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SUSAN MERRIMETH

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Aug 26 2016 01:30 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CARSON CITY
* * * *

SIERRA PACKAGING & CONVERTING,
LLC,

Petitioner,

vs.

THE DIVISION OF INDUSTRIAL
RELATIONS OF THE DEPARTMENT OF
BUSINESS AND INDUSTRY, STATE OF
NEVADA; THE OCCUPATIONAL
SAFETY AND HEALTH REVIEW
BOARD; THE CHIEF ADMINISTRATIVE
OFFICER OF THE OCCUPATIONAL
SAFETY AND HEALTH
ADMINISTRATION OF THE DIVISION
OF INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA,

Respondents.

Case No.: **CV14-OC-001951B**

Dept. No. 1

NOTICE OF APPEAL

Notice is hereby given Petitioner, the SIERRA PACKAGING & CONVERTING, LLC,
by and through its attorneys of record, McDonald Carano Wilson LLP, hereby appeals to the
Supreme Court of Nevada from the Order Denying Petition for Judicial Review entered on
August 31, 2015. A true and correct copy of the Order Addressing Petition for Judicial Review
is attached hereto as Exhibit 1.

///

1 The undersigned does hereby affirm that the foregoing does not contain the social
2 security number of any person

3 Dated this 25th day of August, 2016.

4 McDONALD CARANO WILSON LLP

5
6 By: J. E. Rowe
7 TIMOTHY E. ROWE, ESQ.
8 Attorneys for
9 Petitioner Sierra Packaging & Converting, LLC
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP, and that on the 20th day of August, 2016, I served the preceding **NOTICE OF APPEAL** via Reno Carson Messenger Service to the following parties

Salli Ortiz, Esq.
Division of Industrial Relations
400 W. King St., Suite 201
Carson City, NV 89703
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Appeals Office
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Carole Davis

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EXHIBIT 1

EXHIBIT 1

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SUSAN MERRITT WETHERS
CLERK

BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

SIERRA PACKAGING & CONVERTING, LLC,
Petitioner,

vs.

THE DIVISION OF INDUSTRIAL RELATIONS
OF THE DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA; THE
OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD; THE CHIEF
ADMINISTRATIVE OFFICER OF THE
OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION OF THE DIVISION OF
INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA,

Case No. 14-OC-00195-1B

Dept. No. 1

Respondents.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

On August 22, 2014, SIERRA PACKAGING & CONVERTING, LLC ("Sierra Packaging"), filed its petition for judicial review of the Nevada Occupational Safety and Health Administration Review Board's (Review Board) April 11, 2014, Decision and its July 28, 2014, Findings of Fact, Conclusions of Law, and Final Order. The Review Board's Decision affirmed the September 10, 2013, Citation and Notification of Penalty¹, containing safety citations and proposed penalties, issued by Respondent Chief Administrative Officer of

¹ The Citation and Notification of Penalty also alleged a violation of 29 CFR 1910.132(d)(1), but this violation was not contested. As a result, no further allegations were made in NV OSHA's Complaint, the Review Board did not address it in its Decision, and it is not the subject of this Petition.

1 the Occupational Safety and Health Administration of the Division of Industrial Relations of
2 the Department of Business and Industry, State of Nevada (NV OSHA).

3
4 FACTS

5 Respondent NV OSHA, a section of the Division of Industrial Relations ("Division") of
6 the Nevada Department of Business and Industry, is responsible for enforcing the provisions
7 of Chapter 618 of the Nevada Revised Statutes and the federal Occupational Safety and
8 Health Act ("OSH Act"), 29 USCS § 651 pursuant to Section 18 of the OSH Act. The Review
9 Board, created pursuant to NRS 618.565, consists of five members: two members are
10 representatives of management, two of labor, and the fifth is a representative of the general
11 public. The Review Board conducts formal, fact finding hearings in contested cases involving
12 citations issued by NV OSHA.

13 The Citation at issue in this proceeding was based on the results of a NV OSHA
14 investigation, Inspection No. 317224608, conducted at Sierra Packaging's Reno, NV,
15 manufacturing site. ROA 177².

