United States of America
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**
100 Alabama St. S.W
Building 1924 Room 2R90
Atlanta, GA 30303-3104

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| SECRETARY OF LABOR,<br>Complainant,<br><br>v.<br><br>ALTAIRSTRICKLAND, LLC,<br>Respondent. | OSHRC Docket No. **16-2053** |

**DECISION AND ORDER**

**COUNSEL**:

Michael D. Schoen, Attorney, Office of the Solicitor, U.S. Department of Labor, Dallas, TX, for Complainant.

William Jackson Wisdom, Sylvia Ngo, Attorneys, Martin, Disiere, Jefferson & Wisdom, L.L.P., Houston, TX, for Respondent.

**JUDGE**: John B. Gatto, United States Administrative Law Judge.

## I. INTRODUCTION

This enforcement action arose from a tragic accident involving an AltairStrickland employee killed on May 11, 2016, at an ExxonMobil oil refinery in Beaumont, Texas. The Department of Labor's Occupational Safety and Health Administration ("OSHA") investigated and issued[1] a five-item citation to AltairStrickland for allegedly violating the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651–678, with proposed penalties of

[1] The Secretary of Labor has assigned responsibility for enforcement of the Act to OSHA and has delegated his authority under the Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. *See* Order No. 4–2010 (75 FR 55355), as superseded in relevant part by 1–2012 (77 FR 3912). The Assistant Secretary has redelegated his authority to OSHA's Area Directors to issue citations and proposed penalties. *See* 29 C.F.R. §§ 1903.14(a) and 1903.15(a). The terms "Secretary" and "OSHA" are used interchangeably herein. OSHA Compliance Safety and Health Officer Jorge Gomez conducted a fatality investigation at the Beaumont facility the morning of May 11, 2016 (Tr. 379). Based on his recommendations, the Area Director issued the citation that gave rise to this enforcement proceeding.

$62,355.00.[2] After AltairStrickland timely contested the citation, the Secretary filed a formal complaint[3] with the Commission charging AltairStrickland with violating the Act and seeking an order affirming the citation and proposed penalties. A bench trial was held in Houston, Texas.

There is no dispute that jurisdiction of this action is conferred upon the Commission by section 10(c) of the Act, 29 U.S.C. § 659(c), that AltairStrickland is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5) (Compl. ¶¶ I-II; Answer ¶¶ I-II; Pretrial Order, Attach. C ¶¶ I-II). Pursuant to Commission Rule 90(a), after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings. If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so. For the reasons indicated infra, the Court **VACATES** the remaining citation items.

## II. BACKGROUND

ExxonMobil contracted with AltairStrickland, an industrial engineering company, to remove a heat exchanger at its refinery in Beaumont, Texas, which weighed approximately 24,000 pounds (Tr. 77, 91, 98). Hector Barron was the foreman in charge of AltairStrickland's crew, which consisted of two of his brothers, the Decedent and Jorge Barron, as well as Osiel Rocha, Horacio Tovar, Jose Duran, and Victor Buchot (Tr. 93-94). Foreman Barron conducted a toolbox safety meeting with his crew on May 10, 2016, between 8:00 and 8:30 p.m., and reviewed the job safety analysis (JSA) form prepared by Jose Duran, which the crew members signed (Tr. 131-132). Christopher Laster, a safety manager for AltairStrickland at the time of the accident, also reviewed the JSA for the May 10-11 shift (Tr. 296, 300).

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[2] Item 1 of the citation alleged a serious violation of section 29 C.F.R. § 1926.21(b)(2), for failing to instruct each employee in the recognition and avoidance of unsafe conditions. Item 2 alleged a serious violation of 29 C.F.R. § 1926.1417(q), for permitting employees to pull the load of a crane sideways. Item 3 alleged a serious violation of 29 C.F.R. § 1926.1425(c)(1), for failing to ensure the material being hoisted was rigged to prevent unintentional displacement. Item 4 alleged two instances of serious violations of 29 C.F.R. § 1926.1425(c)(3), for permitting material to be rigged by an unqualified rigger. Item 5 alleged a serious violation of 29 C.F.R. § 1926.1428(a) for allegedly failing to ensure that each signal person met qualification requirements. After trial, the Secretary withdrew instance (a) of Item 4 and withdrew Item 5. The withdrawals reduced the Secretary's total proposed penalties to $49,884.00.

