jib securement pins were removed. Once Rogers released the three jib securement pins, he instructed Bednar to take the tagline and pull the jib away from the boom, approximately 10 inches, so as to line up the base section ears with the boom head ears. (PA at pp. 0408-0411).

As Rogers attempted to pin the base section to the boom head, the jib became stuck and it would not line up correctly. Bednar pulled hard on the tagline. Rogers, sensing that Bednar was having difficulty pulling the tagline, instructed Dennis Hosler to assist him. (PA at p. 0411). As Hosler walked over toward Bednar, the jib began to shift and then separated completely from the boom and rolled off the ramp, falling nine feet to the ground below.

At the time the jib began to shift, Bednar was holding the tagline near the outriggers approximately 15-20 feet away from the jib. In the span of a few seconds, however, Bednar went from that location to a point under the fall radius. Rogers and Hosler suspected that Bednar panicked and ran toward the jib to secure it when it began to move. As a result, the jib fell on Bednar and he suffered serious injuries. (PA at pp. 0371-0372, 0412-0413).

**F. The Investigation And OSHA Citations.**

Midwest investigated the accident and properly reported it to the Occupational Safety and Health Administration (“OSHA”), which sent Compliance Officer Matt Marcinko to perform an inspection. The Company and

OSHA inspected the 220G-5 crane and could not determine why the pivot pin failed or became disengaged. (PA at pp. 0268-0270, 0305-0307). Several possibilities were considered, including the possibility that vibrations from the transport of the crane from the yard to the jobsite and booming up of the crane at the jobsite caused the pivot pin to disengage. The Company interviewed the crew members and found no evidence that anyone disengaged the pivot pin. (PA at pp. 0268-0270, 0305, 0478-0479, 0481). The Company considered the possibility that one of the crew members prematurely released the pivot pin, though that was unlikely since none of the crew members recalled seeing anyone release the pin and all denied having done it themselves. Further, it would be highly unusual for this to occur because this was a critical step in the process. The crew had performed this task many times, and there was no advantage to be gained from releasing the pivot pin prematurely. (PA at pp. 0267-0268, 0272, 0289). Prematurely releasing the pivot would be closely akin to shifting a car into reverse while traveling down the road at 70 miles per hour. It is something that someone would not intentionally do, and it would make no sense to do it.

Despite the fact that there was no determination by the Company or the Secretary as to how the pivot pin disengaged, the Secretary issued two serious citations relating to the crane safety standard. The citations alleged that Midwest violated the Act because it failed to follow the crane manufacturer's instructions by

prematurely releasing the pivot pin and failing to use a lifting strap attached to the crane's superstructure. The citations alleged that the above failures caused the jib to fall to the ground. In addition, the Secretary alleged the above failures proved that Midwest had failed to effectively communicate work rules and that the crew did not understand their tasks or the hazards associated with their work.

## **SUMMARY OF THE ARGUMENT**

The Decision of the Review Commission is contrary to law and not supported by substantial evidence for the following reasons:

1. The purpose of the lifting strap is not to prevent the jib from falling to the ground, as alleged in citations, but to prevent the jib from suddenly moving when the jib securement pins are released. Midwest produced unrefuted evidence that its method of attaching a tagline to the jib and holding it taut, in lieu of attaching a “lifting strap” to the crane’s superstructure, offered equivalent if not safer protection, because it kept the workers away from working underneath the jib.

2. The citation alleged that a Midwest crew member prematurely released the pivot pin, but all crew members denied doing that, and the Secretary produced no evidence at hearing to show that this was done. Therefore, the Secretary failed to prove that Midwest released the pivot pin before swinging the jib.

3. The stated basis for Citation 1, Item 1a was that the crew member prematurely released the pivot pin. The evidence introduced at the hearing and Midwest’s Post-Hearing Brief addressed that issue. The Secretary, however, attempted to amend the citation in its Post Hearing Brief. The Secretary dropped its contention that the pivot pin was prematurely released and instead argued that Midwest violated the Act because it did not verify that the pivot pin was engaged. The ALJ permitted the amendment and found a violation of the Act based upon Midwest’s alleged failure to check the pivot pin. This improper amendment after the record was closed severely prejudiced Midwest and deprived it of fair notice of the allegations against it.

4. The Secretary failed to prove, and the ALJ and Review Commission’s Decisions lack factual findings to establish, that the Midwest crew did not understand their tasks and associated hazards.

5. The Secretary failed to prove, and the ALJ and Review Commission’s Decisions lack factual findings to establish, that Midwest failed to effectively communicate its work rules regarding the pivot pin and the lifting strap.

## LAW AND ARGUMENT

Final orders of the Commission are subject to the general judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. See *CMC Electric Inc. v. Occupational Safety and Health Admin.*, 221 F.3d 861, 865 (6<sup>th</sup> Cir. 2000). Under those provisions the reviewing court will uphold agency determinations unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. §706(2)(A). In making this determination, the reviewing court must defer to the agency’s reasonable interpretation of the OSH Act and the governing regulations. See *CMC Electric, Inc.*, *supra*.

The OSH Act also directs that “[t]he findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.” 29 U.S.C. §660(a); *Nat’l. Eng’g. & Contracting Co. v. Herman*, *supra*, 181 F.3d 715, 721 (6<sup>th</sup> Cir. 1999). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The substantial evidence test protects both the factual findings and the inferences derived from them, and if the findings and inferences are reasonable on the record, they must be affirmed even if this court could justifiably reach a different result *de novo*. *Nat’l Eng’g.*, 181 F. 3d at 721.

It is well settled that the Secretary of Labor bears the burden of proving the following elements by a preponderance of the evidence:

“(1) The standard applies to cited conditions; (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or should have known of the hazardous condition with the exercise of reasonable diligence.”

*R.P. Carbone Const. Co. v. Occupational Safety & Health Review Comm’n*, 166 F.3d 815, 818 (6<sup>th</sup> Cir.1988).

OSHA citations do not enjoy a presumption of validity. It is incumbent upon the Secretary to sustain its burden of proving all necessary elements of a citation.

**I. THE REVIEW COMMISSION ERRED IN FINDING A VIOLATION OF 29 C.F.R. § 1926.1403(a), WHERE MIDWEST PRODUCED UNREFUTED EVIDENCE THAT ITS USE OF A TAGLINE PROVIDED EQUIVALENT, IF NOT GREATER PROTECTION, AND THERE WAS NO EVIDENCE THAT A CREW MEMBER PREMATURELY RELEASED THE PIVOT PIN.**

Citation 1, Item 1a alleged a violation of 29 C.F.R. § 1926.1403(a), which requires an employer to follow the manufacturer’s instructions or develop instructions for the assembly of the jib onto the main boom of the crane. Specifically, the citation alleged that Midwest violated the Act because:

The pivot pin had been released prior to fastening the top jib with base section to the main boom head and no strap was used to secure the jib to the crane’s superstructure which caused the jib to fall approximately nine feet to the ground, striking an employee, resulting in serious bodily injury.

**A. Tagline in Lieu of “Lifting Strap.”**

The Secretary presented evidence at the hearing that Midwest failed to use a lifting strap as specified in the crane manual. (PA at pp. 0135, 0226). The Secretary’s primary fact witness was the investigating compliance officer, Matt Marcinko. Mr. Marcinko testified that the purpose of the lifting strap was to hold the jib in place so that it does not come out quickly when the securement pins are released. The strap does not hold weight and is not intended to prevent the jib from falling to the ground. (PA at pp. 0138-0139, 0178-0180). Thus, at hearing, the Secretary abandoned the allegation in the citation that the absence of the lifting strap caused the jib to fall to the ground.<sup>2</sup>

The Company witnesses agreed that the purpose of the lifting strap was not to prevent the jib from falling but to stabilize the jib and prevent it from “jumping out” when the three (3) jib securement pins are released. The release of the jib securement pins could release built-up mechanical tension causing the jib top section to move suddenly as it slides out onto the ramp to the stopping point. (PA at pp. 0130-0131, 0249, 0487, 0547).