16 On August 9, 2013, NV OSHA received a referral complaint from an anonymous
17 source alleging various safety and/or health violations by Sierra Packaging:

- 18 • Employees climbing in racking without being protected from falls; and
19 • Employees operating powered industrial trucks without certificate of
20 training.

EOR 115.

21 The anonymous source provided with this referral complaint photographs of three
22 employees working/climbing on racking without any fall protection. EOR 153-155.

23 Based on this referral complaint, Jennifer Cox, a Compliance Safety and Health
24 Officer ("CSHO") with NV OSHA, conducted an inspection, number 317224608, on
25 August 16, 2013. EOR 116.

26 ///

27 _____
28 ² A copy of Petitioner's Excerpts of Record ("EOR"), Volume 1 and Volume 2, are on file with the Court. Citations are made to both the EOR and the Record on Appeal ("ROA").

1 CSHO Cox conducted an investigation and verified the location and authenticity of the
2 photographs provided in the referral complaint as being taken in the Sierra Packaging's
3 Reno-Stead warehouse. The employees were identified by Maintenance Manager Steve
4 Tintinger ("Maint. Mgr. Tintinger"), as temporary maintenance Employees Caal, Soto, and
5 Gonzalez. EOR 119-120.

6 CSHO Cox interviewed each employee identified in the photographs, with the
7 assistance of a Spanish speaking translator provided by Sierra Packaging. EOR 120; 125-127.

8 Employee Gonzalez admitted in his statement to CSHO Cox that: 1) he was climbing on
9 the racks; 2) he was assigned by a supervisor to put the stabilizers on the racks; 3) he was not
10 aware he was not supposed to climb the racks; 4) he had not been provided any safety
11 training, and; 5) he was not aware of any safety program. During the interview, Employee
12 Gonzalez was able to provide to CSHO Cox a five-point body harness, six foot lanyard and a
13 three foot shock plate. EOR 120, 125.

14 On cross-examination, CSHO Cox confirmed she did not know where the harness was
15 retrieved from, nor had she specifically asked if the harness was for employees to use while
16 working on the racks or whether it was just general fall protection equipment located in the
17 plant. ROA 111:6-20. CSHO Cox stated she simply asked to see the fall protection, and the
18 five-point body harness, six foot lanyard and a three foot shock plate was what was provided
19 to her. ROA 111:21-22.

20 Employee Caal stated he was working on a ladder, while the other two employees were
21 climbing on the racking. He stated he is aware of the safety training, harness, and other
22 personal protective equipment ("PPE") the company provides and that the training was
23 provided in Spanish. According to Employee Caal, Maint. Mgr. Tintinger assigned the
24 employees to secure metal between the racks. EOR 126. He also stated that management did
25 not oversee work being done. *Id.*

26 Employee Soto stated he was trained on fall protection or other PPE and is aware of
27 company safety policies (i.e. no climbing on racks, running on production floor, etc.).
28 EOR 127.

1 Following her employee interviews, CSHO Cox discussed her findings with several
2 management personnel. EOR 46-48. That discussion revealed the lack of knowledge from
3 management regarding the limitations of the harness system. *Id.* CSHO Cox took the time
4 to have Maint. Mgr. Tintinger model the harness while she explained to everyone the safety
5 features. *Id.*

6 In regards to the report that employees were operating powered industrial trucks
7 without certification, CSHO Cox found it invalid, therefore no violation was found regarding
8 this item of the complaint. EOR 120.

9 On September 10, 2013, NV OSHA issued a Citation and Notification of Penalty
10 ("Citations") for inspection number 317224608. EOR 131-142. On September 26, 2013, Sierra
11 Packaging filed a Notice of Contest of the Citation, contesting only Citation 1, Item 1:

12 29 CFR 1910.132(f)(1)(iv): The employer shall provide training to each employee
13 who is required by this section to use personal protective equipment (PPE). Each
such employee shall be trained to know the limitations of the PPE:

14 Facility; employees used a fall arrest system consisting of a five point body
15 harness, six foot lanyard with a three foot shock pack to access the top tier
16 racking located 15 feet, 7 inches high. The lack of knowledge of the minimum
required distance from a suitable anchorage point to ground exposed user to an
17 unarrested fall of 15 feet, 7 inches.