[3] Attached to the complaint and adopted by reference was the citation at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

At approximately 8:30 p.m., Foreman Barron conducted a 10-minute walkthrough of the planned removal of the heat exchanger, accompanied by the AltairStrickland crew and Exxon's job representative, Derek McDaniel, who signed the work permit for the task. During the walkthrough, Foreman Barron went through the steps for unbolting and taking off the components attached to the heat exchanger and getting it ready for the lift (Tr. 100-102).

During the walkthrough, Foreman Barron noticed a pipe he thought might obstruct the lift. McDaniel told him the pipe would have to be removed by the insulator crew members, who were working in another area of the facility. McDaniel told Foreman Barron the insulators would come by later to remove the pipe. Jose Duran rigged the heat exchanger for the crane lift at approximately 20 minutes before midnight. He also acted as the signalman. When AltairStrickland's crew was ready to make the lift around midnight, the insulators still had not arrived to remove the pipe (Tr. 41-42, 102-104, 112, 117, 217, 224).

Nonetheless, shortly after midnight during the night shift's "lunch" period, AltairStrickland's work crew began lifting the heat exchanger with a LIEBHERR TM 1500 mobile crane, which was operated by B&G Crane Service employee Richard Sicard (Tr. 28, 32). Duran signaled by radio to Sicard to begin the lift. After 5 to 10 minutes, when the load was lifted approximately 2 to 3 feet above the ground, Duran signaled to Sicard to "dog the crane movement off" due to obstacles (Tr. 43). According to Sicard, to dog the crane movement means "lock it down. Stop all movement. . . When you dog it off …you stop [in] the immediate position." (Tr. 44.)

Duran halted the lift because an obstruction prevented the heat exchanger from moving upward. The crew decided to move the heat exchanger slightly to the west to clear the obstruction and then continue with the lift. Foreman Barron elected to use a "come-a-long"[4] cable and lever (handle) to move the heat exchanger, referred to as bull rigging,[5] clear of the obstruction (Tr. 179-180). According to Sicard, "as you crank or cinch that handle, it tightens up the cable, the rigging. It actually applies pressure to that. That bull rigging system was attached to the bottom of the heat

[4] A "come-a-long" means "a mechanical device typically consisting of a chain or cable attached at each end that is used to facilitate movement of materials through leverage." 29 C.F.R. § 1926.1401.

[5] According to AltairStrickland's *HSE Execution Plan* for the ExxonMobil Beaumont facility, "[b]ull rigging refers to using mechanical methods available to relocate/reposition through lifting techniques (rigging methods) site parts and equipment either into or out of a designated area. The same principles apply to bull rigging as normal rigging." (Ex. C-16, p. 18.)

exchanger and then anchored to another one of the pipes in the area on the platform where they were working." (Tr. 12-13.)

Foreman Barron was operating the come-a-long, when his brother, the Decedent, volunteered to take over. Using the come-a-long, the heat exchanger was moved a few inches to the west and cleared the obstruction. The Decedent began to unhook the come-a-long from the heat exchanger when suddenly the crew members heard a loud noise and looked around for the source. They saw that a pipe, running parallel to the north side of the heat exchanger, had broken off, striking and injuring Foreman Barron as it fell, and landing on the Decedent (Tr. 179-183, 187-190, 337-338). Emergency services were called, and medics arrived and attempted to treat the Decedent but he died a short time later. (Ex. C-2, p. 6.)

## III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). However, in the Fifth Circuit, the jurisdiction in which this case arises,[6] "[a]s has often been said, OSHA does not impose strict liability on an employer but rather focuses liability where the harm can in fact be prevented." *Central of Ga. R.R. Co. v. OSHRC*, 576 F.2d 620, 623 (5th Cir.1978). Thus, the Act requires that employers "shall comply with occupational safety and health standards promulgated under this chapter." *Byrd Telcom, Inc. v. Occupational Safety & Health Review Comm'n*, 657 F. App'x 312, 315 (5th Cir. 2016) (quoting 29 U.S.C. § 654(a)(2)). The Commission serves as a "neutral arbiter" between the Secretary and cited employers. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a court in the agency-review context." *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.)*, 499 U.S. 144, 151, 154 (1991).

[6] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Beaumont, Texas, and the company's corporate office is located in La Porte, Texas (Resp.'s Proposed Findings of Fact and Conclusions of Law; Pretrial Order, Attach. C ¶ 5), both in the Fifth Circuit. "[I]n general, '[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.'" *Dana Container, Inc*., 25 BNA OSHC 1776, 1792 n.10 (No. 09- 1184, 2015), aff'd, 847 F.3d 495 (7th Cir. 2017) (citation omitted). Therefore, the Court applies the precedent of the Fifth Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

As an initial matter, the Secretary and AltairStrickland disagree on whether the heat exchanger struck the pipe at issue, causing it to fall. However, the Court concludes resolution of this disagreement is not dispositive of any issues before the Court since the four items at issue relate to alleged violations of safety training and rigging standards, not standards relating to crane loads striking pipes or other structures. As the Commission has long held, "it is the hazard, not the specific incident that resulted in injury or might have resulted in injury, that is the relevant consideration in determining the existence of a recognized hazard." *Associated Underwater Servs*., 24 BNA OSHC 1248, (No. 07-1851, 2012) (quoting *Arcadian Corp.*, 20 BNA OSHC 2001, 2008 (No. 93-0628, 2004)). *See* also *Kelly Springfield Tire Co., Inc.*, 10 BNA OSHC 1970, 1973 (No. 78-4555, 1982), *aff'd*, 729 F.2d 317 (5th Cir. 1984)); *American 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 part, rev'd in part*, 351 F.3d 1254 (D.C. Cir. 2003); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2017 (No. 90-2668, 1992) (finding that the employer may not have foreseen the precise circumstances of the accident but generally knew the potential dangers associated with the location where its employees were working).

The Fifth Circuit has held "[t]o support a citation, the Secretary must show by a preponderance of the evidence that: (1) the OSHA standard invoked applies to the cited conditions; (2) the requirements of the standard were not met; (3) employees were exposed to or had access to the hazardous condition; and (4) the employer knew or should have known of the hazardous condition with the exercise of reasonable diligence." *Jacobs Field Servs. N. Am., Inc. v. Perez*, 659 F. App'x 181, 188 (5th Cir. 2016), *cert. denied sub nom. Jacobs Field Servs. N. Am., Inc. v. Hugler*, 137 S. Ct. 2257 (2017).

### A. Item 1

The Secretary alleges in Item 1 that AltairStrickland violated section 1926.21(b)(2), a safety training and education standard, by failing to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his/her environment to control or eliminate any hazards or other exposure to illness or injury." (Compl. Ex. A at 6 of 12). More specifically, the Secretary asserts on or about May 11, 2016, AltairStrickland's "employees were not instructed in the recognition and avoidance of unsafe conditions per company HSE site specific execution plan, exposing employees to struck by hazards." (*Id.*) The cited standard requires the

employer to "instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury." 29 C.F.R. § 1926.21(b)(2).

*(1) Whether the Cited Standard Applies to the Cited Conditions*

Section 1926.21(b)(2) is found under the general safety and health provisions of subpart C of the construction standards, which sets forth the general requirements for training of employees engaged in construction work activities. At the time of the fatality, AltairStrickland was engaged in construction work activities involving the removal of a heat exchanger at the Beaumont facility. Therefore, the cited standard applies to the cited conditions.

*(2) Whether the Requirements of the Cited Standard Were Not Met*

The Commission has held that section 1926.21(b)(2) "requires instructions to employees on (1) how to recognize and avoid the unsafe conditions which they may encounter on the job, and (2) the regulations applicable to those hazardous conditions." *Superior Custom Cabinet Co.*, 18 BNA OSHC 1019, 1020 (No. 94-200, 1997), *aff'd without published opinion*, 158 F.3d 583 (5th Cir. 1998). However, section 1926.21(b)(2) does not require the safety instructions "be written as long as the safety rule is clearly and effectively communicated to employees." *Gem Indus., Inc.*, 17 BNA 1861, n. 5 (No. 93-1122, 1996). Item 1 focuses on one specific alleged oversight in AltairStrickland's safety training—it charges the company with failing to provide safety training in bull rigging.

The Secretary argues AltairStrickland violated section 1926.21(b)(2) since Compliance Officer Gomez concluded from the employee interviews "that none of the employees knew of the hazards associated with the use of the 'come-a-long' or bull rigging and the only employee who knew about AltairStrickland's HSE site specific execution plan was the foreman, Hector Barron." (Sec'y's Br. 2) (*citing* Tr. 383-88). The Secretary also asserts Foreman Barron "did not train AltairStrickland's crew about its HSE site specific execution plan" and asserts Foreman Barron admitted "no training had been given on bull rigging to AltairStrickland's crew." (*Id.*) (*citing* Tr. 137-41). The Secretary also asserts one of AltairStrickland's boilermakers "testified that there was no discussion of using bull rigging before the lift of the heat exchanger, that he did not know what bull rigging was before the accident, and that he never received training from Respondent on bull rigging or AltairStrickland's HSE site specific execution plan." (*Id.*) (*citing* Tr. 146, 154-59).

AltairStrickland's HSE site specific execution plan provides the following information on bull rigging:

> Bull Rigging
> Bull rigging refers to using mechanical methods available to relocate/reposition through lifting techniques (rigging methods) site parts and equipment either into or out of a designated area. *The same principles apply to bull rigging as normal rigging*.
> Bull rigging increases the hazards of: line of fire, pinch points, struck by, side loading, and overloading. Due to the increased hazards due to utilizing bull rigging techniques a thorough ASAP [AltairStrickland Safety Analysis Plan] will be conducted when utilizing bull rigging operations.
> Bull rigging is a normal part of operations for AS due to the type of work conducted and the space restrictions often faced. Employees engaged for this project have or will receive training for conducting these types of operations. It is the responsibility of site leadership to ensure that any employee engaged in bull rigging has received the appropriate training and has the experience necessary to perform the task.

(Ex. C-16; p. 18) (emphasis added).

It is undisputed bull rigging was not addressed in the JSA discussed at the beginning of the shift, and Foreman Barron did not stop and conduct an ASAP once he determined the crew would use bull rigging to reposition the load (Tr. 138, 154-155). Osiel Rocha, who was working for a different company at the time of the trial but had previously been a boilermaker for AltairStrickland, testified he had not been trained in bull rigging (Tr. 156-157). Thus, the issue is whether AltairStrickland violated section 1926.21(b)(2) if it failed to train its employees in a safety rule not found in the cited standard.

The standards governing rigging are found in *Subpart CC—Cranes and Derricks in Construction.* There is no standard addressing bull rigging and the term is not defined or used in the construction standards. Foreman Barron, in common with the OSHA standards, does not regard bull rigging as requiring separate safety rules from general rigging. "[B]ull rigging is part of rigging." (Tr. 136.) He considered his crew members qualified to perform bull rigging because they had been trained in rigging safety.

> Q. Who amongst your crew members do you believe was appropriately trained and had the appropriate experience to perform bull rigging?
>
> A. All my guys.
>
> Q. So what training had been provided on bull rigging?

A. -- I don't know.

Q. You can't recall any training for bull rigging?

A. No. I mean, it's -- bull rigging is just like I said, part of rigging.

(Tr. 140-141.)

The Secretary cannot establish AltairStrickland failed to instruct the crew members in the applicable regulations, because no regulation addressing bull rigging, as opposed to rigging, exists. Contrary to Gomez's testimony, OSHA does not enforce private safety plans. The Commission has held, in the context of an excavation case, it is the applicable OSHA standard that triggers the employer's duty to instruct employees "regarding the requirements of that standard," not the employer's safety rules.

> [T]he plain language of the cited training provision requires an employer to provide instruction "*in ... the regulations applicable* to [each employee's] work environment." 29 C.F.R. § 1926.21(b)(2) (emphasis added). Here, it is undisputed that the "regulation" on which training was required is the excavation standard . . . [and] Bardav was obligated by the training provision to instruct its employees regarding the requirements of that standard. *See O'Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2061 (No. 98-0471, 2000) (affirming § 1926.21(b)(2) violation where employer failed to instruct "employees about the requirements of OSHA's regulations with regard to guarding the [concrete] hopper's point of operation"). In this respect, the applicable regulations—in this case, the excavation standard—trigger the duty to instruct under the cited training provision.

