United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. MIDWEST EQUIPMENT COMPANY, Respondent.	OSHRC Docket No. 19-0723

ON BRIEFS:

Ashley A. Briefel, Senior Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Elena S. Goldstein, Deputy Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Tod T. Morrow, Esq., Susan Chae, Esq.; Morrow & Meyer LLC, Canton, OH
For the Respondent

DECISION

Before: ATTWOOD, Chairman; LAIHOW, Commissioner.

BY THE COMMISSION:

Midwest Equipment Company is a crane rental and operations service company based in Cleveland, Ohio. In December 2018, a Midwest employee was seriously injured when a jib that he was helping to install on a crane fell and crushed him. As a result of this incident, the Occupational Safety and Health Administration conducted an inspection and issued Midwest a serious citation—consisting of two items, each containing two sub-items—alleging violations of four provisions of the Cranes and Derricks in Construction standard, 29 C.F.R. § 1926, Subpart CC. Following a hearing, Administrative Law Judge Sharon D. Calhoun affirmed the citation in its entirety and assessed the total proposed penalty of $15,912.

At issue on review is whether the judge erred in finding that the Secretary established Midwest's failure to comply with each cited provision. For the following reasons, we conclude

that the Secretary established noncompliance with respect to three of the provisions. Accordingly, we affirm Items 1a, 2a, and 2b, and vacate Item 1b.

BACKGROUND

Midwest was hired to install antennas on a 285-foot-tall cell phone tower in Graysville, Ohio. For this project, Michael Simerale, the company's field superintendent, determined that Midwest would use a Tadano 220G-5 mobile crane, which is equipped with a 220-foot-long telescoping boom and a 43-foot-long "swing away" jib that is stowed alongside the boom. Because of the cell phone tower's height, the company planned to add two 20-foot-long jib inserts to allow the crane to reach a height of approximately 303 feet.

Midwest's crew for the job consisted of crane operator and designated assembly/disassembly (A/D) director Jon Rogers,[1] crane operator Dennis Hosler, and an employee assigned to assist the crane operators, known as an "oiler." The crew first convened in Cleveland on the morning at issue and then split up, with Hosler proceeding directly to the Graysville worksite while Rogers and the oiler met at a predetermined location to refuel the 220G-5 crane. After Rogers and the oiler arrived at the worksite, the crew ensured the crane was level, extended its outriggers, put counterweights in place, and then began deploying the swing-away jib, which has two sections (a "base jib" and a "top jib"). The whole jib, which weighs 3,400 pounds, is attached to the main boom with "securement pins" at three locations along the length of the boom, as well as with a "pivot pin" in a fourth and most crucial location nearest the boom head.

The crew members rolled out a ramp to support the top jib and then attached a 20-foot-long tag line to the end, so that they could hold the whole jib against the boom and remove the securement pins. At that point, the oiler pulled on the tag line to move the top jib away from the boom, rotating on the pivot pin, to line up two of the "ears" on the base jib with their corresponding ears on the boom head. To line up the ears, the oiler needed to move the jib about 10 inches, at which time pins would be inserted through the ears to secure the jib to the boom head. The next step would have been to release the pivot pin by having an employee stand beneath the boom and

[1] The crane standard specifies that crane "[a]ssembly/disassembly must be directed by a person who meets the criteria for both a competent person and a qualified person, or by a competent person who is assisted by one or more qualified persons ('A/D director')." 29 C.F.R. § 1926.1404(a)(1).

turn a hand crank twenty to twenty-five revolutions over a two-minute period. Then, the entire jib would be swung around 180 degrees so the other two ears could be pinned and secured.

On the day in question, however, when the oiler began pulling on the tag line to align the first two ears, the jib became stuck. Rogers, who was operating the crane, told Hosler to help. As Hosler began walking toward the oiler, the jib separated completely from the boom, rolled off the ramp, and fell nine feet to the ground below, landing on the oiler, who sustained serious injuries. Midwest investigated the incident but was unable to determine why the pivot pin, which would have kept the jib from falling, became disengaged.

DISCUSSION

On review, Midwest argues only that the judge erred in concluding that the Secretary established the noncompliance element of his prima facie case regarding each cited provision of the Cranes and Derricks in Construction standard. *See Conie Constr., Inc.*, 16 BNA OSHC 1870, 1871 (No. 92-0264, 1994) ("In order to establish a violation, the Secretary must demonstrate that . . . the employer failed to comply with the terms of the [cited] standard."), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995).

I. Item 1a – 29 C.F.R. § 1926.1403(a) (Manufacturer Procedures Applicable to Assembly/Disassembly)

Section 1926.1403(a) states that "[w]hen assembling or disassembling equipment (or attachments), the employer . . . must comply with . . . [m]anufacturer procedures applicable to assembly and disassembly." The Secretary asserts that Midwest violated this provision on the day of the incident because it failed to comply with two requirements in the manual for the Tadano 220G-5 mobile crane—that there be a lifting strap holding the jib in place until the securement pins that attach the jib to the side of the boom are removed, and that the crane operator ensure the pivot pin is in place before swinging the jib.[2] The judge noted that Midwest conceded its crew did not use a lifting strap that day and rejected the company's assertion that its use of a tag line served the same purpose. The judge also determined that testimony from Rogers claiming he had checked the pivot pin three times that day lacked credibility. As such, the judge concluded that Midwest

[2] Midwest claims that the citation fails to identify the alleged violation with sufficient particularity because "[n]o mention is made . . . of the lifting strap or the pivot pin," which "left [the company] guessing as to which parts of the manual it allegedly failed to follow." We find no merit in this argument, given that the citation does in fact mention both the "pivot pin [having] been released" and "no strap [having been] used to secure the jib."

failed to comply with the manufacturer's assembly procedures and, in turn, the cited standard. For the following reasons, we conclude that Midwest failed to comply with the manufacturer's procedures.

A. The Lifting Strap

The Tadano manual instructs users to "[f]asten a lifting strap . . . or a similar device to the top end of the jib (base section) and in an appropriate location on the superstructure," before removing the jib securement pins. The purpose of the lifting strap is, as Midwest acknowledges, to stabilize the jib and prevent it from jumping out when the securement pins are released due to built-up mechanical tension. Midwest concedes that the Secretary presented evidence that the company failed to use a lifting strap as specified in the manual, and that its own witnesses testified to this effect. Midwest nonetheless makes two arguments in support of its position that the record fails to show noncompliance with § 1926.1403(a), both of which we reject.

First, Midwest asserts that the absence of a lifting strap played no role in the incident that occurred here, because the strap referenced in the Tadano manual is not intended to prevent the jib from falling and the strap must be removed prior to swinging the jib.[3] Noncompliance, however, is not dependent on how the incident precipitating the OSHA inspection occurred. *See Par Elec. Contractors, Inc.*, 20 BNA OSHC 1624, 1626 (No. 99-1520, 2004) (noncompliance determined "regardless of how the accident occurred"); *Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated) ("Determining whether the standard was violated is not dependent on the cause of the accident."), *aff'd in relevant part*, 351 F.3d 1254 (D.C. Cir. 2003). Thus, because it is undisputed that a lifting strap was not used, the company's first argument fails.[4]

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[3] The Tadano manual instructs operators to "[r]elease the lifting strap from the superstructure" and then "[s]wing the jib forward." Thus, if Midwest had used a lifting strap here, it would have been removed by the time the jib fell.

[4] We note that the citation does address the concept of causation: "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." (Emphasis added.) But this language simply serves to describe (albeit perhaps inaccurately regarding the strap) the conditions on the day in question. As discussed, noncompliance with § 1926.1403(a) is established by proof of Midwest's failure to use a strap or similar device as specified in the Tadano manual, regardless of how the incident that led to the OSHA inspection occurred. *See Par Elec. Contractors*, 20 BNA OSHC at 1626.

Second, Midwest claims that because the Tadano manual references a lifting strap "or a similar device," the company did in fact comply with § 1926.1403(a) when A/D director Rogers instructed the oiler to attach a tag line to the top end of the jib and hold it toward the boom to keep the jib from swinging when disengaging the securement pins. As the judge noted, however, the Tadano manual specifically requires that when using either a lifting strap or similar device, it must be fastened to *both* the jib and the crane structure before removing the securement pins. Midwest's own expert acknowledged this requirement, stating that "[i]n the manual it basically says that you would attach [the lifting strap or device] to the jib, and the superstructure," and "then you would remove the three pins, and then you would remove this device from the superstructure," while "[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." Because Midwest's tag line was fastened only to the jib, and not also to the crane structure as the manual requires, there is no basis on which to assess the company's claim that using the tag line was equivalent to using a lifting strap.[5]

Accordingly, we conclude that the Secretary has established Midwest's failure to comply with § 1926.1403(a) regarding the Tadano manual's lifting strap requirement. On this basis alone, a violation has been proven.