Although Midwest conceded that it did not secure the jib to the crane superstructure with a “lifting strap,” the Company rebutted the Secretary’s case by

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<sup>2</sup> The Review Commission’s Decision also recognized that the citation and the ALJ decision were erroneous in that the absence of a lifting strap had nothing to do with the jib falling to the ground. (PA at p. 0286)

introducing evidence that it used a similar or equivalent procedure to stabilize the jib during the unlocking of the securement pins. Specifically, the A/D Director, Jon Rogers, instructed Mr. Bednar to attach a tagline to the top end of the jib and hold it taut toward the boom; that is, away from the direction that the jib could move when the securement pins were released. This keeps the jib from suddenly moving when disengaging the jib securement pins. Thus, pulling on the tagline performed the same function as the lifting strap and kept the worker away from the jib. (PA at pp. 0427-0428).

Jocko Vermillion, a former OSHA Compliance Officer and crane expert, testified it is standard practice in the crane industry to use a tagline in lieu of a lifting strap to stabilize the jib. Vermillion testified that holding the tagline allows a worker to control the jib and prevent it from “swinging out and getting away from you” when the jib securement pins are released. (PA at pp. 0472-0477). In addition, Mr. Vermillion testified that using a tagline is actually a safer method, because the person holding a tagline is located farther away from the jib’s fall zone. Attaching a lifting strap to the jib and the superstructure is more dangerous because it requires a person to work underneath the jib. (PA at p. 0473). In fact, Mr. Vermillion testified that the use of a tagline in lieu of a lifting strap was the way he was taught at the OSHA crane safety training courses he attended. (PA at pp. 0476-0477).

While the use of a tagline is not specified in the crane manual, the manual references a lifting strap or “similar device.” (PA at pp. 0163-0164, 0497-0499, 0569). The manual also makes it clear that a tagline is synonymous with a lifting strap because it also calls for the use of a “lifting strap” to swing the jib into place at the boomhead. (See PA at p. 0680).

The use of equivalent devices was contemplated during the promulgation of the regulation. With respect to Section 29 C.F.R. §1403, The Federal Register states:

“The Committee determined that deviations [from manufacturer’s procedures] should be allowed....”

*Cranes and Derricks in Construction (Final Rule)* 75 Fed. Reg. 47906, 47937 (August 9, 2010). In addition, the regulation and Citation 1, Item 1 itself specifically allow for the employer to develop their own procedures.

The employer’s evidence regarding the tagline was unrefuted. The Secretary presented no evidence by way of its case in chief or by rebuttal to refute Midwest’s contention that the tagline served as an equal if not superior substitute for attaching a lifting strap. The Secretary was offered a chance to rebut this assertion but chose not to. (PA at pp. 0504-0505).

Nevertheless, the Review Commission held that the tagline did not offer equivalent protection, because it was not attached to the superstructure of the

crane. Thus, the Commission engaged in circular reasoning to dispense with Midwest's evidence of equivalent protection. In effect, the Commission reasoned:

1. The Manual states that the strap must be attached to the superstructure.
2. Midwest developed an equivalent if not safer method that involved pulling on a tagline thereby dispensing with the need to attach the strap to the superstructure.
3. Midwest's procedure was not equivalent because it did not call for attaching the strap to the superstructure.

The purpose of the lifting strap is to prevent the jib from moving when the securement pins are released. The Commission's decision ignores the unrefuted testimony that by holding the tagline taut, there is equivalent protection against sudden movement, and therefore, there is no need for the crew member to work underneath the jib to fasten the line to the crane's superstructure. No contrary evidence was presented to challenge the Employer's method of pulling on the tagline, which is in fact industry custom. Further, there was no evidence that the jib jumped out suddenly while Bednar held the tagline, thereby confirming the fact that holding the tagline taut offered sufficient protection.

#### **B. The Pivot Pin**

The Review Commission held that Midwest violated the Act because it failed to confirm that the pivot pin was engaged before swinging the jib (PA at pp. 0781, 0828-0829). The citation, however, did not allege this as the basis for a violation. Rather, Citation 1, Item 1a alleged that the pivot pin had been

prematurely released before the crew swung the jib. At no time did the Secretary assert that the failure to verify the engagement of the pivot pin was the basis for the violation, until after the record was closed and it filed its post-hearing brief. (PA at p. 0757). In fact, the Secretary's brief does not even address the issue of whether the pivot pin was released prematurely.

This is improper. The citation alleged that Midwest violated the Act because someone prematurely disengaged the pivot pin. That was the issue that was litigated at the hearing, and Midwest's post-hearing brief focused on that issue. By allowing the Secretary to amend its position after the record was closed, the Review Commission allowed the Secretary to "sandbag" the employer by finding a violation that was neither alleged in the citation or litigated at hearing.

This unfair "sandbagging" was raised by Midwest in its Petition to the Review Commission, but the Commission simply ignored it and focused upon the ALJ's credibility determination regarding whether the crane operator checked the pivot pin at least three times before deploying the jib.

It is well established that an employer is entitled to fair notice of the allegations against it, and for this reason, a citation must be drafted with particularity, and cannot be amended after the hearing. If Citation 1, Item 1a was based upon Midwest's failure to verify that the pivot pin was in place, then the citation should have stated that. Otherwise, Petitioner is subject to unfair surprise.

See Section 9(c) of the Act, 29 U.S.C. § 658(a). *Secretary of Labor v. Del Monte Corp.*, 4 BNA OSHC Cases 2035 (Rev. Com. 1977); *Secretary of Labor v. L.E. Meyers Co.* 3 BNA OSHC Cases 1026 (Rev. Com. 1975).

In addition, the Review Commission flipped the burden of proof to the employer to prove that it did not violate the Act. An examination of the record shows that the Secretary presented no evidence in its case in chief to prove that Mr. Rogers failed to check the pivot pin before deploying the swing away jib. Instead, the Secretary's evidence was directed at whether Rogers or another crew member prematurely released the pivot pin. (PA at pp. 0157, 0182, 0224-0225). In that regard, Matt Marcinko could not say who released the pin and admitted that this was merely an assumption. (PA at p. 0182). None of the Secretary's witnesses gave testimony on whether Midwest failed to confirm the engagement of the pivot pin prior to swinging the jib. As noted above, this did not become the basis for the violation until after the record was closed. Nevertheless, having failed to allege and present evidence regarding a failure to check the pivot pin in its case in chief, the Secretary failed to present a prima facie case on the issue, and the ALJ was precluded from finding for the Secretary.<sup>3</sup>

The focus of the Commission's inquiry should have been on whether the Secretary sustained its burden of proving that Midwest prematurely disengaged the

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<sup>3</sup> At the conclusion of the Secretary's case in chief, Midwest moved for judgment, but the motion was denied (PA at pp. 0254-0255).

pivot pin prior to swinging the jib, as alleged in the citation, and not whether the Company failed to prove in its case in chief that it had verified that the pivot pin was engaged.

**II. THE REVIEW COMMISSION ERRED IN FINDING A VIOLATION OF 29 C.F.R. §1926.1404(d)(1), WHERE THE FINDING THAT THE MIDWEST CREW DID NOT UNDERSTAND THEIR TASKS OR ASSOCIATED HAZARDS IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

Citation 1, Item 2a alleged a violation of 29 C.F.R. §1926.1404(d)(1), because the A/D director failed to ensure that the crew members understood their tasks and hazards associated with those tasks. As was true with Citation I, Item 1a, this citation item was based upon the Secretary's assertion that the pivot pin was prematurely released and that the crew failed to attach a lifting strap to the crane's superstructure. Specifically, the citation alleged that the crew did not understand their tasks and associated hazards because:

The pivot pin had been released prior to fastening the top jib with base section to the main boom head and no strap was used to secure the jib to the cranes superstructure which caused the jib to fall approximately nine feet to the ground, striking an employee, resulting in bodily injury.

Once again, there is no dispute that the absence of the lifting strap did not cause the jib to fall to the ground. Further, no evidence was presented to show that the pivot pin had been released, or to refute that the method of pulling a tagline taut against the direction of the swing away jib offered a safer means of ensuring that

the jib would not suddenly move. Therefore, the Secretary failed to sustain its burden of proving a violation of the Act as alleged in Citation 1, Item 2a.

As to whether the crew generally understood their tasks and associated hazards, the record is replete with evidence that they did, and the Review Commission's decision cannot be reconciled with the evidence. Jon Rogers and Dennis Hosler had over 70 years of experience operating mobile cranes with swing away jibs. They had extensive crane safety training, which included training specific to the Tadano 220G-5 as well as CCD license training (PA at pp. 0356-0362, 0392-0396). Nothing in their testimony revealed any failure to understand the rules, tasks and hazards associated with setting up a crane, and nothing in the Review Commission's Decision indicates otherwise.

Similarly, the record demonstrates that Bob Bednar fully understood the work rules, tasks, hazards and unsafe locations. Specifically, the record demonstrates:

1. Bob Bednar had participated in deployment of the swing-away jib on this specific crane with Jon Rogers on at least 5 or 6 prior occasions (PA at pp. 0084), and Bednar had deployed a swing-away jib many more times with other crane operators on other mobile cranes including another Tadano 220G-5. (PA at pp. 0052, 0084, 0090, 0267);
2. Bednar was trained and understood that he should stay a safe distance back and away from the fall zone of the jib. (PA at pp. 0059, 0082-0083, 0086, 0372, 0414);
3. Jon Rogers specifically instructed Bednar to grab the tagline and position himself in front of the crane near the outriggers, 15-20 feet away from the jib

so he could control the top jib. (PA at pp. 0068, 0369, 0387, 0410, 0411, 0437);

4. Bednar understood that the pivot pin could not be released until the base section of the jib was pinned to the boom head. (PA at pp. 0080, 0430, 0431); and
5. Bednar understood that he had no authority to perform a task unless specifically directed by Jon Rogers, and only Jon Rogers was permitted to remove the pivot pin. (PA at pp. 0085, 0093, 0274, 0415).

As to the importance of staying out of the fall zone of the jib, Bednar testified:

Q. I understand that, but you were taught to stay away from the fall zone of the jib, is that correct?

A. Yes sir.

Q. And that's common sense, you don't want to work under the jib; is that correct?

A. Right, yes.

(PA at pp. 0082-0083). (See also PA at p. 0414).

In addition to the overwhelming evidence that the crew understood their tasks and hazards, Michael Simerale, the Field Superintendent, met with the crew on the morning of the accident and reviewed the job extensively, specifically covering the tasks and hazards associated with the job. (PA at pp. 0086, 0087, 0272, 0278, 0363-0364, 0399-0400, 0412). Further, the record demonstrates that Jon Rogers reviewed the tasks and hazards with the crew at the jobsite. (PA at pp. 0059, 0271-0272, 0365-0366, 0404-0407).

Despite the fact that the crew had performed the jib deployment process numerous times and the record is full of testimony regarding their understanding of their tasks and hazards, the Review Commission concluded that the crew did not have such an understanding. When reading the Review Commission's Decision, however, one searches in vain for any examples of the crew's lack of understanding. What did they not understand? The Commission does not say. The Commission's Decision is completely devoid of any evidence to support its Decision.

**III. THE REVIEW COMMISSION ERRED IN FINDING A VIOLATION OF 29 C.F.R. § 1926.1400(f), WHERE THE FINDING THAT MIDWEST FAILED TO EFFECTIVELY COMMUNICATE WORK RULES REGARDING THE PIVOT PIN AND THE LIFTING STRAP IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.**

An examination of the record shows that the Secretary presented no evidence in its case in chief to establish that the Company failed to communicate the tasks and hazards associated with jib deployment. Compliance Officer Marcinko testified as to what topics should be covered, but neither he nor anyone else testified that those things were not covered by Midwest. In fact, when asked at the hearing to provide support for Citation 1, Item 2b, Mr. Marcinko offered no testimony or evidence that the tasks and hazards were not communicated by Midwest. (PA at pp. 0144-0145).

At the conclusion of the Secretary's case, the ALJ should have found that the Secretary failed to sustain its burden of proof and granted judgment to Midwest. (PA at pp. 0254-0255). Instead, the Commission flipped the burden to the employer to show that it effectively communicated both tasks and hazards. This burden flipping is contrary to established Commission precedent. See *Secretary of Labor v. Aerospace Testing Alliance*, OSHRC Docket 16-1167 (Rev. Com. 2020) ("It is not [the employer's] burden, however, to show [compliance]").

Nevertheless, the record is chock full of evidence that work rules were effectively communicated by Midwest, and the assertion that Midwest failed to present evidence of compliance is shockingly at odds with the record. As noted above, the employer submitted evidence that Bednar was told and understood that he should stay a safe distance away from the fall zone of the jib. (PA at pp. 0082-0083, 0414). The evidence shows that Rogers instructed Bednar to stand at a safe location and he was in a safe location when the jib began to fall. (PA at p. 0410). Rogers specifically testified that the Company maintained a work rule regarding staying out of the fall zone of the jib and he communicated that rule to Bednar. (PA at p. 0414). This work rule was communicated to him frequently. (PA at pp. 0059, 0082-0083, 0086, 0372, 0414). Bednar testified that he understood that if the 3,400 pound jib were to fall, he should not run toward it. There really does not

need to be a rule on such a basic thing, but nevertheless, there is no dispute that Midwest established that rule and communicated it.

Placing the burden of proof on the Secretary where it belongs, it is important to note that when asked at hearing to provide support for Citation 1 Item 2b, Compliance Officer Matt Marcinko provided two examples of what work rules and hazards that should be communicated (PA at pp. 0144-0145, 0156-0158), but he offered no testimony that these rules and hazards were not communicated by Midwest. In fact, Mr. Marcinko conceded that the employer had in fact communicated work rules regarding staying away from the fall zones and watching out for the jib. (PA at p. 0159). The Secretary presented no evidence that the crew did not understand rules regarding their tasks, the hazards or unsafe locations.

The Review Commission's Decision appears to be based upon the fact that the A/D Director did not review in detail at the jobsite each and every task that the crew would perform. This is absurd in that it completely ignores the fact that the crew members had performed the task of jib deployment countless times before. It ignores the fact that Mike Simerale met with the crew for nearly an hour that morning and reviewed the project in detail, including the tasks to be performed and the relevant hazards. Further, the Commission minimized the oiler's testimony on this point when he said they covered the four-handling set up, "just set up." (PA at

p. 0832). The Commission fails to understand that “set up” refers to the deployment process.

The Review Commission took issue with Jon Rogers’ testimony that while the Company instructs workers to stay out from under the jib, he does not communicate that rule every time unless there was a new crew member. (PA at pp. 0833-0834). To require the Company to recite each and every work rule at every jobsite before commencing work is absurd. More to the point, such a requirement goes well beyond the requirements of 29 C.F.R. § 1926.1400(f), which contains no such requirement.

Once again, this was an experienced crew that had deployed a swing away jib many times before. The evidence shows that the Company communicated the applicable work rules, the crew had studied the crane manual and they testified at hearing that they understood the relevant work rules pertaining to the deployment of the jib, the importance of the pivot pin and as well as the need to stay out from under the fall zone of the jib.<sup>4</sup>

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<sup>4</sup> It is worth noting that the Secretary’s position is internally inconsistent in that it faults the Company for failing to instruct employees to stay out from under the jib and yet the Secretary contends that the Company violated the Act because it failed to require workers to work underneath the jib by attaching a lifting strap to the crane’s superstructure.

**CONCLUSION**

Based upon the foregoing, Petitioner, Midwest Equipment Company, respectfully requests that the Court find that the Review Commission's Decision is contrary to law and not supported by substantial evidence, and therefore, all citation items must be vacated.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because:

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/s/Tod T. Morrow

Tod T. Morrow  
Attorney for Petitioner

Dated: October 4, 2022

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing *Brief of Petitioner, Midwest Equipment Company*, was electronically filed and served through the Court's CM/ECF system on Ashley Briefel, counsel for Respondents, OSHA and U.S. Department of Labor; and Regular U.S. Mail on John X. Cerveny, on behalf of OSHRC, this 4<sup>th</sup> day of October, 2022.

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