*Bardav, Inc.*, 24 BNA OSHC 2105, 2111 (No. 10-1055, 2014).

It is the Secretary's burden to establish AltairStrickland failed to instruct each of the crew members in the recognition and avoidance of struck by hazards and the applicable OSHA regulations. The Secretary presented no evidence AltairStrickland failed to caution the crew members about struck by hazards. The Secretary concedes AltairStrickland provided safety training relating to cranes, rigging, and signaling to its employees (Tr. 384). Its foremen hold daily toolbox talks with their crews (Tr. 130). All of the AltairStrickland crew members viewed a PowerPoint presentation on crane rigging safety (Ex. R-39). AltairStrickland provided copies of training documentation for the crew members working at the time of the accident, which establish they had received extensive safety training (Ex. R-3 through Ex. R-13). AltairStrickland was under no obligation to provide special instructions to its employees regarding bull rigging. Therefore, the Secretary failed to establish a violation of section 1926.21(b)(2) and Item 1 must be vacated.

### B. Item 2

The Secretary alleges in Item 2 that AltairStrickland violated section 1926.1417(q) because the "equipment was used to drag or pull loads sideways." (Compl. Ex. A at 7 of 12). More specifically, the Secretary asserts that on or about May 11, 2016, the crane "was used to pull a load sideways during a lifting operation, exposing employees to struck-by hazards." (*Id.*) The cited standard mandates the "equipment must not be used to drag or pull loads sideways." 29 C.F.R. § 1926.1417(q).

*(1) Whether the Cited Standard Applies to the Cited Conditions*

Section 1926.1417 is found under the Cranes and Derricks in Construction provisions of subpart CC of the construction standards. At the time of the fatality, a crane was being used in the removal of the heat exchanger at the worksite. Therefore, the cited standard applies to the cited conditions.

*(2) Whether the Requirements of the Cited Standard Were Not Met*

The Secretary argues, "[t]he evidence at trial established that the *crane* was used to pull the heat exchanger sideways during the lift." (Sec'y's Br. 8) (emphasis added). The Court does not agree with the Secretary. As AltairStrickland correctly points out, the crane did not pull the heat exchanger sideways; rather, as the heat exchanger was suspended after the crane operator dogged the crane movement, Foreman Barron attached a come-a-long to the load and used the come-a-long to move the heat exchanger a few inches to clear the obstruction.[7] The "equipment" referenced in the standard is the "equipment covered by this subpart," 29 C.F.R. § 1926.1401, which is "*power-operated* equipment, when used in construction, that can hoist, lower and horizontally move a suspended load," including "mobile cranes" such as the one at issue here. 29 C.F.R. § 1926.1400(a). The standard expressly excludes "[m]achinery that hoists by using a come-a-long or chainfall." 29 C.F.R. § 1926.1400(b)(1). Thus, the "equipment" referenced in the cited standard is the crane, not the come-a-long attached to it. Therefore, the Secretary has failed to

[7] The Secretary asserts dogging the crane involves moving the load incrementally: "Gomez testified that from the interviews he conducted, AltairStrickland's crew directed the crane operator to boom up, hold, boom up, hold, boom down, hold, boom up, hold, etc. This caused the heat exchanger to move sideways." (Sec'y's. Br. p. 3). Both the Secretary and his compliance officer are incorrect. As indicated *supra*, the crane operator explained that to "dog the crane" means "to lock it down. Stop all movement." (Tr. 44.)

establish a violation since he failed to establish AltairStrickland used "equipment," as defined by section 1926.1400, to drag or pull the load sideways.[8] Thus, Item 2 must be vacated.

### C. Item 3

The Secretary alleges in Item 3 that AltairStrickland violated section 1926.1425(c)(1) because it "did not make sure that the materials being hoisted when employees were hooking, unhooking, or guiding the load were rigged to prevent unintentional displacement." (Compl. Ex. A at 8 of 12). More specifically, the Secretary asserts that on or about May 11, 2016, AltairStrickland "did not ensure that the E-17 exchanger was rigged to prevent unintentional displacement, exposing employees to struck-by hazards." (*Id.*) The cited standard in relevant part mandates when employees are engaged in hooking, unhooking, or guiding the load, or in the initial connection of a load to a component or structure and are within the fall zone, "[t]he materials being hoisted must be rigged to prevent unintentional displacement." 29 C.F.R. § 1926.1425(c)(1).

*(1) Whether the Cited Standard Applies to the Cited Conditions*

Section 1926.1425(c) sets requirements when employees are engaged in hooking, unhooking, or guiding the load. It is undisputed AltairStrickland was engaged in guiding the heat exchanger, which was required to be rigged to prevent unintentional displacement. Therefore, the cited standard applies to the cited conditions.

*(2) Whether the Requirements of the Cited Standard Were Not Met*

The Secretary argues the cited standard was violated because Compliance Safety and Health Officer Gomez "testified that the rigging on the heat exchanger led to the unintentional displacement of the heat exchanger, which led to other things, including the heat exchanger hitting the pipe that came crashing on the platform and crushed [the Decedent] and hit Hector Barron." (Sec'y's Br. 9) (*citing* Tr. 405-07, Ex. C-37). The Secretary appears to conflate the fall zone of the load, which is what the standard addresses, with the fall zone of the pipe.

[8] The Secretary also alleges Sicard's operation of the crane caused the heat exchanger to move. *See* Secretary's Br. 4 (*citing* Tr. 189). The Court finds no merit in this argument. While it is true Foreman Barron testified Sicard was making big movements with the heat exchanger, it is clear Barron was referring to events *before* the come-a-long was attached to the heat exchanger and the "big movements" were the reason Foreman Barron decided to use the come-a-long. "[A]ll I'm worried about is shifting it over because the crane operator, he just – he couldn't do soft and gentle moves, what we needed to get it out of there. It was just -- he was just doing big, big movements and I -- we stopped, and I just proceeded to shifting it over, you know." (Tr. 189.) Further, Sicard credibly testified he never moved the load once he was instructed by Duran to "dog" the crane. (Tr. 75.) The Court credits this testimony.

The "fall zone" is "the area (including but not limited to the area directly beneath the *load*) in which it is reasonably foreseeable that partially or completely suspended materials could fall in the event of an accident." 29 C.F.R. § 1926.1401 (emphasis added). The heat exchanger was suspended 2 to 3 feet above the ground at the time the pipe fell (Tr. 251). As noted *supra*, the slight westward movement of the heat exchanger using the come-a-long was intentional and there is no evidence the heat exchanger was improperly rigged. When asked, "Are you aware of any defects of the equipment or the actual application of the rigging?" Gomez responded, "I did not inspect the rigging equipment." (Tr. 475.)

The preamble to the cited standard indicates it "addresses the hazards posed to employees from being struck or crushed by the *load*." *Cranes and Derricks in Construction*, 75 Fed. Reg. 47906-01 (August 9, 2010) (emphasis added). The preamble also explains that paragraph (c)(1) "requires that the load be rigged to prevent unintentional displacement, so that workers in the fall zone are less likely to be struck by *shifting* materials." (*Id.*) (emphasis added). Therefore, the struck by hazard contemplated by the standard is that of being struck by the "shifting materials." AltairStrickland was not required to anticipate the fall zone of the pipe. Thus, the Secretary has failed to establish AltairStrickland violated the terms of the standard. Item 3 must be vacated.

**D. Item 4**

The Secretary alleges in Item 4 that AltairStrickland violated section 1926.1425(c)(3) because "[t]he materials were not rigged by a qualified rigger." (Compl. Ex. A at 9 of 12). More specifically, the Secretary asserts that on or about May 11, 2016, AltairStrickland "bull rigging was performed by an employee who was not a qualified rigger, exposing employees to struck-by hazards." (*Id.*) The cited standard in relevant part mandates when employees are engaged in hooking, unhooking, or guiding the load, or in the initial connection of a load to a component or structure and are within the fall zone, "[t]he materials must be rigged by a qualified rigger." 29 C.F.R. § 1926.1425(c)(3).

*(1) Whether the Cited Standard Applies to the Cited Conditions*

As indicated supra, section 1926.1425(c) sets requirements when employees are engaged in hooking, unhooking, or guiding the load. It is undisputed AltairStrickland was engaged in guiding the heat exchanger, which was required to be rigged by a qualified rigger. Therefore, the cited standard applies to the cited conditions.

*(2) Whether the Requirements of the Cited Standard Were Not Met*

The Secretary contends AltairStrickland violated the cited standard because "bull rigging was used where nobody was qualified to do bull rigging." (Sec'y's Br. 9.) Gomez, based on interviews, identified the Decedent as the crew member who performed the bull rigging (Tr. 412). AltairStrickland safety manager Christopher Laster testified he observed the Decedent attach the come-a-long to the heat exchanger (Tr. 333-334). Osiel Rocha stated he was not in a position at the time of the rigging to see who attached the come-a-long to the heat exchanger (Tr. 158-159). Crane operator Richard Sicard likewise could not see who attached the come-a-long (Tr. 81).

Foreman Barron testified he attached the come-a-long to the heat exchanger (Tr. 179-181). Jose Duran corroborated the foreman's testimony (Tr. 2514). Foreman Barron stated that after he had attached the come-a-long and started cranking it, the Decedent stepped in and took over.

> [H]e volunteered to do it, but since I had already attached it, I started cranking and cranking, maybe once or twice. And then he's just like, let me do it, let me do it. I mean, he was always looking out -- he was always saying, you know, kidding around or whatnot, hey man, you're the boss, you shouldn't be working, let me do it.

(Tr. 182-183.)

This comports with Laster's testimony. Despite testifying earlier that the Decedent had attached the come-a-long, Laster stated he saw Foreman Barron operating the come-a-long and recounted the Decedent taking over in striking similar language to that of Foreman Barron. "And the next thing you know, [the Decedent] come and say, move, get out of the way, let me do it. You're the boss, you know, I got this. Move out of the way. And [the Decedent] started pulling on the come-a-long." (Tr. 338). The Court credits Foreman Barron's testimony that he was the person who attached the come-a-long to the heat exchanger. As the person who performed the task, he is in the best position to accurately recall the events. Therefore, it is Foreman Barron's qualifications as a rigger that is at issue.

A "qualified rigger" is "a rigger who meets the criteria for a qualified person." 29 C.F.R. § 1926.1401. A "qualified person" is "a person who, by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training and experience, successfully demonstrated the ability to solve/resolve problems relating to the subject matter, the work, or the project." (*Id.*)

Foreman Barron had received the National Center for Construction Education & Research (NCCER) certification as a boilermaker, which includes the rigging module (Ex. R-3; Tr. 206).

The Secretary has presented no evidence Foreman Barron was not a qualified rigger. He incorrectly states, "After interviewing the workers, Gomez determined that none of the employees performing rigging, particularly [the Decedent], were qualified to do bull rigging (Tr. 411-412)." (Sec'y's Br. pp. 9-10). However, Gomez's testimony on this point concerns only the Decedent.

> Q. Right. So who was the employee – you have "by an employee who was not a qualified rigger." Explain to the Court how you determined that there was a violation of this standard.
>
> A. There I made the determination as far as who had applied that bull rigging and then looked at that employee's training record to see if he was a qualified rigger. And, again, I could not determine that he was a qualified rigger, that that person had received training specifically on bull rigging.
>
> Q. All right. Now, that we've had some trial testimony, you've been here, that by name, the employee not being a qualified rigger, that was [the Decedent] that actually installed or attached the bull rigging to the exchanger?
>
> A. As I recall.

(Tr. 412.) Therefore, the Secretary has failed to establish AltairStrickland failed to comply with the terms of the standard. Item 4 must be vacated. Accordingly,

## V. ORDER

**IT IS HEREBY ORDERED THAT** the all citation items are **VACATED** and no penalties are assessed.

**SO ORDERED.**

**/s/_____**
**First Judge John B. Gatto**

Dated: May 31, 2018
Atlanta, GA