18 EOR 140; 143. The violation was classified as "Serious", with a proposed penalty of \$3,825.
19 EOR 143.

20 NV OSHA filed a Complaint with the Review Board on October 8, 2013. EOR 144-148.
21 Sierra Packaging served its Answer on October 23, 2013. EOR 149-152. The Review Board
22 heard the matter at an evidentiary hearing held on March 12, 2014. ROA 43. Testimony was
23 given at the hearing by several individuals, including CSHO Cox and Maint. Mgr. Tintinger.
24 ROA 72.

25 On April 11, 2014, the Review Board issued its written Decision affirming NV OSHA's
26 Citation 1, Item 1, and the proposed penalty of \$3,825. EOR 1-16. The Review Board
27 specifically found the testimony and evidence presented by and through CSHO Cox credible,
28 which evidence established the cited violation. EOR 21:16-17. The Review Board specifically

1 found Maint. Mgr. Tintinger's testimony was "unsupported". EOR 21:18-19. The Final Order
2 on this matter was issued on July 28, 2014. EOR 17.

3 Sierra Packaging timely filed the instant Petition for Judicial Review.
4

5 ISSUES

6 Although Sierra Packaging admits that maintenance workers do have some job tasks
7 that require them to work at heights, and does not dispute that it did not directly provide fall
8 protection training to employees, or training regarding the limitations of fall protection PPE,
9 Sierra Packaging argues such was not required as employees are prohibited from climbing on
10 the racking, and the task assigned could have been accomplished on ladders. Specifically,
11 Sierra Packaging argues that, since these temporary maintenance employees were not
12 required to work at heights, there was no requirement to train them on fall protection, so
13 there can be no violation.

14 Sierra Packaging also argues that simple "access" to a harness does not trigger the
15 cited standard.

16 STANDARD OF REVIEW

17 Pursuant to NRS 233B.135(2), the Review Board's final order "shall be deemed
18 reasonable and lawful until reversed or set aside in whole or in part by the court." "The
19 agency's fact-based conclusions of law are entitled to deference, and will not be disturbed if
20 they are supported by substantial evidence." Law Offices of Barry Levinson, P.C. v. Milko, 124
21 Nev. 355, 362, 184 P.3d 378, 383-384(2008)(internal quotes and citations omitted). The
22 burden of proof is on the party attacking or resisting the decision to show that the final
23 decision is invalid . . .". NRS 233B.135(2). An appellate court's review of findings of fact is
24 explicitly limited by NRS 233B.135(3) which prohibits a reviewing court from "substitut[ing]
25 its judgment for that of the agency as to the weight of evidence on a question of fact." ³
26

27
28 ³ See also, Construction Indus. v. Chaloe, 119 Nev. 348, 351-352, 74 P.3d 595, 597 (2003) (We review
an administrative body's decision for clear error or an arbitrary abuse of discretion); State, Dep't Mtr.
Veh. v. Jones-West Ford, 114 Nev. 766 (1998) (Our role in reviewing an administrative decision is

1 The task of the Review Board is to receive and weigh the evidence; an appellate court
2 is not to substitute its judgment for that of the administrative law judge on matters of weight,
3 credibility or issues of fact. ⁴ On issues of fact, the court's review of an agency decision is
4 limited to whether substantial evidence exists to support the findings of fact, and Nevada
5 case law mandates an appellate court affirm the decision of an Appeals Officer if the decision
6 is supported by substantial evidence. ⁵ Substantial evidence is "evidence that a reasonable
7 person could accept as adequately supporting a conclusion," ⁶ and is less stringent than
8 standards requiring "clear and convincing" or "beyond a reasonable doubt." A reviewing
9 court "will not reweigh the evidence or pass on the credibility of witnesses."⁷ Therefore, this
10 Court must only answer the question whether substantial evidence exists to support the
11 Review Board's Findings of Fact, Conclusions of Law, and Final Order.

12 13 DISCUSSION

14 Petitioner Sierra Packaging argues that:

- 15 • The Review Board committed an error of law by finding the cited standard applied to
16 the "conduct or work conditions at issue", specifically because
 - 16 ○ Its employees were not "required" to use fall protection to accomplish the
 - 17 assigned task of installing stabilizing plates on the racking system, and
 - 17 ○ The task could have been accomplished using ladders;
- 18 • The Review Board committed an error of law by admitted hearsay statements from
19 three of Sierra Packaging's employees whom it had allegedly failed to train;
- 20 • The Decision was arbitrary and capricious as the Review Board "ignored relevant
21 evidence and reached its decision without sufficient evidentiary support"; and
- 22 • The Decision was arbitrary and capricious because the Review Board rejected Sierra
23 Packaging's defense that the employees' actions of climbing on the racks, an activity
24 that required fall protection, was employee misconduct, violating Sierra Packaging's
25 policy that expressly prohibited any employee from climbing on the racks.

26 identical to that of the district court—to review the evidence before the agency so that a determination
27 can be made as to whether the agency decision was arbitrary, capricious, or an abuse of discretion).

28 ⁴ See Apeceche v. White Pine Co., 96 Nev. 723, 616 P.2d 975 (1980).

⁵ Manwill v. Clark County, 123 Nev. 238, 162 P.3d 876 (2007).

⁶ Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-492 (2003).

⁷ Desert Valley Construction v. Hurley, 120 Nev. 499, 502, 96 P.3d 739, (2004).

1 Sierra Packaging focuses extensively on the use of the word “required” in the cited
2 standard. It also seeks to narrow the definition of “required”, as used in the cited standard, to
3 mean there is only one option for compliance. Since Sierra Packaging did not require its
4 employees to use fall protection when working on the storage racks, as the task could be
5 accomplished without the need for fall protection, Sierra Packaging maintains the standard
6 does not apply.

7 As to the definition itself, it is not so narrowly structured as to admit to only one
8 option possible⁸. Definitions of “required” also encompass circumstances where someone in
9 authority instructs, expects, or calls for someone to do something.

10 Here, Safety Manager Hodges admitted maintenance employees are required to have
11 fall protection training, because they are the ones sometimes required to work at heights.
12 EOR 77:15-22. Maint. Mgr. Tintinger identified the three employees pictured as temporary
13 maintenance employees. EOR 119-120. Safety Mgr. Hodges further testified that he was
14 aware that two of the three individuals identified in the photographs on top of the racks were
15 trained in fall protection to change lightbulbs. EOR 86:23 through 87:6. Harnesses are made
16 available to maintenance employees by Sierra Packaging, and Maint. Mgr. Tintinger admitted
17 he had at times observed the identified employees with fall protection PPE. EOR 101:15-23.

18 Moreover, one of the employees interviewed specifically stated that Maint. Mgr.
19 Tintinger instructed them to install the plates between the racks using a five-point harness
20 and a ladder, but this employee decided to use the ladder instead of the harness. EOR 126.

21 Further, the standard states “The employer shall provide training to each employee
22 who is required *by this section* to use PPE.” 29 CFR 1910.132(f)(1)(emphasis added). The first
23 part of that section provides some context:

24 Application. Protective equipment, including personal protective equipment for . . .
25 extremities . . . and protective shields and barriers, shall be provided, used, and
26 maintained in a sanitary and reliable condition *wherever it is necessary by reason of*
hazards of processes or environment, . . . encountered in a manner capable of causing

27 ⁸ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/required> (last visited
28 February 20, 2015); The New Oxford American Dictionary,
http://www.oxforddictionaries.com/us/definition/american_english/require (last visited July 20, 2015).

1 injury or impairment in the function of any part of the body through absorption,
2 inhalation or physical contact.

3 29 CFR 1910.132(a)(emphasis added). Neither section of 29 CFR 1910.132 states the
4 requirement to provide PPE, or training on its use and limitations, is task-specific. In this
5 context, working at heights is the "hazard" requiring the use of protective equipment, and the
6 five-point harness systems are the protective equipment provided.

7 Sierra Packaging does not dispute that the three employees identified in this
8 inspection were not trained in fall protection issues. CSHO Cox testified all three employees
9 demonstrated very little basic knowledge, training, or understanding of the use or limitations
10 of PPE. EOR 42:2 through 44:14, 53:1 - 23, 68:3 through 69:14. Additionally CSHO Cox
11 testified that, when she met with the five Sierra Packaging management representatives, they
12 also failed to demonstrate knowledge of PPE use or limitations, including the fall distances
13 required for a lanyard. EOR 46-48. They were unable to confirm or document any employee
14 knowledge or training in the use of the five-point harness system. EOR 43:24 through 44:14.

15 Sierra Packaging argues providing "access" to fall protection equipment is irrelevant to
16 OSHA establishing a violation occurred, as it does not show Sierra Packaging "required" use
17 of the PPE.

18 Establishing employee exposure is an element of OSHA's prima facie case. In 1976, the
19 federal Occupational Safety and Health Review Commission (OSHRC) expressly disavowed
20 proof of actual exposure as a requirement, given OSHA's preventative purpose, and
21 developed the "rule of access". Secretary of Labor v. Gilles & Cotting, Inc., 3 BNA OSHC
22 2002, 1976 WL 5933 at *4 (OSHRC, Feb 20, 1976) ("On balance we conclude that a rule of
23 access based on reasonable predictability is more likely to further the purposes of the Act
24 than is a rule requiring proof of actual exposure.").

25 The "rule of access" standard based on "reasonable predictability" of employee
26 exposure has subsequently been applied with relative consistency by the OSHRC:

27 The Secretary could establish exposure by showing that employees were actually
28 exposed to the hazard, or that it was reasonably predictable that during the course of
their normal work duties, employees might be in the 'zone of danger' posed by the

1 [violative] condition; see generally Mark A. Rothstein, *Occupational Safety and*
2 *Health Law* §5:13 (2013 ed). And, although phrased differently by some courts, the
3 standard derived from *Gilles & Cotting, Inc.*—which ultimately requires, simply, that
4 the agency prove that it was reasonably predictable that one or more **employees had**
5 **been, were, or would be exposed to the hazard presented by the violative**
6 **condition at issue**—has been endorsed by a majority of the federal appellate courts
7 that have considered the issue and remains the prevailing standard of proof with
8 respect to employee exposure under the federal OSHA.

9 Or. Occupational Safety & Health Div. v. Moore Excavation, Inc., 307 P.3d 510, 516, 257 Ore.
10 App. 567, 576-577(2013)(quoting Secretary of Labor v. Field & Associates, Inc., 19 OSH Cas
11 (BNA) 1379, 1383 (2001))(internal citations omitted).

12 The Ninth Circuit is among the majority of federal courts that have endorsed the “rule
13 of access” standard, so long as it is reasonably predictable employees have access to a zone of
14 danger/hazard. R. Williams Constr. Co. v. OSHRC, 464 F.3d 1060, 1064 (9th Cir. 2006).

15 Here, Safety Manager Hodges admitted maintenance employees are sometimes
16 required to work at heights. EOR 77:15-22. Harness systems are made available to
17 maintenance employees by Sierra Packaging, and Maint. Mgr. Tintinger admitted he had at
18 times observed the identified employees with fall protection PPE. EOR 101:15-23.

19 Providing maintenance employees access to the harness system, without the training
20 to teach them the uses and limitations of such equipment, makes it reasonably predictable
21 these employees had been, were, and continue to be exposed to fall hazards.

22 While Sierra Packaging argues the Review Board’s finding that providing its
23 employees access to fall protection equipment does not mean it “required” its use, this
24 position fails to provide a basis for finding the final Decision erroneous. The Review Board
25 has taken the reasonable stance that when an employer provides fall protection equipment, it
26 must also provide the training on the safe use of such equipment.

27 Despite Sierra Packaging’s argument that the assigned task could have been
28 accomplished on ladders, the record shows no evidence to support the contention that the
entire task could be accomplished with ladders, or that there were sufficient ladders available
to the identified employees. Regardless, the availability and sufficiency of ladders does not
negate the facts Sierra Packaging provided PPE, Maint. Mgr. Tintinger instructed the

1 employees to use the PPE for this task, and had previously seen the employees using the PPE,
2 yet no training was provided.

3 Accordingly, no error of law was committed by the Review Board when it found the
4 cited standard applied to the situation at hand.

5 Sierra Packaging's argument, that the Review Board committed an error of law by
6 admitting hearsay statements, is without merit.

7 The three employees identified in this inspection were interviewed by CSHO Cox, with
8 the help of a Sierra Packaging-provided translator. They provided information relevant to the
9 inspection, including the fact that harnesses were provided by Sierra Packaging, that they
10 had been directed to use the harnesses for the assigned task, and that they had received no
11 fall protection training. None of these employees were present at the hearing.

12 However, the Nevada Supreme Court has supported the assertion that hearsay
13 evidence can be regarded as substantial evidence for the purposes of an administrative
14 hearing and that therefore hearsay evidence can be the basis of an administrative decision.
15 *See Dept. of Motor Vehicles v. Kiffe*, 101 Nev. 729, 709 P.2d 1017 (1985), *see also Schaefer v.*
16 *United States*, 633 F.2d 945 (Ct.Cl. 1980). Thus the Review Board properly considered this
17 information, and its Decision is without an error of law.

18 Additionally, there is no support for Sierra Packaging's contention that the Review
19 Board ignored relevant evidence in reaching its Decision.

20 Sierra Packaging is correct that the Review Board's Decision does not explicitly
21 mention the testimony of Sean Tracy, Sierra Packaging's Plant Operations Manager ("Plant
22 Ops Mgr."). No support is offered for the position that the Review Board is required to
23 mention every witness or document submitted in its Decision, before it can be valid.

24 Here, the Review Board presumably found the testimony to be irrelevant, not
25 necessitating a credibility finding. This is supported by the fact that, even if Plant Ops Mgr.
26 Tracy's testimony is accepted as true, it does not negate the relevant facts discussed supra,
27 which form the basis of the violation.

28 ///

1 Simply because the Review Board did not find the testimony of a witness or some
2 documents noteworthy does not mean that testimony and evidence was “ignored”. There is
3 no evidence that the Review Board failed to recognize the importance of the documentary or
4 testimonial evidence.

5 The Review Board’s Decision is not capricious, as it is supported by the specifically-
6 determined-credible testimony of CSHO Cox, the submitted evidence, and even Sierra
7 Packaging’s own testimony.

8 As evident in the Decision, the Review Board relied heavily on the testimony of the NV
9 OSHA inspector. During her testimony, CSHO Cox went through the four specific elements of
10 OSHA’s prima facie case, making reference to the documentary evidence that supported
11 each. She distinctly explained how everyone she spoke with at the facility regarding the
12 harness provided demonstrated very little basic knowledge, training, or understanding of the
13 use or limitations of the PPE. EOR 42:2 through 44:14, 53:1-23; 68:3 through 69:14. The
14 Review Board specifically found the testimony and evidence presented by and through
15 CSHO Cox credible, which evidence established the cited violation. EOR 21:16-17.

16 The only contradictory evidence presented by Sierra Packaging regarding the
17 employees’ statements or CSHO Cox’ testimony regarding the harness was Maint. Mgr.
18 Tintinger’s testimony, which the Review Board found was “unsupported”. EOR 21:18-19.

19 The Review Board’s credibility determinations regarding the witnesses are not subject
20 to review. NRS 233B.135(3); Law Offices of Barry Levinson, 124 Nev. 355. Due to the fact
21 that CSHO Cox was found credible, the Review Board gave more weight to the evidence
22 presented through her, than through the evidence presented through Sierra Packaging. This
23 is a proper function of the Review Board, and the weight it chose to give any evidence is also
24 not subject to review. NRS 233B.135(3); Law Offices of Barry Levinson, 124 Nev. 355.

25 Finally, Sierra Packaging’s argument that the Decision is arbitrary and capricious
26 because the Review Board improperly rejected Sierra Packaging’s “employee misconduct”
27 defense is not supported by the record. Sierra’s defense that the employees’ actions of
28 climbing on the racks, an activity that required fall protection, was employee misconduct,

1 violating Sierra' policy that expressly prohibited any employee from climbing on the racks."
2 Opening Brief 1:16-18.

3 To establish the affirmative defense of employee misconduct, four (4) factors must be
4 shown by the employer. See Capform, Inc., 16 OSH Cases 2040, 2043 (Rev. