

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Camarata Masonry Systems, LTD,

Respondent.

OSHRC Docket No. **16-0097**

Appearances:

Felix R. Marquez, Esquire, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For the Secretary

Keith E. Coulter, Esquire, Esquire, Coulter, P.C., Houston, Texas
For the Respondent

BEFORE: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Camarata Masonry Systems, LTD was responsible for installing stone for the Two Shell Plaza project in downtown Houston. On July 27, 2015, one of its employees was injured while unloading a damaged crate, weighing nearly 3,000 pounds, containing marble slabs. The employee was hospitalized as a result of his injuries. The Occupational Safety and Health Administration conducted an investigation of Camarata's worksite at 777 Walker Street, Houston, Texas, on July 29, 2015. As a result of that investigation the Secretary issued a Citation and Notification of Penalty to Camarata on December 4, 2015.

Item 1 of the Citation alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), for failing to instruct employees in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment to control or eliminate hazards. The Secretary proposes a penalty of \$1,600.00 for this Citation. Camarata timely contested the Citation.

The Court held a hearing in this matter on February 8, 2017, in Houston, Texas. The parties filed briefs on April 10, 2017.

For the reasons that follow, the Court finds 29 C.F.R. § 1926.21(b)(2) was not violated. Therefore the Court **VACATES** Citation 1, Item 1. No penalty is assessed.

JURISDICTION AND COVERAGE

The parties stipulate the Commission has jurisdiction over this action and that Camarata is a covered employer under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act) (Tr. 18, 19). Based on the parties' stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Camarata is a covered employer under § 3(5) of the Act.

DISCUSSION

Background

Camarata is a masonry construction contractor owned since its inception in 2004 by Kevin Camarata,¹ president and general partner, and chief executive officer (Tr. 171-172). It consists of a masonry division and a tile and terrazzo division with offices in Houston, Texas, and Coconut Creek, Florida (Tr. 173-174). Camarata typically works on large institutional projects such as museums and performing arts facilities, or high-rise construction (Tr. 174-175). On July 27, 2015, it was engaged in remodeling the outside facade² of an existing building in downtown Houston on a project known as the Two Shell Plaza Project (Exh. C-1). Camarata was responsible for installing stone and the exterior columns of the buildings, the exterior sidewalk floor, and the interior walls for the project (Tr. 229). It also received the stone and placed it on the jobsite (Tr. 229). Approximately 20 to 25 employees of Camarata were engaged in stone setting and other activities on the jobsite (Tr. 229-230). On the evening of July 27, 2015, Camarata unloaded crates containing marble slabs from a flatbed semi and placed the crates of marble slabs on the jobsite (Tr. 50). The Camarata employees working that evening, in

¹ Kevin Camarata formerly was vice president and general manager of Lucia Constructors, a wholly owned subsidiary of Linebeck Corp. Lucia is no longer in business and most of its employees migrated over to Camarata and that division of Linebeck Corp was dissolved (Tr. 172, 177).

² CSHO Baez's inspection narrative (Exh. C-1) provides that Camarata was remodeling the outside fascia. The Court concludes that from the context of the evidence "fascia" should be "façade."

or near the area where the unloading of crates was occurring, included Foreman Roger Wagner,³ a helper, and a marble setter/forklift operator⁴ (operator) (Tr. 88-89, 207; Exh. C-2).

The flatbed contained eight crates of marble slabs which weighed 350 to 400 pounds each. Each crate weighed approximately 3,000 pounds and contained six to seven slabs positioned in the crates in an upright position (Tr. 48-49, 50). All except one of the crates was in an A-frame configuration. The dissimilar crate was smaller, shaped like a rectangular box and was damaged all around the bottom which was loose (Tr. 143, 231). The damaged crate came from Camarata's warehouse and contained the type of slabs Camarata had used on a prior jobsite known as the Exxon Mobil Campus Project. The crates were removed from the flatbed with a telehandler,⁵ a type of forklift which moves laterally, up and down rather than vertically, and can tilt the load (Tr. 50-51). The operator was responsible for operating the telehandler to remove crates from the semi, place them on the jobsite and distribute the stones (slabs) in various places on the jobsite (Tr. 120).

Once the flatbed containing the crates pulled up to the worksite, Wagner observed that one of the crates was damaged (Tr. 230, 232). The operator also noticed the damage and told Wagner the crate was broken or chipped. Wagner discussed the damaged crate with the operator and how they were going to handle the situation (Tr. 124, 156, 221, 233, 244, 245). The operator testified Wagner told him how to unload the broken crate and provided him instructions specifically how to unload it (Tr. 127-128). They discussed putting a strap⁶ around the broken crate when removing it from the semi (Tr. 232). Wagner also knew that an A-frame was going to be built for the crate that was damaged and testified there was nothing different about building an A-frame for this crate than for any other (Tr. 234). He discussed with the operator that a bracing system (A-frame) would have to be built for the damaged crate (Tr. 233). After providing instructions to the operator, Wagner left the work area to assist in another area on the jobsite. Only the operator and a helper were left in proximity of the semi and crates.

³ Roger Wagner has been employed for 6 ½ years as a foreman for Camarata. Prior to that he worked as a foreman for Lucia (Tr. 216)

⁴ The marble setter/forklift operator was the injured employee.

⁵ "Telehandler" and "forklift" were used interchangeably during hearing, despite the differences in how they operated.

⁶ "Strap" and "sling" were used interchangeably during the hearing. It was used to tie down and secure the load (Tr. 51-52).

After approximately two hours on the jobsite, apparently without incident, the operator had removed all crates except the damaged one, which was chained to another crate. It was left for last because it was damaged. After the damaged crate was unchained, the operator placed the forklift under the crate and then placed the strap around the crate so it would not fall while he unloaded it (Tr. 123-124). The strap was hooked around the sides or edges of the forklift carriage, not extending completely around it (Tr. 124-125, 147). After placing the strap around the crate, the operator took it down from the truck, with the crate sitting on top of the telehandler (Tr. 126-127).

Once the damaged crate was removed from the flatbed, the operator tilted the forks of the telehandler and began removing the sling so he could place 2 x 4's to build an A-frame to stabilize the crate when it was on the ground so it would not fall (Tr. 128). The forks of the telehandler were tilted back so that the forks were up when he removed the strap (Tr. 158). The operator testified the load was unstable at this point and was still unstable while he took measurements for the footings⁷ (Tr. 130). He had completed measurements for the footings on one side and was preparing to measure the second side when the crate fell (Tr. 131). The bottom of the crate broke loose and fell over (Tr. 242). When it fell it remained on the forklift (Tr. 126-127). It fell on the operator, breaking his right foot and left knee (Tr. 132). Wagner testified he did not know the kickers were off the crate, and if he had, he would have told the operator to make sure it was stable and keep the forks back (Tr. 236). The operator testified he tilted the forks, but he did not know why the crate fell (Tr. 158-59, 164).

No one other than the operator was in the immediate area when the crate fell. The helper was located 30 to 40 feet away and Wagner was in an entirely different area 60 to 80 feet away, his view blocked by equipment (Tr. 131, 238). After the accident, the helper reached the operator first and tried to render assistance. Wagner arrived next and immediately moved the forklift because he thought the crate was on top of the operator (Tr. 239). It was not, it only hit his leg (Tr. 240). The operator was taken to the hospital where he was treated for a broken right tibia and dislocated left knee (Tr. 132-133; Exh. C-1).⁸

⁷ The operator used the term "footers" to identify what the foreman described as "kickers." The foreman testified the footers were already installed and that the kickers, which are usually located on the sides of the crate, were missing (Tr. 236). The footers and kickers form the base of the brace (Tr. 128-129, 143, 236).

⁸ CSHO Baez's testified the injury was a broken tibia and fractured hip (Tr. 64).

At the time of the accident, the operator had worked with Wagner for 7 years, beginning a year after he began working at Lucia. When they first started working together Wagner provided him instructions on how to build crates⁹ (Tr. 138, 144). Wagner taught him the importance of using the forks to position the load so it should not fall (Tr. 156). He also told the operator to use a strap for stabilizing and explained that if the crate is not strapped, then it could become uneven and fall—breaking the stone or perhaps injuring the operator. The operator confirmed this when he testified Wagner talked to him about the need to keep the straps on until you were convinced the load was stable (Tr. 149-150). At safety meetings, Wagner also talked to the operator about the importance of keeping the forks tilted so the load would be stable when unstrapped (Tr. 150).

According to Wagner, the operator had often removed crates from trucks with slings (Tr. 233). Wagner testified he discussed with the operator the reason for the strap was that some loads are unstable and the operator needs to be sure that nothing tips over and either breaks or hurts him or another worker (Tr. 233). Wagner also testified he had previously talked to the operator about the importance of waiting to remove the strap until he was sure the load was stabilized by tilting the fork. However, he did not have that discussion with him on the day of the accident (Tr. 235).

On July 27, 2015, Wagner completed a Pre Task Plan (PTP) which reflects he had talked to employees about setting stone and distributing stone, proper lifting techniques and watching out for pinch, crush and crush points, keeping body parts away from those areas, struck by hazards, electrical and respiratory hazards (Tr. 220-221; Exh. R-16.1). Wagner testified he also does a weekly Job Safety Analysis (JSA) and conducts Safety meetings, where he provides more specific instruction than what is on the JSA and PTP (Tr. 223).

In addition to the instructions received from Wagner, the operator had taken forklift training which covered weight and distance, keeping the load balanced so it would not fall off and keeping the forks back, (tilting them). He is a certified forklift operator (Tr. 153, 237, 238). The operator also received certification for a crane and rigging class in 2011 when he worked for Lucia (Tr. 150, 152).

⁹ From the context of the testimony and questioning, the Court concludes that Respondent’s counsel was referring to “frames or bracing systems” when he used the word “crates.”

The operator testified that on the day of the accident he and Wagner talked about the plan to strap the crate and build a brace for it, and that there was a hazard of the stones tipping over if they were not adequately tilted or strapped (Tr. 156). He had not talked to Wagner that day about when to take the strap off, but had done so in the past (Tr. 156-157). According to the operator, he had not previously dealt with a broken crate like the one at issue, which was broken on one side only. He also testified that the training they received was not specific for unloading broken crates because it was very unusual for a crate to arrive broken (Tr. 128, 133).

As a result of the accident on July 27, 2015, OSHA Compliance Safety and Health Officer (CSHO) Ricardo Baez¹⁰ conducted an investigation. He arrived at the Camarata worksite two days after the accident, on July 29, 2015, and initiated the investigation. Based on CSHO Baez's investigation, the Secretary issued to Camarata on December 4, 2015, the Citation at issue.

CITATION NO. 1

Item 1: Alleged Serious Violation of § 1926.21(b)(2)

In Item 1 of the Citation the Secretary alleges a serious violation of 29 C.F.R. § 1926.21(b)(2) asserting that “On July 27, 2015 at the job site the employer did not provide hazard recognition training for employees performing activities such as, but not limited to, rigging.” The Secretary contends employees were exposed to a struck-by hazard as a result of improperly rigged crates (Secretary's brief, pp. 5-7; Tr. 55).

The cited standard § 1926.21(b)(2) provides:

The employer shall 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.

The Secretary's Burden of Proof

The Secretary has the burden of establishing the employer violated the cited standard.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

¹⁰ CSHO Baez has been employed by OSHA for 7 ½ years. He holds a B.A. Degree in Science and Civil Engineering (Tr. 34).

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Applicability of the Cited Standard

Section 1926.21(b)(2) is found in **Subpart C - General Safety and Health Provisions** of the Construction Standards. The general requirements for training of employees engaged in construction work activities are set forth in Subpart C. Camarata was engaged in construction work activities involving the installation of stone for the remodeling of Two Shell Plaza. Section 1926.21(b)(2) applies to the construction activity Camarata was engaged in on July 27, 2015. The cited standard therefore is applicable.

Noncompliance with Terms of the Standard

In determining noncompliance with the terms of the standard found at § 1926.21(b)(2) the Commission considers what instructions a reasonably prudent employer would have given:

Section 1926.21(b)(2) requires the Secretary to “establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given in the same circumstances.” *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424, 1993-1995 CCH OSHD ¶ 30,231, p. 41,620 (No. 90-1106); *see also Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015, 1991-1993 CCH OSHD ¶ 29,902, p. 40,810 (No. 90-2668, 1992) (holding § 1926.21(b)(2) requires that “an employer must instruct its employees in the recognition and avoidance of those hazards of which a reasonably prudent employer would have been aware”); *A. P. Horo Co.*, 14 BNA OSHC 2004, 2009, 1991-1993 CCH OSHD ¶ 29,223, p. 39,130 (No. 85-369, 1991) (“Section 1926.21(b)(2) requires employers to instruct employees concerning ‘safety hazards which would be known to a reasonably prudent employer *or* which are addressed by specific OSHA regulations” (citation omitted)). In considering whether an employer has met its obligation under this general standard, “the Commission has specifically considered whether a reasonable person, examining the generalized standard in light of a particular set of circumstances can determine what is required, or if the particular employer was actually aware of the existence of the hazard or a means to abate it.” *W. G. Fairfield*, 19 BNA OSHC 1233, 1235, 2000 CCH OSHD ¶ 32,216, p. 48,865 (No. 99-0344, 2000)(citation and internal quotation marks omitted), *aff’d* 285 F.3d 499 (6th Cir. 2002). Thus, the obligation to train “is dependent upon the specific conditions [at the worksite], whether those conditions create a hazard, and whether the employer or its industry has recognized the hazard.” *W. G. Fairfield*, 19 BNA OSHC at 1236, 200 CCH OSHD at p. 48,865.

Compass Environmental, Inc., 23 BNA OSHC 1132, 1134 (No. 06-1036, 2010). The reasonably prudent employer requirement was reaffirmed more recently by the Commission in *Bardav, Inc. d/b/a Martha’s Vineyard Mobile Home Park*, 24 BNA OSHC 2105, 2111 (No. 10-1055, 2014),

citing *El Paso Crane & Rigging, supra*, where the Commission stated “to establish noncompliance, the Secretary must establish that the cited employer failed to provide the instructions that a reasonably prudent employer would have given[.]”(emphasis in original)

Therefore, in consideration of this well-settled Commission precedent, the Court must determine whether Camarata provided instructions that a reasonably prudent person would have given in the same circumstances. Camarata asserts it did. It contends there were no instructions beyond those already given to the injured employee that a reasonably prudent employer would have known to give to enable the injured employee to better recognize or avoid the hazard (Camarata brief, p. 2). The Secretary contends Camarata did not provide instructions regarding rigging broken crates and the associated hazards (Secretary’s brief, pp. 5-7). CSHO Baez specifically described the hazard as a struck-by hazard for the helper and operator (Tr. 55, 62).

The evidence does not support the Secretary’s contention that Camarata failed to instruct the operator in the recognition and avoidance of unsafe conditions in his work environment. The operator was a seasoned marble setter and forklift operator, with at least fourteen years of experience, four years with Camarata doing the same type of work (Tr. 137-138).¹¹ His job was to remove crates from the trucks when they arrived and to place and brace the crates in various locations on the jobsite (Tr. 120, 138). He testified to having built thousands of bracing systems (Tr. 139). In addition to his work experience, the operator had been trained on forklifts and cranes and received certifications for such training. The foreman testified the operator handled crates all of the time (Tr. 246). The foreman and the operator testified consistently about the instructions the foreman provided regarding loading and placing crates both prior to and on July 27, 2015.¹² Their testimony was not disputed.

At the hearing, the operator appeared nervous. However, he testified confidently regarding his training and the events on July 27, 2015. The Court finds his testimony credible. The operator testified:

¹¹ Wagner testified that the operator had been a forklift operator for him for 15 years (Tr. 246).

¹² The operator’s testimony regarding the frequency of working with broken crates differed from the foreman’s. The operator initially responded “No” when asked on direct examination if he had handled broken crates (Tr. 133). He also testified that crates rarely arrived broken and that he had minimal frequency of handling broken crates (Tr. 133-134). The Court credits the operator’s testimony regarding his having handled broken crates because it is corroborated by the foreman in that respect.

Q. And what is the reason why - - well, let me - - who told you to start - - who told you to use a strap when the crates need stabilizing?

A. Always talk to the foreman.

Q. And that's Roger Wagner?

A. Yes.

Q. And had he explained to you that if the crate isn't strapped, then it could become uneven and fall - - breaking the stone or perhaps injuring you?

A. Yes.

Q. And did you and he talk about the need to keep the straps on until you were convinced the load was stable?

A. Yes.

Q. And did he talk with you about the importance of keeping the forks tilted so that the load would be stable when unstrapped?

...

A. Yes.

Q. And have you talked about those things at the safety meetings that you have every day?

A. It's always talked about.

(Tr. 149-150).

Foreman Wagner testified:

Q. And so there would have been a JSA meeting about - - the first line on here says - - it cautions workers about material dropping and balancing overload. And the far-right column says to tilt the forks up, right?

A. Yes, that's what you would do.

Q. And then there's also a reference to how to use the 2 - by- 4 studs to place supports on end of crates so that stone does not fall forward, correct?

A. Yes.

Q. And so even though you may not have discussed these things every day or may not even have discussed them on the day that [the operator][had his accident, these are instructions that were provided to the workers on a fairly regular basis, is that correct?

A. Yes.

(Tr. 222-223; Exh. R-16.1).

Q. And did you discuss with him that the reason for the strap was that some loads are unstable and you need to make sure that nothing tips over and either breaks or hurts him or another worker?

A. Yes.

Q. And did you also discuss that a bracing system would be built for this one because it didn't have one yet?

A. Yes.

(Tr. 233). Wagner testified confidently and without hesitation. He was forthright about what instructions he gave and did not give on July 27, 2015. He projected a confident demeanor. Accordingly, the Court finds him to be a credible witness.

The operator's training and experience must be taken into consideration in assessing what instructions a reasonably prudent employer in the same circumstances would give. The operator was not a novice employee unfamiliar with the hazards associated with the work he was performing. He had a minimum of fourteen years (four with Camarata) of training and experience which involved using a forklift to remove and place stones. In addition, the work being performed on July 27, 2015, was the same type of work he had performed on Camarata's Exxon Mobil Campus Project and during the ten years he worked at Lucia. When determining the adequacy of instructions given to an employee, the Commission considers how effectively the information is communicated in light of the employee's training. *S. J. Louis Construction of Texas*, 25 BNA OSHC 1892, 1895-97 (No. 12-1045, 2016); *See also LJC Dismantling Corp.*, 24 BNA OSHC 1478, 1481-82 (No. 08-1318, 2014) (finding adequacy of employee's prior training relevant to assessing sufficiency of employer's instructions).

The uncontroverted evidence shows that on July 27, 2015, once the flatbed with the crates arrived, Wagner instructed the operator to use a sling to remove the broken crate. Using a sling was not something the operator was unfamiliar with. Wagner testified the operator had done this many times before (Tr. 233). When the crates arrived, Wagner also instructed the operator to brace the crate (build an A-frame) and tilt the forks of the telehandler to stabilize the

crate. The operator had tilted the forks and was in the process of measuring for putting the kickers on the A-frame when the accident occurred (Tr. 130, 158). The operator testified that on the day of the accident he and Wagner discussed the plan to strap the crate and build a brace for it, and that there was a hazard of the stones tipping over if the crate was not adequately tilted or strapped (Tr. 156). CSHO Baez¹³ testified it was his understanding that the operator and foreman did not discuss the importance of tilting the forks when the straps were taken off (Tr. 94). The CSHO's testimony on this issue is outweighed by a preponderance of the evidence disputing his understanding. Based on the instructions on the day of and prior to the accident, the operator was made aware of the hazards and what he needed to do to avoid them.

Nonetheless, the Secretary contends Camarata failed to provide instructions regarding the hazards of broken crates. In support, the Secretary relies on the operator's testimony that he had not handled a crate which was broken on one side like the damaged crate. This reliance is misplaced. On the evening of July 27, 2015, the foreman told the operator to put a sling around the crate because of its damaged condition, and specifically told him how to remove the crate. This is undisputed. The Secretary adduced no evidence as to how these instructions were deficient, or regarding additional instructions which should have been provided under the circumstances. It is the Secretary's burden to show how the standard was violated.

In addition, the Secretary argues, assuming Camarata provided instructions, they were ineffective because they were provided in English rather than Spanish. The Court is not persuaded by this argument. The operator testified his instructions were in English, however, the helper testified instructions were provided in Spanish and that the foreman's training was translated to Spanish by co-workers who speak Spanish (Tr. 165-166, 211, 212). Further, Mr. Camarata testified most of the company's training was done in two languages (Tr. 190). The Court credits this testimony over that of the operator. In addition, the record shows the operator speaks and understands English. Although he testified with the assistance of a translator at the hearing, it was clear to the Court the operator understood at least some of the questions when he responded in English rather than waiting for the interpreter to translate. More importantly, even if his understanding of English is limited, his testimony shows he understood the safety measures

¹³ CSHO Baez's investigative documents and testimony showed some inconsistencies and conclusions which were refuted by a preponderance of the evidence, thereby challenging the reliability of his investigation findings. Therefore, his investigation findings will only be accorded weight when corroborated by other evidence.

taught to him by Wagner, and as a result of the programs he attended from which he received various certifications. Other than the instant incident, the record is devoid of any evidence the operator lacked an understanding of how to perform his job according to the training and instructions he had received from the company. Even if the court were to credit the operator's testimony that the instructions were all in English, the record does not show they were ineffective.

To further support his position, the Secretary argues the operator was not trained to undo the straps on the load (Secretary's brief, p. 6). This argument also fails. Although Wagner admits he had not told the operator on July 27, 2015, when to remove the sling, he previously had explained to the operator to not remove a sling until the crate was stable (Tr. 149-150). The operator testified he was so instructed. Even so, he appears to have disregarded those instructions. He did not ensure the crate was stable before removing the sling, despite knowing the crate was unstable when he removed the sling to conduct his measurements for the 2 x 4's (Tr. 130). His testimony confirms he was fully aware of the hazard and knew that tilting the forks of the telehandler was a way to keep the load from falling.

Finally, the Secretary does not specifically argue Camarata failed to provide instructions regarding the kickers. However, the Court finds the evidence shows Wagner did not know the crate was missing the kickers. Wagner testified he would have given additional instructions to the operator, to make sure the crate was stable and to keep the forks back, had he known (Tr. 236-237). Camarata's foreman instructed the operator regarding the hazards he was aware were present at the jobsite. The Commission considers whether an employer was actually aware of the hazard in assessing what a reasonably prudent employer would do in the circumstances. *W. G. Fairfield, supra*. The Secretary also has not established that Wagner should have known the kicker was missing.

The Secretary has failed to show that Camarata failed to provide instructions to its employee that a reasonably prudent employer would have given under the same circumstances. Accordingly, Citation No. 1, Item 1 is **VACATED**.

Unpreventable Employee Misconduct Defense

Unpreventable employee misconduct is an affirmative defense that must be proven by the employer. *American Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2097 n.4 (No. 10-0359, 2012).

To prove this defense, “an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule.” *Schuler-Haas Electric Corp.*, 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006) (citations omitted). An employer may rebut the Secretary’s prima facie showing with evidence that it took reasonable measures to prevent the occurrence of the violation. In addition, the employer has the burden of showing “that the violative conduct of the employee was idiosyncratic and unforeseeable.” *L. E. Myers Co.*, 16 BNA OSHC 1037, 1040 (No. 90-945, 1993) (*L.E. Myers*).

Camarata raised the defense of unpreventable employee misconduct in its Answer and made references in its brief to suggest it had not completely abandoned the defense. Since the Court finds the Secretary has failed to establish a prima facie case regarding the cited standard found at § 1926.21(b)(2), it is not necessary for the Court to address Camarata’s unpreventable employee misconduct defense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

ORDER

Based on the foregoing decision, it is hereby ORDERED:

Item 1 of Citation No. 1, alleging a violation of § 1926.21(b)(2), is **VACATED** and no penalty is assessed.

SO ORDERED.

/s/

Date: **May 26, 2017**

SHARON D. CALHOUN
Administrative Law Judge
Atlanta, Georgia