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[5] Midwest points to *Piedmont Mechanical, Inc.*, 24 BNA OSHC 1153 (No. 11-2562, 2013), as support for the proposition that, as the company frames it, a "[c]ontractor may deviate from [a] manufacturer's instructions where [the] deviation offers equal protection." What Midwest in fact cites is an administrative law judge's decision appended to a Commission order remanding the case for reconsideration, *see Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (unreviewed judge's decision not binding precedent), that did not even address a provision of the crane standard. Indeed, the crane standard allows an employer to use an equivalent device only in limited circumstances. Section 1926.1403(b) states that, as an alternative to complying with manufacturer procedures under § 1926.1403(a), the provision cited here, an employer may comply with its own assembly and disassembly procedures, but "only where the employer can demonstrate that the procedures used meet the requirements in § 1926.1406." *See* 29 C.F.R. § 1926.1406(a)(1)-(3), (b) (requiring, among other things, that employer procedures are "developed by a qualified person"); *see also* Cranes and Derricks in Construction, 75 Fed. Reg. 47,906, 47,937 (Aug. 9, 2010) (final rule) ("The Committee determined that deviations [from manufacturer procedures] should be allowed . . . [because] [t]he inclusion of specific requirements in the standard that employer procedures must meet (*see* § 1926.1406) addresses the concern that those procedures ensure worker safety."). Midwest has not, however, at any point in this case invoked § 1926.1403(b).

B. The Pivot Pin

The Tadano manual and decals on the side of the crane require that the pivot pin be in place until the base section of the swing-away jib is secured to the boom head.[6] It is undisputed that at the time of the incident, the pivot pin was not in place.[7] Midwest nevertheless contends that the Secretary failed to prove noncompliance with this manual requirement because A/D director Rogers testified he had checked the pivot pin at least three times before deploying the jib. The judge "place[d] no weight" on this testimony, finding that Rogers "appeared nervous and hesitant," and his testimony "lacked confidence and believability" and "appear[ed] provided to absolve him of any responsibility."[8]

"The Commission usually defers to a judge's credibility determination, for the judge has seen the witnesses and observed their demeanor." *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1720 n.4 (No. 95-1449, 1999). Midwest claims that such deference is unwarranted here because no other witness testified that Rogers did not check the pivot pin, so the judge was not forced to decide between conflicting testimony. But the judge's decision to place little weight on Rogers's

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[6] The manual states, under the heading "Mounting the base section to the boom head," that "[i]f the jib is not correctly secured by pins, it might get loose and fall to the ground," so "[a]lways make sure that the . . . pivot pins are in position before starting any operation." One of the boom decals states, "Danger—Do not remove pivot pin until head section pins are installed," and another states, "Ensure jib pivot pins are installed at boom head before disconnecting jib from stowing bracket."

[7] At times throughout these proceedings, Midwest appears to have suggested that the pivot pin was actually in place and simply failed, rather than having not been engaged. The company, however, ultimately acknowledged in its post-hearing brief to the judge that the pin was not in place: "Respondent submits that the pivot pin disengaged most likely because it came loose from vibrations from the transport of the crane and possibly the strenuous movement of the jib by [the oiler] as he and Rogers attempted to close the gap and pin the jib to the boom."

[8] In rejecting Rogers's testimony, the judge also noted that when Rogers was "questioned about his visual inspections, [he] merely claimed the pivot pin was engaged because 'it would probably fall' off if it had not been." Midwest contends that the judge "mischaracterized" Rogers's testimony in this regard and we agree. Rogers's statement that the jib "would probably fall" was in response to this specific question: "If the pivot pin had been disengaged or released, how would that affect the jib as when you're booming up?" As such, Rogers was not saying that the only reason he knew the pivot pin was in place was the jib hadn't fallen, nor does he seem to have been evading questions regarding whether he checked the pivot pin, as the judge herself noted that Rogers claimed at two different points during the hearing that he visually inspected the pin. Accordingly, we do not consider this particular statement a basis for discrediting Rogers's testimony.

testimony is not only well-supported by her assessment of his demeanor, it is consistent with the undisputed fact that the pivot pin was not engaged at the time of the incident. It is also consistent with Rogers's own statement that he did not see anyone remove the pin—which the record shows and Midwest concedes was located out of easy reach inside an opening beneath the jib and boom, and the removal of which would have taken twenty to twenty-five turns of a hand crank over a two-minute period—just before the jib was deployed.

Given that the jib in fact fell and based on the timeline of events, it appears impossible that someone removed the pivot pin just before the jib was deployed. As such, we decline to disturb the judge's credibility finding. *See Capform, Inc.*, 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994) (dismissing as not credible supervisor's "self-serving" testimony that he instructed employees on hazard, given that employer "had no written work rule dealing with the hazard"). *Compare Sanders Lead Co.*, 17 BNA OSHC 1197, 1199 (No. 87-0260) ("We concur with the judge that [the witness's] testimony is credible and deserving of weight," particularly given that it was "corroborated by" other record evidence), *with Aerospace Testing Alliance*, No. 16-1167, 2020 WL 5815499, at *5 (O.S.H.R.C. Sept. 21, 2020) ("Because the injured employee's testimony is internally inconsistent and contrary to the testimony of all three other operators, we set aside the judge's credibility determination.").

In any event, regardless of whether Rogers checked the pivot pin as he claims, Midwest's noncompliance is, under our precedent, established by the undisputed fact that the pin was not engaged when the jib was deployed. *See Armstrong Utils., Inc.*, No. 18-0034, 2021 WL 4592200, at *2 (O.S.H.R.C., Sept. 24, 2021) (finding noncompliance with standard's requirement to "ensure" that no employee breaches the minimum approach distance (MAD) from power lines, where "none of the standard's protective measures were in place when [the employee] breached the MAD and contacted the energized line"); *Nordam Grp.*, 19 BNA OSHC 1413, 1416-17 (No. 99-0954, 2001) (finding noncompliance with standard requiring employer to "ensure" use of appropriate personal protective equipment established by testimony that employees engaged in grinding work without eye protection), *aff'd*, 37 F. App'x 959 (10th Cir. 2002) (unpublished). Such a finding "does not render [an employer] strictly liable for the alleged violation because noncompliance is but one element of the Secretary's prima facie case." *Armstrong Utils.*, 2021 WL 4592200, at *2. We therefore conclude that Midwest failed to ensure that the pin was in place until the base section of the jib was secured to the boom head as required in the manual, and that

the company therefore failed to comply with § 1926.1403(a) on this basis as well. Accordingly, we affirm Item 1a.

II. Item 1b – 29 C.F.R. § 1926.1404(b) (A/D Director Understanding of Assembly/Disassembly Procedures)

Section 1926.1404(b) provides that "[t]he A/D director must understand the applicable assembly/disassembly procedures." The Secretary alleges that Rogers, as the project's A/D director, did not understand the assembly procedures to include securing the jib to the crane structure with a lifting strap, as evidenced by his belief that using a tag line to pull on the jib would be equivalent. The judge agreed with the Secretary, finding that Rogers's "testimony that the tag line, used in the manner they used it[,] served the same purpose [as the lifting strap] demonstrates his lack of understanding of the Tadano Manual requirements."[9]

We disagree. Rogers testified extensively at the hearing about his understanding of the strap requirement, and his testimony establishes the opposite of what the Secretary contends. Specifically, Rogers testified that he had read the Tadano manual and was "aware of the concept of the strap," that the strap was meant "to keep [the jib] from swinging" while "pull[ing] three [securement] pins," and that the strap "has to be removed prior to swinging the jib to ten inches" so that the ears on the jib would line up with those on the boom head and pins could be inserted. Rogers also testified that while he personally believed using a tag line was safer and more effective than using a strap, he was "sure [the strap] is for safety, so it doesn't swing on you, while you're pulling three pins out." His testimony is consistent with the Secretary's own assertions about the lifting strap—that it "serves a safety function by restraining the jib against the crane while the jib's securing pins are removed." And the Secretary specifically stated in his post-hearing brief to the judge that "Rogers testified he knew about the manufacturer's strap requirement, and he knew the strap was intended as a safety device." In short, Rogers understood the lifting strap procedure but chose to disregard it and use a tag line instead, which he believed to be an adequate substitute. Accordingly, we vacate Item 1b.

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[9] Midwest asserts that the judge failed to understand the jib deployment procedures, which call for the removal of the lifting strap once the securement pins are removed, and so because the boom fell after the pins were released, the failure to use a lifting strap is immaterial to the alleged § 1926.1404(b) violation. As with Item 1a, however, Midwest is improperly litigating the incident. *See Am. Wrecking*, 19 BNA OSHC at 1707 n.4 ("[T]he issue . . . is whether the cited standard was violated, not what caused the accident.").

III. Item 2a – 29 C.F.R. § 1926.1404(d)(1) (Crew Member Understanding of Assembly/Disassembly Tasks)

Section 1926.1404(d)(1) states 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." The Secretary alleges that Midwest failed to ensure the crew members understood the tasks, hazards, and hazardous locations associated with "mounting the jib onto the main boom of the crane," in particular those related to the lifting strap and pivot pin assembly requirements. The judge agreed, finding that: (1) A/D director Rogers did not discuss the hazards associated with the work to be done with the crew; (2) the plan formulated at the worksite simply addressed obstacles and the ground's unevenness, not specific hazards; and (3) no instructions were given regarding how to use the tag line or where to stand when pulling it.[10] On review, Midwest argues that the judge flipped the burden of proof to the company to establish that the crew understood their tasks and associated hazards. Midwest also claims that, in any event, the record shows that both field superintendent Simerale and A/D director Rogers reviewed the tasks and hazards with the crew members, such that they fully understood the work rules, tasks, hazards, and unsafe locations.

First, we reject Midwest's assertion that a statement in the judge's decision—"[n]o evidence was adduced at the hearing to show the employees understood their tasks, the hazards associated with them or the hazardous locations they needed to avoid"—shows she placed the burden on the company. *See Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994) ("[T]he Secretary has the burden of proving . . . the employer's noncompliance with the standard's terms."). Indeed, immediately before and after this statement, the judge fully outlined the record evidence that she relied on as proof of Rogers's failure to instruct the crew members on the pertinent tasks and hazards and their failure to understand them. *See Trinity Indus., Inc.*, 15 BNA OSHC 1788, 1789-90 (No. 89-1791, 1992) (noting that while "[t]he Secretary bears the burden of

[10] The judge also stated that there was a "clear indication" the oiler did not understand the hazards involved because he ran toward the jib when it fell. Midwest asserts that the oiler's behavior during this "stressful emergency" does not establish any lack of understanding of work rules. We agree. The oiler's conduct in a moment of panic brought on by the sudden fall of the jib is, in our view, an unreliable indicator of whether he understood the tasks, hazards, and hazardous locations related to the assembly process.

proving her case by a preponderance of the evidence," the Secretary's evidence may "be balanced against [the employer's] evidence").

Second, we find that the record shows the company failed to ensure its crew members understood the jib deployment tasks, the struck-by and caught-between hazards associated with them, and the hazardous positions they needed to avoid. The oiler testified that Rogers did not, prior to arriving at the worksite, discuss with him the tasks to be performed or the associated hazards, and once at the worksite, he and Rogers discussed only the placement of the crane. Moreover, in response to a specific question by the Secretary's counsel as to whether the oiler and Rogers "discuss[ed] the tasks that you were going to undertake, steps you were going to follow," the oiler responded that "[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." Nothing in Rogers's testimony rebuts any of these statements, nor does Midwest even assert that it does—the company simply states in its brief on review that the judge "emphasized that [A/D director] Rogers did not cover these topics," but "failed to mention that Mr. Simerale did, thus rendering it redundant for Rogers to cover the same thing." The record thus shows that Rogers took no steps to ensure the oiler understood the jib deployment task and associated hazards, particularly given that none of the discussions between them addressed the lifting strap and pivot pin requirements that are the subject of this citation item.

Further, Midwest's argument that it was Simerale who ensured the crew understood the hazards it faced on the day in question finds little support in the record. Simerale merely testified, quite generally, that it was "an everyday procedure" to "train [his] operators to review the tasks and hazards of a particular job site with the crew," and that he would "relay [safety information] to [the crew on] the morning of the job." Likewise, Hosler and Rogers provided only general testimony in this regard, with Hosler stating that prior to starting the job at issue, Simerale discussed with the crew "the roles of each [crew member] in the process," "potential safety hazards," and the "ground conditions," and Rogers saying that on the morning the job began, Simerale reviewed the "packet" with the crew—the packet covering "the layout of the job, photos of the area, and any . . . safety thing that . . . we got to be aware of." As the Secretary points out, none of this testimony—including Simerale's own—shows that Simerale addressed any of the hazards identified in this citation item.

Finally, Midwest lists several parts of the oiler's testimony that, according to the company, show he understood the tasks, hazards, and unsafe locations associated with the work that day. This testimony, however, merely notes his participation in previous jib deployment jobs and describes the instructions Rogers gave him on how to manipulate the tag line, which included telling him to stand a safe distance from the jib. But as the oiler admitted, when he was pulling on the tag line "in order to get that thing to flex, I had to be pretty close," and when asked whether he was "instructed where to stand," he responded, "Not really, just the front and pull it." In sum, none of the examples cited by Midwest are sufficient to rebut the Secretary's evidence that Midwest failed to comply with § 1926.1404(d)(1). Accordingly, we affirm Item 2a.[11]

IV. Item 2b – 29 C.F.R. § 1926.1400(f) (Establishment, Effective Communication, and Enforcement of Work Rules)

Section 1926.1400(f) states that "[w]here 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." The Secretary alleges that Midwest failed to ensure that work rules for performing the jib-mounting tasks were effectively communicated to the crew. The judge agreed, noting that the only rules in place were those set forth in the Tadano manual and on the crane's safety decals, none of which were specifically communicated to the oiler.[12]

We find that the record supports a finding of noncompliance. Although Rogers claimed that "Midwest employees [are] instructed to stay out from under the jib," he conceded immediately

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[11] Midwest also contends that Item 2a is limited to the lifting strap and pivot pin requirements and does not sufficiently allege the fall zone hazard, such that the company was "subject to unfair surprise." We are not persuaded. This citation item specifically references the "jib fall[ing] approximately nine feet to the ground, striking an employee," and it alleges that Midwest "did not ensure that crew members understood . . . the hazardous positions/locations that they need to avoid when mounting the jib onto the main boom of the crane, thereby exposing the employees to a struck-by and/or caught-between hazard." This language gives notice that the crew members' understanding of the jib's fall zone was at issue. *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.").

[12] The judge also relied on the fact that the oiler ran toward the jib when it fell as evidence that work rules were not communicated. As noted (*see supra* note 10), we view the oiler's conduct in this moment of panic as an unreliable indicator of whether work rules were established, communicated, and enforced.

thereafter that "we don't communicate [this rule] every time unless we have someone new with us." Similarly, as noted above regarding Item 2a, the oiler testified that he was "taught to stay away from the fall zone of the jib" because "that's common sense [that] you don't want to work under the jib," but stated immediately thereafter 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. As such, even if Midwest had established a rule that crew members must stay clear of the jib's fall zone, this testimony shows that it was neither adequately communicated nor enforced. *See PSP Monotech Indus.*, 22 BNA OSHC 1303, 1306 (No. 06-1201, 2008) ("general rule" requiring employees to "stay clear of the load" suspended by cranes not adequately communicated where "there was no particular method employees should use in determining a sufficient distance" and "instruction to employees [was] to use common sense"); *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1187 (No. 00-0553, 2005) ("Active's safety program was poorly enforced [because] although [the company's] procedures . . . require positive ventilation while a person is in a tank, the record establishes that this was not done at the . . . worksite."). In addition, Rogers acknowledged that Midwest lacked written procedures pertaining to jib deployment, as the company relied solely on the Tadano manual. And as noted above regarding Item 2a, the record shows that Simerale's instructions to the crew were too general and did not speak specifically to the hazards involved in the crew's work. Finally, despite these failures, no one was disciplined as a result of the incident at issue here, which shows that Midwest's enforcement was lacking.

In sum, the record shows that Midwest failed to comply with § 1926.1400(f) because it did not establish, communicate, and enforce work rules to ensure its crew's compliance with § 1926.1404(d)(1). Accordingly, we affirm Item 2b.

V. Penalty

The Secretary proposed, and the judge assessed, a grouped penalty of $9,282 for Items 1a and 1b, and a grouped penalty of $6,630 for Items 2a and 2b. On review, Midwest does not challenge either of these penalty amounts, so we would ordinarily assess the same. *See, e.g., KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (assessing same penalty as judge when not in dispute).

However, given that we vacate Item 1b, we find that a reduction in the penalty assessed for the violation affirmed under Item 1a is appropriate. *See, e.g., Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1329 (No. 97-0469, 2003) (consolidated) (adjusting penalty to reflect vacating two

of three instances of violation); *Skydyne, Inc.*, 11 BNA OSHC 1753, 1755 (No. 80-5422, 1984) (same). Taking into account the gravity of that violation, we assess a penalty of $6,188. 29 U.S.C. § 666(j) (setting forth penalty factors); *MEI Holdings, Inc.*, 18 BNA OSHC 2025, 2027 (No. 96-0740, 2000) ("[G]ravity is the principal [penalty] factor to be considered."), *aff'd*, 247 F.3d 247 (11th Cir. 2001) (table). We also assess the proposed grouped penalty of $6,630 for Item 2.

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: April 15, 2022

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant v. Midwest Equipment Company, Respondent.	OSHRC Docket No.: **19-0723**

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BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Midwest Equipment Company (Midwest), located in Cleveland, Ohio, provides full-service crane rental and operation (Tr. 256). On December 18, 2018, a Midwest employee was severely injured when attempting to mount a top jib and base section to the boom head of a Tadano, ATF 220G-5, all-terrain hydro mobile crane at a worksite located at 9539 Long Run Road Graysville, Ohio (Graysville worksite) (Tr. 27). In response to the employee's worksite injury the Occupational Safety and Health Administration (OSHA) conducted an inspection of the Graysville worksite on December 19, 2018. The inspection was led by OSHA Compliance Safety and Health Officer (CSHO) Matthew Marcinko (Tr. 114). As a result of OSHA's inspection, the Secretary of Labor (Secretary) issued a Citation and Notification of Penalty (Citation) to Midwest on April 9, 2019, alleging four serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) as follows:

Item 1a alleges a serious violation of 29 C.F.R. § 1926.1403(a) for failing to comply with manufacturer procedures applicable to assembly and disassembly.

Item 1b alleges a serious violation of 29 C.F.R. § 1926.1404(b) for failure of the

Assembly/Disassembly (A/D) director to understand the applicable assembly/disassembly procedures. The Secretary proposes a grouped penalty of $9,282 for items 1a and 1b.

Item 2a alleges a serious violation of 29 C.F.R. § 1926.1404(d)(1) for failure of the A/D director to ensure the crew members understood their tasks, the hazards associated with their tasks, and the hazardous positions/locations they needed to avoid.

Item 2b alleges a serious violation of 29 C.F.R. § 1926.1400(f) for failing to establish, effectively communicate, and enforce work rules. The Secretary proposes a grouped penalty of $6,630 for items 2a and 2b.

JURISDICTION AND COVERAGE

Midwest filed a timely notice of contest bringing this matter before the Occupational Safety and Health Review Commission (Commission). Thereafter, the Court held a hearing on February 20-21, 2020, in Cleveland, Ohio. Both parties filed post-hearing briefs on June 8, 2020. The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to §10(c) of the Act (Tr. 26). Midwest also admits that at all times relevant to this proceeding it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 25-26). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Midwest is a covered employer under § 3(5) of the Act.

For the reasons that follow, the Court **AFFIRMS** Items 1a, 1b, 2a and 2b of the Citation as serious, and assesses penalties in the amount of $9,282 for Items 1a and 2b, and $6,630 for Items 2a and 2b.

STIPULATIONS

The parties reached the following stipulations which were read into the record:

1. Jurisdiction of this action is conferred upon the Commission pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et. seq.*, hereinafter the Act, 19 U.S.C. § 659(c).
2. At all times material to this action, Respondent, Midwest Equipment Company, had a worksite at 9539 Long Run Road, Graysville, Ohio, 45734, on December 18, 2018.
3. Midwest Equipment Company is a full-service crane rental company that employed individuals for a cell tower erection project at the worksite on December 18, 2018 and December 21, 2018.

4. On December 18, 2018, Respondent's employees were working with a Tadano, ATF 220G-5, all-terrain hydro mobile crane.
5. On December 18, 2018, Respondent's employee, [R. B.], was injured when the crane's jib rolled of the jib ramp.
6. [R. B.] was hit by the falling jib and sustained serious injuries. He remains a Midwest employee, but has not yet been released to return to work.
7. At all times relevant to this action, Midwest Equipment Company was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 651(5).
8. The injuries sustained by [R. B.] are serious and if there is a violation, it would be properly characterized as serious.

(Tr. 24-27).

BACKGROUND

Midwest operates as a full-service crane rental company (Tr. 26-27). It employs approximately 25 employees at its Cleveland, Ohio facility (Tr. 256). In December 2018, Midwest was engaged in crane rental operations regarding a cell tower erection project on Long Run Road in Graysville, Ohio (Tr. 26-27). The multi-day project consisted of installing additional sections to the top of a cellular tower (Tr. 60-62). The Graysville worksite utilized three employees (Tr. 26-27, 54-57). Midwest's worksite management included A/D director Jon Rogers, assist crane operator Dennis Hosler and the injured crew member (Tr. 73-76, 226, 270, 320).

OSHA initiated its inspection of the Graysville worksite following Midwest's report to OSHA on December 19, 2018, of an accident at the worksite resulting in an employee suffering serious injuries (Tr. 24-25, 27, 114, 336-337, 377-378). The employee was engaged in installing components to the Tadano, ATF 220G-5, all-terrain hydro mobile crane (Tadano) when a jib weighing 3,400 pounds fell on him, causing severe injuries (Tr. 27, 68-70, 152, 447). During OSHA's inspection, CSHO Marcinko[13] met with Michael Simerale, a Field Superintendent and representative for Midwest. Jocko Vermillion, a consultant for Midwest, was present by telephone (Tr. 114-116). The CSHO then conducted an opening conference and began his walk around

[13] CSHO Marcinko holds Bachelor's and Master's degrees in Occupational Safety and Health from Columbia Southern University (Tr. 109). He was an E-5 sergeant with the U.S. Army and a security officer for 3 years (Tr. 113). He worked for several years as a crane operator for the Army Corps of Engineers and Northwest Pipe Company (Tr. 110-111). Afterwards, CSHO Marcinko began work for OSHA, where he has been employed for over 8 years as a Safety Compliance Officer (Tr. 108). His duties consist of performing various inspections and investigations on behalf of OSHA (Tr. 108-109).

inspection where he took photographs of the worksite (Tr. 114-116). He conducted interviews on January 2, 2019 (Tr. 117-118). Thereafter, the CSHO held a closing conference with Jocko Vermillion, Michael Simerale and Midwest's president, Michael Ricchino (Tr. 133). As a result of the inspection, OSHA issued citations for alleged violations of the crane and derrick safety standards pertaining to assembly/disassembly procedures and workplace rules.

Midwest had been hired to install multiple sector frames to a TelCom Construction cellular tower at the Graysville worksite (Tr. 26-27, 274-275). On December 18, 2018, Midwest employees met in Cleveland, Ohio before leaving for the worksite (Tr. 26-27, 274-275). A/D director Rogers did not discuss the hazards associated with the work to be performed that day (Tr. 53). The Midwest employees proceeded to the Graysville worksite. Rogers drove the Tadano mobile crane, Hosler drove a small boom truck with an assist crane mounted on it, and R. B.[14] drove a flatbed truck containing counterweights for the Tadano (Tr. 53-54, 328, 367). Hosler proceeded directly to the worksite, while Rogers and R. B. met at a predetermined laydown site approximately three-quarters of a mile from the worksite (Tr. 54-56, 306). At the laydown site, Rogers and the injured employee refueled the Tadano (Tr. 55-56). Rogers did not discuss any hazards associated with the tasks to be performed that day with R. B. while at the laydown site (Tr. 52, 56).

Rogers and R. B. finished the last leg of their journey and arrived at the worksite where they met with Hosler (Tr. 55). Upon their arrival, the three employees formulated a plan regarding how they would move forward with the project (Tr. 331). The plan consisted of discussing the unevenness of the ground and steps to level it for the crane. It also included a discussion of tree and fence obstacles which needed to be avoided (Tr. 331-332). Because the Tadano did not arrive at the worksite fully assembled, the next steps would require installing the additional jib sections so the Tadano could reach to the top of the cell tower (Tr. 58-62).

Cautionary decals were located on the side of the Tadano warning the pivot pin was not to

[14] R. B. was very candid and testified without hesitation despite his traumatic injuries. His memory of the events leading up to the accident is solid and his ability to recall is strong. Although R. B. admits to blacking out from his injuries and suffering a traumatic brain injury (Tr. 70-71, 73-76), the Court finds his testimony honest and credible. However, his testimony regarding the distance from the laydown site to the Graysville worksite is inconsistent with the evidence, and the Court places no weight on his testimony regarding that distance (Tr. 55, 306, 396). The Court places more weight on the testimony in the record that the distance from the laydown site to the worksite was ¾ mile.

be removed until necessary to do so (Tr. 224-225; Ex. C-5). Rogers did not instruct the other employees not to remove the pivot pin (Tr. 396). However, he testified he visually inspected the pivot pin on at least three separate occasions: that morning in Cleveland, at the laydown site, and at the Graysville worksite (Tr. 364, 368-369, 373, 385-386).

Once the Tadano arrived, the employees leveled the work area for the crane and extended its outriggers to the outrigger pads (Tr. 64-65, 127). Counterweights were then put in place (Tr. 65-66, 127). The outrigger pads and counterweights were not attached to the Tadano during transport. They were separately transported to the worksite on R. B.'s truck (Tr. 64-66, 127). Once the outrigger pads and counterweights were in place, the employees were to pull the swing away jib from the boom, attach it to the end of the main boom, and *then* release the pivot pin (Tr. 66-67, 127).

While attempting to swing the jib it stuck (Tr. 66-68). Rogers then instructed R. B. to use a tag line to negotiate the jib into place (Tr. 66-68, 376). R. B. tugged on the 20-foot tag line, but was not able to shift the jib (Tr. 66-68, 376). Rogers noticed R. B. was having trouble with the tag line so he instructed Hosler to help R. B. (Tr. 376-377). As Hosler approached R. B. he noticed the jib beginning to fall. He ran to get away (Tr. 335). R. B. did not realize the jib was falling. He was crushed by the 3,400 pound weight of the jib, and sustained serious injuries (Tr. 24-27, 70).

As a result of CSHO Marcinko's investigation of the accident, OSHA issued Midwest four serious citations. One was issued for a violation of 29 C.F.R. § 1926.1403(a) regarding Midwest's failure to comply with manufacturer procedures applicable to assembly and disassembly by disregarding the use of a strap required by the manufacturer's instructions, and by releasing the pivot pin prematurely (Tr. 134-136; Exs. C-5, C-5A). A citation for a violation of 29 C.F.R. § 1926.1404(b) was issued for A/D director Rogers's failure to understand the applicable assembly/disassembly procedures. OSHA issued a citation for a violation of 29 C.F.R. § 1926.1404(d)(1) due to A/D director Rogers's failure to ensure his crew members understood their tasks, the hazards associated with those tasks, and the hazardous position/locations that they needed to avoid (Tr. 142-145). And OSHO issued a citation for a violation of 29 C.F.R. § 1926.1400(f) due to Midwest's failure to establish, effectively communicate, and enforce work rules (Tr. 155-158).

THE CITATION

The Secretary's Burden of Proof

In order to establish a violation of a safety standard under the Act the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazardous condition covered by the standard; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prods*., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

Assembly or Set-up?

Subpart CC of the Occupational Safety and Health Standards in Part 1926 addresses cranes and derricks used in construction. Section 1926.1400 elaborates on the scope of the standard and more specifically provides the standard is applicable to "mobile cranes (such as wheel-mounted, rough-terrain, all-terrain, commercial truck-mounted, and boom truck cranes)." The parties stipulated that on December 18, 2018, Midwest's employees were working with a Tadano ATF 200G-5 all-terrain hydro mobile crane (Tr. 27). Therefore, the provisions of 1926.1400 are applicable.

Midwest does not argue the Tadano is not covered by the standard. Instead, it argues the *activities* it was engaged in at the time of the accident are not covered by the standard because it was engaged in set-up and not assembly. Section 1926.1401 defines assembly as follows:

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

29 C.F.R. §1926.1401. Although the term "assembly" may appear ambiguous, its meaning is clear.

When interpreting a standard, the first consideration begins with the language of the statute itself. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). "If the meaning of the [regulatory] language is 'sufficiently clear,' the inquiry ends there." *Davey Tree Expert*, 25 BNA OSHC 1933, 1934, 1937 (No. 11-2556, 2016), quoting *Beverly Healthcare-Hillview,* 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006), *aff'd in relevant part*, 541

F.3d 193 (3d Cir. 2008). The regulatory language is considered ambiguous where the meaning is "not free from doubt." *Martin v. OSHRC* (*CF&I*), 499 U.S. 144, 150-51 (1991). Where the regulatory language is ambiguous, deference should be afforded to the Secretary's reasonable interpretations of nebulous regulations promulgated under the Act. *Id.* at 158. When considering the reasonableness of the Secretary's interpretation, the Commission may consult the regulation's preamble, the promulgation of interpretive rules, and agency enforcement guidelines. *Id.* at 157. "Where the language of the standard itself is not explicit on the matter in issue," the Commission will look to the standard's legislative history. *Superior Rigging & Erecting Co*., 18 BNA OSHC 2089, 2091 (No. 96-0126, 2000). The preamble to the standard provides the "most authoritative evidence of the meaning of the standard." *Id.; Am. Sterilizer Co.*, 15 BNA OSHC 1476, 1478 (No. 86-1179, 1992).

When interpreting terms that are disputed, the Commission looks to "the provisions of the whole law, and to its object and policy." *Phoenix Roofing, Inc.,* 17 BNA OSHC 1076, 1077 (No. 90-2148, 1995). The Commission applies the rule of statutory construction that "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." *Morrison-Knudsen Co. / Yonkers Contracting Co*., 16 BNA OSHC 1105, 1108 (No. 88-572, 1993) (citation omitted). *See Davey Tree*, 25 BNA OSHC at 1934. *See generally, Gen. Motors, Delco Chassis Div.*, 17 BNA OSHC 1217, 1220 (No. 91-2973, 1995) (consolidated) (effect must be given to every clause and word in defining a standard's application), *aff'd*, 89 F.3d 313 (6th Cir. 1996). Once nebulous, definitions become evident when words are placed in context. *See American Federation of Govt. Employees, Local 2782 v. Fed. Labor Relations Authority,* 803 F.2d 737, 740 (D.C. Cir. 1986).

As there is no legislative history suggesting that Congress intended the word "assembly" to mean anything other than its ordinary meaning, its plain text guides. The plain text of the standard supports the Secretary's interpretation that the activities undertaken by Midwest's employees on December 18, 2018, constitute "assembly." The Secretary points out the Merriam-Webster Dictionary provides "assembly" means the "fitting together of manufactured parts into a completed machine," (Sec'y Br. at 14). The Secretary's interpretation that Midwest's actions constitute assembly as covered by Subpart CC of the Occupational Safety and Health Standards in Part 1926 is reasonable and entitled to deference. *See CF&I*, 499 U.S. at 150-51.

The activities carried out by Midwest's crew on December 18, 2018, are consistent with the afore-mentioned definition of "assembly." The crew had begun the assembly of the Tadano mobile crane, using outriggers, counterweights, an assist crane, and additional sections of jib, with the objective of fitting together the manufactured jib parts into a completed crane that would ultimately allow them to work on the cell tower. Midwest's crew had set aside the entire first day to assemble the crane and install various components and sections onto the crane (Tr. 58, 62-63, 64-66, 127). The Tadano mobile crane required assembly at the worksite for Midwest to complete work on the cell tower (Tr. 58-62). Specifically, Midwest's crew had added outrigger pads and counterweights from a completely separate vehicle (Tr. 64-66, 127), with the intent to add additional sections of jib (Tr. 58-62).

Dennis Eckstine,[15] the Secretary's expert, testified "[a]ssembly is a complex process that has a lot of steps, takes additional" and a "considerable amount of time to set it up, attaching…" and "assembling the boom sections to the jib or to the crane, to put it together. It requires things like adding counterweights" and "assembling sections" (Tr. 220). Eckstine further clarified that "set-up" is the process followed to use an already-assembled crane (Tr. 219). He explained that set-up of an already-assembled crane would consist of a simple crane, without a jib, which could be used for work immediately after the crane has been leveled and the outriggers deployed (Tr. 219-220). In contrast, Midwest's crew used the Tadano ATF 220G-5, all-terrain hydro-mobile crane, which is not a fully assembled crane and required the attachment of counterweights and additional sections (Tr. 219-221). Midwest's crew was in the process of assembling the Tadano before they could begin any work on the cell tower (Tr. 338-339). Midwest's crew set aside the entire first workday to assemble the Tadano. They were planning to add sections which would be pinned to the crane. The assembly would also involve the use of the assist crane (Tr. 161-162, 338-339). The record shows, and Eckstine's testimony establishes Midwest was in the process of

[15] Dennis Eckstine holds both a Bachelor of Science degree in mechanical engineering from the University of Maryland and a Master of Business Administration from Shippensburg University in Pennsylvania (Tr. 200). Throughout his career he has held numerous leadership positions in the crane industry including, chairing various international and national crane organizations (Tr. 196, 197-198; Ex. C-8 pp. at 33-37). Eckstine has also assisted in drafting international crane standards, maintains several professional memberships in the crane industry, and has been qualified as an expert on crane safety many times (Tr. 199, 202, 203; Ex. C-8 pp. at 33-37). The Court finds Eckstine's testimony highly credible and places more weight on it than that of the Secretary's expert.

assembling the Tadano before R. B. was injured (Tr. 221-222, 338-339). Nonetheless, Midwest argues the crew was engaged in set-up operations and never reached the assembly phase (Resp't Br. at 22-24).

Midwest's expert in crane safety, Jocko Vermillion,[16] testified that because the crew had not yet implemented the use of an assist crane by the time of the accident (Tr. 436), Midwest was only engaged in set-up (Tr. 436, 453-454). He provided no support for this opinion. Vermillion further testified that assembly would occur at the point additional pieces or sections are added to the length of the jib (Tr. 454). The Court is not persuaded. The crane did not arrive at the jobsite fully assembled. Components and jib sections had to be added onsite (Tr. 220-222, 333-334, 338-339). Midwest's crew was involved in the process of assembling the Tadano and would have continued to add more sections of jib to the crane but for the jib falling on R. B. and causing serious injuries.

In support of its position, Midwest relies on an OSHA October 15, 2014, Letter of Interpretation from James G. Maddux, Director, Directorate of Construction to Charlie Bird (Resp't Br. at 23; Ex. R-10). The interpretation letter addresses the types of activities which constitute set-up and those which constitute assembly/disassembly (Ex. R-10). In describing assembly the letter provides "simple assembly of the boom..." or the addition of "counterweights or attachments, attaching outriggers/stabilizers, or using an assist crane to position the boom or jib for pinning/unpinning" are elements of assembly. The interpretation letter describes set-up as the deployment of an already assembled crane, and "includes activities like deploying and pinning outriggers, leveling the equipment, or unfolding and pinning a boom or swing-away jib" (Ex. R-10).

Midwest's activities regarding the crane fall squarely within the assembly description set forth in the June 15, 2014, Letter of Interpretation. The Tadano was not an already assembled crane. On December 18, 2018, Midwest's employees were engaged in adding counterweights to the Tadano (setting outrigger pads down and extending the outriggers onto the pads, and

[16] Jocko Vermillion has formalized education with crane safety from the Crane Institute of America (Tr. 427-428; Ex. R-12). Vermillion has over 10 years of experience working for OSHA in crane safety (Tr. 411). However, Vermillion has never drafted crane regulations or standards with any national or international bodies governing the crane industry (Tr. 430-431; Ex. R-12.) Aside from crane examiner and operator, Vermillion holds no memberships in the crane industry (Tr. 430; Ex. R-12). Prior to the instant matter, he had not previously been qualified as a crane safety expert (Tr. 420).

pinning/unpinning the jib) (Tr. 65-66, 127, 333, 372-373). But for the injury to R. B., Midwest would have continued to assemble the Tadano crane by adding an additional 82 feet of jib to the Tadano with an assist crane (Tr. 338-339).

As recognized by the Supreme Court in *FDA v. Brown & Williamson Tobacco Corp.*, and further expounded upon by the Commission in *Secretary of Labor v. TNT Crane & Rigging, Inc*., ("a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *Secretary of Labor v. TNT Crane & Rigging, Inc*., No. 16-1587 2020 WL 1657789 (O.S.H.R.C., Mar. 27, 2020).

In *TNT Crane & Rigging, Inc.,* the Commission held that a careful examination of the text and structure of the crane standard clearly indicated that the meaning of "disassembly" was intended to include antecedent tasks even before crane components are physically disassembled. *Secretary of Labor v. TNT Crane & Rigging, Inc*., No. 16-1587 2020 WL 1657789 (O.S.H.R.C., Mar. 27, 2020). Similarly, when scrutinizing the text and structure of the crane standard at issue here, it is clear that "assembly" was meant to include preliminary tasks prior to the physical addition of crane sections. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). That R. B. was injured and the initial assembly process stopped, does not change the nature of the assembly activities being performed. Midwest's argument its crew was engaged in set-up operations and not assembly/disassembly is contrary to the plain meaning of the applicable standard. Midwest's crew was involved in the process of assembling the Tadano and would have continued the assembly had the jib not fallen.

Item 1a: Alleged Serious Violation of § 1926.1403(a)

Section 1926.1403(a)

Section 1926.1403(a) provides:

> *Assembly/Disassembly.* 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…

Alleged Violation Description

Item 1a alleges:

> On or about December 18, 2018, located at cell tower site ATT W044 at 9539 Long Run Road, in Graysville, Ohio, employees were assembling a Tadano, ATF 220G-5, all-terrain hydro mobile crane for the installation of sector antennas on a 285 foot tower. The employer did not follow the manufacturer's instructions or develop instructions under (b) of this section for the assembly of the jib onto the main boom of the crane, thereby exposing the employees to a struck-by and/or caught-between hazard.

(1) Applicability of the Cited Standard

As set forth above, Subpart CC of the Occupational Safety and Health Standards in Part 1926 addresses cranes and derricks used in construction. Section 1926.1400 defines the scope of the standard and more specifically states that the standard is applicable to "mobile cranes (such as wheel-mounted, rough-terrain, all-terrain, commercial truck-mounted, and boom truck cranes)." Based on the parties' stipulation that on December 18, 2018, Midwest's employees were working with a Tadano ATF 200G-5 all-terrain hydro mobile crane, the Tadano mobile crane is within the defined scope of this subpart.

Section 1926.1403 of Subpart CC requires assembly/disassembly of cranes and derricks be pursuant to the manufacturer's procedures. As set forth above, Midwest's crew was engaged in the assembly of the Tadano crane. The assembly of the Tadano on December 18, 2018, and subsequent serious injury to crew member R. B. is the exact scenario contemplated by § 1926.1403(a). The Tadano manufacturer provided procedures which require the use of a strap during assembly. Section 1926.1403(a) applies.

(2) Compliance with the Terms of the Cited Standard

The record reveals that Midwest failed to comply with Tadano manufacturer's procedures pertaining to the Tadano, ATF 220G-5, all-terrain hydro mobile crane in violation of § 1926.1403(a). Midwest contends it complied with all the material terms of the Tadano Manual applicable to assembly/disassembly. It asserts the use of a tag line constitutes a similar device as called for in the Manual (Resp't Br. at 12-15).

The Tadano Manual requires the use of a strap to hold the jib in place (Tr. 137-138, 225; Exs. C-5, C-5A). The strap holds the jib in place as a safety precaution in case a procedural step is missed in the assembly process (Tr. 137-138, 225-226, 393). Rogers testified that the manufacturer's procedure is to use the strap for safety so that it does not swing away during the

assembly process (Tr. 392-393). Midwest admits it did not use a strap (Tr. 138; Ex. C-2). Midwest also admits it did not have a strap for this purpose (Tr. 137-138, 225; Exs. C-2, C-5, C-5A). Instead, it used, as an alternative, a tag line which it contends is an acceptable similar device to the strap in the Tadano Manual (Resp't Br. at 12-15). The evidence does not support this contention. The tag line does not serve the same purpose as the strap required by the manufacturer. The 20-foot tag line was used by Midwest to shift and negotiate the jib into place and provided no safety protection to workers (Tr. 66-68, 137-138, 225, 310, 376; Exs. C-5, C-5A). The strap required by the manufacturer provides stability and safety.

The Tadano Manual also requires the crane operator confirm the pivot pin is in place before swinging the jib (Tr. 223-224, 252; Ex. C-11). This requirement is found not only in the manual but is also on the several decals attached to the Tadano crane (Tr. 223-226; Ex. C-11). Rogers testified it was his job to verify that the pivot pin was in place and functioning properly (Tr. 394). He contends he confirmed it was in place on three separate occasions (Tr. 385-386). If the pivot pin had been in place, however, the jib would not have been dislodged and fallen. The record does not reflect why the pin was not in place[17]. Rogers's testimony that he inspected the pin's location lacks credibility and appears provided to absolve him of any responsibility.

The evidence adduced at trial shows Midwest did not follow the Tadano Manual procedures regarding the use of the strap and did not ensure the pivot pin was in place. Therefore, the terms of the standard were violated.

(3) Access to the Violative Condition

The Secretary bears the burden of proving employee exposure to the violative conditions. *Fabricated Metal Products, Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997) (citations and footnotes omitted). The Commission has long held the test for hazard exposure requires the Secretary to "show that it is reasonably predictable either by operational necessity or otherwise

[17] The evidence adduced at trial fails to clarify how the pivot pin became disengaged, resulting in the jib falling. Rogers claims he visually inspected the pivot pin at both the laydown site and worksite (Tr. 368-369, 373). However, when questioned about his visual inspections Rogers merely claimed the pivot pin was engaged because "it would probably fall" off if it had not been (Tr. 368-369). He also testified he verified the pivot pin was engaged at the worksite by visually inspecting it from the ground (Tr. 373-374). During his testimony regarding inspecting for the pin's placement, Rogers appeared nervous and hesitant. His testimony on this issue lacked confidence and believability. Therefore, the Court places no weight on Roger's testimony he inspected for the placement of the pin while onsite.

(including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd.*, 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing id.*). *See also Rockwell Intl. Corp.*, 9 BNA OSHC 1092 (No. 12470, 1980); *Gilles & Cotting*, 3 BNA OSHC 2002 (No. 504, 1976).[18]

The zone of danger is defined as the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr*. Co., LLC, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The zone of danger is determined by the hazard presented by the violative condition and is typically the area surrounding the violative condition that presents the danger to employees which the standard is intended to prevent. *RGM Construction*, Co., 17 BNA OSHC at 1234; *Gilles & Cotting, Inc*., 3 BNA OSHC at 2003.

Midwest's employee, R. B., was actually exposed to the hazardous condition while assembling the Tadano crane when Midwest failed to follow the manufacturer's manual regarding the use of the strap and appropriate removal of the pivot pin, resulting in the 3,400 pound jib falling on him (Tr. 137-138, 223-225, 252; Exs. C-5, C-5A, C-11). As a result, R. B. sustained severe injuries. By failing to use the strap and by failing to confirm the placement of the pin, it was reasonably predictable that employees assembling the crane would be in the zone of danger. Access to the violative conditions is established.

(4) Knowledge of the Violative Conditions

Respondent's knowledge of the violation may be established by showing the employer knew, or with reasonable diligence could have known of the violative condition. 29 U.S.C. § 666(k); *Nat'l Eng'g & Contracting Co. v. Occupational Safety & Health Admin,* 928 F.2d 762, 767 (6th Cir. 1991). An employer's awareness of the violation may be shown through actual or constructive knowledge of the violation. In order to establish constructive knowledge, an employer must fail to exercise reasonable diligence in discovering the noncomplying condition. *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1407 (No. 99-0707, 2001). Whether an employer was reasonably diligent rests on a variety of factors, "including the employer's obligation

[18] In *Gilles & Cotting, Inc*., the Commission rejected the "actual exposure" test, which required evidence that someone observed the violative conduct, in favor of the concept of "access", which focuses on the possibility of exposure under the conditions. *See Gilles & Cotting, Inc*., 3 BNA OSHC at 2002 (holding "that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure").

to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Constr.*, 19 BNA OSHC at 1407; *See Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992).

Furthermore, the actual or constructive knowledge of a supervisor may be imputed to the employer. *Danis-Shook Joint Venture XXV*, 319 F.3d 805 (6th Cir. 2003); *Regina Constr. Co.*, 15 BNA OSHC 1044, 1046 (No. 87-1309, 1991). The Sixth Circuit has long held that knowledge is imputable. *Danis-Shook*, *id*. In *Danis-Shook*, the Sixth Circuit held in a case involving supervisory misconduct "knowledge of a supervisor may be imputed to the employer. Because Wagner was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to Danis-Shook." *Id.*

In order to prove knowledge, the Secretary can show a supervisor had either actual or constructive knowledge of the violation and such knowledge is generally imputed to the employer. An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp*., 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc*., 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992).

Midwest contends the Secretary cannot establish knowledge as Rogers did not know nor could have known with reasonable diligence that the pivot pin was disengaged (Resp't Br. at 22). The Court disagrees. Midwest had actual knowledge of the violation through its A/D director Rogers, who had authority over every employee on the work site (Tr. 371). The Tadano Manual and relevant safety decals require there be a strap and pivot pin holding the jib in place (Tr. 137-138, 225; Exs. C-5, C-5A). Midwest admits it did not have a strap to hold the jib in place (Tr. 138; Ex. C-2). Rogers testified that the manufacturer's procedure is to use the strap for safety so that it does not swing away during the assembly process (Tr. 392-393). Instead, Midwest used a tag line to swing the jib into place. Rogers was aware no strap was available and observed R. B. utilizing the tag line.

Rogers also testified it was his job to verify that the pivot pin was in place and functioning properly (Tr. 394). Although it was his responsibility to ensure the pivot pin was in place, the

Court does not find Rogers's testimony credible he confirmed the pivot pin was in place before swinging the jib. Rogers knew or should have known that the pin was not in place. The record shows Rogers knew the strap was intended as a safety device and he knew there was no strap present at the worksite (Tr. 390-391, 394; Ex. C-2). Actual knowledge is established when a supervisor directly engages in or sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.,* 5 BNA OSHC 1202, at p. 3 (No. 11015, 1977) (holding because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent").

Knowledge of the violative condition is established. The Secretary has proven all elements of his prima facie case.

Item 1b: Alleged Serious Violation of § 1926.1404(b)

Section 1926.1404(b)

Section 1926.1404(b) provides:

> *(b) Knowledge of procedures.* The A/D director must understand the applicable assembly/disassembly procedures.

Alleged Violation Description

Item 1b alleges:

> On or about December 18, 2018, located at cell tower site ATT W044 at 9539 Long Run Road, in Graysville, Ohio, employees were assembling a Tadano, ATF 220G-5, all-terrain hydro mobile crane for the installation of sector antennas on a 285 foot tower. The A/D director did not understand the applicable assembly procedures to include securing the jib to the superstructure, thereby exposing the employees to a struck-by and/or caught-between hazard.

(1) Applicability of the Cited Standard

The Tadano mobile crane is covered by Subpart CC of the Occupational Safety and Health Standards in Part 1926. Section 1926.1404 applies to all assembly/disassembly operations of cranes and derricks. As shown above, Midwest's crew, supervised by A/D director Rogers was engaged in the assembly of the Tadano crane (Tr. 226, 270). The A/D director must understand the assembly and disassembly procedures as provided by § 1926.1404(b). Section 1926.1404(b) is applicable to the work being performed by the crew supervised by Rogers.

(2) Compliance with the Terms of the Cited Standard

Rogers testified he was aware of the manufacturer's strap requirement (Tr. 390-391,394)

and that it was intended as a safety device (Tr. 390-391, 394). He was also aware there was no strap present at the worksite and that they used a tag line instead. Rogers testified use of the tag line was an adequate substitute for the strap. The tag line was used to swing the jib. It was not used as a safety device to safely hold the jib in place. His testimony that the tag line, used in the manner they used it served the same purpose demonstrates his lack of understanding of the Tadano Manual requirements. (Tr. 390-391; Ex. C-2). Rogers's failure to understand and follow the Tadano Manual requirements resulted in the jib becoming dislodged and falling (Tr. 223-224).

A/D director Rogers testified the manufacturer's procedure is to use the strap for safety so that it does not swing away during the assembly process (Tr. 392-393). Significantly, he further testified he had never used a strap as required by the manual and there was "no need to put a strap on the jib because it's really worthless" (Tr. 390-391). The Court finds Mr. Rogers's failure to acknowledge or implement the procedures described in the Tadano manual demonstrates a lack of understanding of the applicable assembly/disassembly procedures. A/D director Rogers's failure to understand and adhere to the proper assembly/disassembly procedures pertaining to the Tadano, ATF 220G-5, all-terrain hydro mobile crane constitutes a violation of § 1926.1404(b). The Secretary has established the terms of the standard were violated regarding Roger's lack of understanding of the manufacturer's procedures regarding the use of the strap.

(3) Access to the Violative Condition

Midwest's employee, R. B., was actually exposed to the improperly secured jib while assembling the Tadano crane (Tr. 137-138, 223-225, 252; Exs. C-5, C-5A, C-11). Access to the violative condition is established.

(4) Knowledge of the Violative Conditions

The Court finds Midwest had actual knowledge. Actual knowledge is established when a supervisor directly engages in or sees a subordinate's misconduct. *See, e.g., Secretary of Labor v. Kansas Power & Light Co.,* 5 BNA OSHC 1202, at p. 3 (No. 11015, 1977) (holding because the supervisor directly saw the violative conduct without stating any objection, "his knowledge and approval of the work methods employed will be imputed to the respondent"). The record shows that Rogers knew about the manufacturer's strap requirement (Tr. 390-391,394), knew the strap was intended as a safety device (Tr. 394), and knew there was no strap present at the worksite when he engaged in the violative activity (Tr. 390-391; Ex. C-2, RFA No. 13). He had authority

over the employee injured by the falling jib and therefore is a supervisor for purposes of imputing knowledge to Midwest.

Knowledge of the violative condition is established. The Secretary has proven all elements of his prima facie case regarding Rogers's lack of understanding of the manufacturer's requirements for the strap.[19]

Item 2a: Alleged Serious Violation of § 1926.1404(d)(1)

Section 1926.1404(d)(1)

Section 1926.1404(d)(1) provides:

> *(d) Crew instructions.* (1) 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.
> (iii) The hazardous positions/locations that they need to avoid.

Alleged Violation Description

Item 2a alleges:

> On or about December 18, 2018, located at cell tower site ATT W044 at 9539 Long Run Road, in Graysville, Ohio, employees were assembling a Tadano, ATF 220G-5, all-terrain hydro mobile crane for the installation of sector antennas on a 285 foot tower. The employer did not ensure that crew members understood the tasks, the hazards associated with their tasks, and the hazardous positions/locations that they need to avoid when mounting the jib onto the main boom of the crane, thereby exposing the employees to a struck-by and/or caught-between hazard.

(1) Applicability of the Cited Standard

As set forth in the applicability section above for Item 1(a), the standard is applicable. The parties stipulated that on December 18, 2018, Midwest's employees were working with a Tadano ATF 200G-5 all-terrain hydro mobile crane (Tr. 27). Mobile cranes are specifically defined and covered in Subpart CC of the Occupational Safety and Health Standards in Part 1926. Section 1926.1404 applies to all assembly/disassembly operations. Midwest's crew was engaged in the

[19] The Tadano Manual requires the crane operator to ensure the pivot pin is in place before swinging the jib (Tr. 223-224, 252; Ex. C-11). It was Rogers's duty to confirm that the pivot pin was in place and functioning properly before swinging the jib (Tr. 394). Rogers checked on the placement of the pivot pin on three occasions (Tr. 385-386). He testified the pin was required to be in place and was to be removed last (Tr. 362-363). The Secretary has not established a violation regarding Rogers's understanding of the procedures regarding the pivot pin.

assembly of the Tadano crane on December 18, 2018.

(2) Compliance with the Terms of the Cited Standard

Midwest's crew lacked a clear understanding of their tasks and potential hazards while assembling the Tadano crane in violation of § 1926.1404(d)(1). Nonetheless, Midwest argues the Secretary failed to show it did not comply with the terms of the cited standard. Midwest asserts it complied with all the material terms of the Tadano Manual applicable to assembly/disassembly, and there is no evidence in the record that the crew did not understand their tasks, the hazards, or the unsafe locations at the worksite (Resp't Br. at 19-22). The Court disagrees.

A/D director Rogers was responsible for ensuring his crew members fully understood their tasks, the hazards associated with those tasks, and the hazardous locations they needed to avoid. *See* 29 C.F.R. 1926.1404(d)(1). The evidence shows that he did not. Before leaving for the Graysville worksite on December 18, 2018, Rogers did not discuss the hazards associated with the work to be performed that day (Tr. 53). Nor did he do so at the laydown site (Tr. 56). It was not until Rogers's arrival at the Graysville worksite that the three employees formulated a plan as to how they would move forward with the project (Tr. 331). This plan simply consisted of pointing out the unevenness of the ground, trees, and a fence (Tr. 331-332). Rogers testified he did not discuss the tasks that were going to be performed that day (Tr. 331). Hosler testified that before beginning to move the jib and assemble the Tadano crane, the crew only discussed where the fence and trees were located (Tr. 340). Rogers 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 (Tr. 331-332, 340, 396). No evidence was adduced at the hearing to show the employees understood their tasks, the hazards associated with them or the hazardous locations they needed to avoid.

CSHO Marcinko testified Midwest's crew should have known their roles, their specific tasks, and what they needed to do if there was any change in the work plan (Tr. 142-145). When the jib got stuck and Rogers told R. B. to use the tag line, no further instructions were provided, nor was it confirmed he understood. R. B. was an apprentice. He had only been with the company for approximately 7 months (Tr. 49, 372). A clear indication R. B. did not understand the hazards is that he ran towards the falling jib which weighed 3,400 pounds in an effort to stop it from falling

(Tr. 336)[20]. As a result, he was crushed and severely injured by the jib when it fell on him (Tr. 24-27, 73-76).

Marcinko further testified that when Hosler was instructed to aid R. B. with the tag line, the crew should have all agreed to stop work and determine a new path forward to complete their modified tasks (Tr. 142-145). The crew did not stop working or reassess the situation under the now changed circumstances (Tr. 334-335). Neither Hosler nor Rogers instructed R. B. to avoid the hazardous position he was in when the jib fell (Tr. 347). A/D director Rogers failed to ensure his crew members understood their tasks or the hazards associated with these tasks. Therefore, as Midwest's crew lacked a clear understanding of their tasks and potential hazards while assembling the Tadano crane, violation of the terms of § 1926.1404(d)(1) is established.

(3) Access to the Violative Condition

Midwest's injured employee was actually exposed to the hazardous condition while assembling the Tadano crane (Tr. 331-332, 340, 396). The Secretary has met his burden in establishing access to the violative conditions.

(4) Knowledge of the Violative Conditions

Midwest had actual knowledge of the violation through A/D director Rogers who had control of the entire crew and directly engaged in the violative conduct (Tr. 371). At no point on December 18, 2018, were Midwest's employees fully informed of the tasks they were to perform, the hazards associated with the assembly process, or where they needed to position themselves to avoid hazards (Tr. 331-332, 340, 396). Nor was there evidence R. B. understood his tasks and the hazards associated with them. As a supervisor for Midwest who engaged in the violative conduct and had authority over the employee injured by the falling jib, Rogers's knowledge is imputed to Midwest.

Knowledge of the violative condition is established. The Secretary has proven all elements of his prima facie case.

Item 2b: Alleged Serious Violation of § 1926.1400(f)

Section 1926.1400(f)

[20] Although the Court has found R. B.'s testimony credible, his testimony regarding whether he ran toward the falling jib is inconsistent with the evidence (Tr. 68). The Court places more weight on Hosler's eyewitness testimony that R. B. ran toward the falling jib (Tr. 336).

Section 1926.1400(f) provides:

> (f) 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.

Alleged Violation Description

Item 2b alleges:

> On or about December 18, 2018, located at cell tower site ATT W044 at 9539 Long Run Road, in Graysville, Ohio, employees were assembling a Tadano, ATF 220G-5, all-terrain hydro mobile crane for the installation of sector antennas on a 285 foot tower. The employer did not ensure that work rules were effectively communicated to crew members when performing the tasks of mounting the jib onto the main boom of the crane, thereby exposing the employees to a struck-by and/or caught-between hazard.

(1) Applicability of the Cited Standard

As discussed above, The Tadano is a mobile crane, and therefore is covered in Subpart CC of the Occupational Safety and Health Standards in Part 1926, § 1926.1400, which provides that the standard is applicable to mobile cranes. The A/D director provided direction to the crew to use the tag line to move the jib which was stuck. The standard found at § 1926.1400(f) is applicable.

(2) Compliance with the Terms of the Cited Standard

The only rules adduced at the hearing were those required by the Tadano Manual and safety decals. Midwest did not have, enforce, or effectively communicate any work rules at the Graysville worksite in violation of § 1926.1400(f) (Tr. 155-158).

Midwest contends it reviewed and communicated work rules, tasks, hazards, and unsafe locations to its crew on various occasions (Resp't Br. at 20-22). The record does not support this contention. R. B. did not know what to do when the jib started falling. Instead of moving away from it, he ran towards it. The record fails to demonstrate R. B. was instructed on what to do when a jib falls.

Midwest did not have, enforce, or effectively communicate any work rules at the Graysville worksite (Tr. 155-158, 230-231). It failed to effectively communicate or enforce any rules pertaining to the crew's tasks, the hazards associated with the assembly process, or where the crew needed to be to avoid any potential hazards (Tr. 155-158, 230-231, 331-332, 340, 396).

Violation of the terms of § 1926.1400(f) is established.

(3) Access to the Violative Condition

Midwest's employee, R. B., was directly exposed to a hazardous condition while assembling the Tadano crane when Midwest failed to have, enforce, or effectively communicate any work rules (Tr. 155-158, 230-231). The Secretary has met his burden in establishing access to the violative conditions.

(4) Knowledge of the Violative Conditions

Midwest had actual knowledge of the violation through its supervisor, A/D director Rogers, who was in charge of every employee on the work site (Tr. 371). At no point on December 18, 2018, were Midwest's employees fully informed as to the tasks they were to perform, the hazards associated with the assembly process, or where they needed to position themselves to avoid hazards (Tr. 331-332, 340, 396). A/D Rogers neither had, enforced, nor effectively communicated any work rules to the employees at the worksite (Tr. 155-158, 230-231). As a supervisor for Midwest, who engaged in the violative conduct and had authority over the injured employee, A/D Rogers's knowledge is imputed to Midwest.

Knowledge of the violative condition is therefore established. The Secretary has proven all elements of his prima facie case.

Characterization of the Violations

The Secretary characterized the violations of the standards found at §§ 1926.1403(a), 1926.1404(b), 1926.1404(d)(1), and 1926.1400(f) as serious. A serious violation is committed where both a substantial probability of death or serious physical harm could have resulted from the violative condition and the employer knew, or with reasonable diligence could have known of the said condition. 29 U.S.C. § 666(k); *Nat'l Eng'g & Contracting Co.,* 928 F.2d 762, 767 (6th Cir. 1991). CSHO Marcinko testified to the high severity associated with these violative conditions (Tr. 152-159). The parties stipulated the employee sustained serious injuries which were properly characterized as serious (Tr. 24-27). The injured employee testified he sustained several broken and fractured bones, including a broken neck, back, ribs, femur and pelvis, a pubic bone fracture, fractured vertebrae, and fractured ribs (Tr. 73-76). He further testified he had sustained a traumatic brain injury, lacerated kidney, hernia, and nerve damage (Tr. 73-76). As of the hearing, R. B. was not able to return to work because of his injuries.

The violations were properly characterized as serious.

Employee Misconduct

Midwest raised, but failed to establish, the affirmative defense of employee misconduct. The burden is on Midwest to prove the elements of employee misconduct. To establish the affirmative defense of unpreventable employee misconduct, the employer must prove: "(1) that it has established work rules designed to prevent the violation; (2) that it adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered." *P. Gioioso & Sons, Inc. v. Occupational Safety and Health Review Comm'n*, 115 F.3d 100 (1st Cir. 1997); *Valdak v. OSHRC*, 73 F.3d 1466 (8th Cir. 1996); *Precast Servs., Inc.*, 17 BNA OSHC 1454, 1455, (No. 93-2971, 1995) *aff'd*, 106 F.3d 401 (6th Cir. 1997); *Hosp. Mgmt., Inc., d/b/a Executive Inn*, No. 96-1478, 1997 WL 185350 (O.S.H.R.C.A.L.J., Apr. 10, 1997), citing *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1578 (No. 91-237, 1996).

The record reveals Midwest did not have, enforce, or effectively communicate any work rules at the Graysville worksite (Tr. 155-158, 230-231). It has not identified any specific rule, designed to prevent the alleged violations related to the Graysville worksite. Nor has Midwest shown it effectively enforced any rules when the alleged violations occurred. It did not discipline any crew member as a result of the December 18, 2018, accident (Tr. 302-303).

As Midwest has not met its burden in establishing any of the elements of the above-mentioned affirmative defense, the Court finds Midwest's employee misconduct defense fails.

PENALTY DETERMINATION

Pursuant to Section 666(j) of the Act, the Commission is granted the authority to assess civil penalties for the violation of citations. 29 U.S.C. § 666(j). In assessing penalties, the Act requires that due consideration be given to the employer's size, the gravity of the violation, the good faith of the employer, and any prior history of violations. 29 U.S.C. § 666(j). These factors are not necessarily accorded equal weight. *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2216 (No. 87-2059, 1993) (*citation omitted*). When applying the penalty assessment factors, the Commission need not accord each one equal weight. *See, e.g.*, *Astra Pharm. Prods., Inc.*, 10 BNA OSHC 2070, 2071 (No. 78-6247, 1982); *Orion*, 18 BNA OSHC at 1867 (giving less weight to the size and history factors). Generally, the gravity of the violation is afforded greater weight in assessing an appropriate penalty. *Trinity Indus.*, 15 OSHC 1481, 1483, (1992). A violation's gravity is

determined by weighing the number of employees exposed, the duration of said exposure, preventative measures taken against injury, and the possibility that an injury would occur. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981).

CSHO Matthew Marcinko testified how the penalties for the citation items were calculated and proposed (Tr. 152-159). In evaluating grouped violations, items 1a and 1b, the gravity of the violations was assessed as high severity because of the high likelihood of permanent disability or death from a 3,400 pound jib striking an employee (Tr. 152, 154). Probability was assessed as greater due to Midwest's failure to use a strap or other means to protect its employees (Tr. 152, 154). There was no reduction for good faith because of the severe nature of the violation, the fact that a serious injury actually occurred, and Midwest's lack of a more robust safety and health program (Tr. 153-154). The gravity-based penalty was not increased because Midwest had no history of previous violations (Tr. 153-154). However, the gravity-based penalty was reduced by 30% due to Midwest having only 25 employees (Tr. 153, 256).

In evaluating grouped violations, items 2a and 2b, the gravity of the violations were also assessed as high severity because of the high likelihood of permanent disability or death from a 3,400 pound jib striking an employee (Tr. 155, 158-159). Probability was assessed as lesser due to Midwest retaining experienced crane operators on the worksite (Tr. 155, 158-159). There was no reduction for good faith because of the fact that a serious injury did indeed occur, and Midwest lacked a more detailed safety and health program (Tr. 153-155, 158-159). The gravity-based penalty was not increased because Midwest had no history of previous violations (Tr. 153-155, 158-159). However, as stated above, the gravity-based penalty was reduced by 30% due to Midwest's size of only having 25 employees (Tr. 153, 256).

For serious Citation 1, Items 1a and 1b, the Secretary proposed, after adjustments, a grouped penalty of $9,282. For serious Citation 1, Items 2a and 2b, the Secretary proposed, after adjustments, a grouped penalty of $6,630. Upon due consideration of section 666 (j) of the Act, with regard given to the enumerated penalty calculation factors, the Court finds the original penalties proposed by the Secretary appropriate, and assesses grouped penalties in the amount of $9,282 for Items 1a and 2b and $6,630 for Items 2a and 2b.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Items 1a and 1b of the Citation, alleging serious violations of § 1926.1403(a) and §1926.1404(b), are **AFFIRMED** and a grouped penalty in the amount of $9,282 is assessed.

2. Items 2a and 2b of the Citation, alleging serious violations of § 1926.1404(d)(1) and §1926.1400(f), are **AFFIRMED** and a grouped penalty in the amount of $6,630 is assessed.

SO ORDERED.

/s/_____
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: September 11, 2020
Washington, DC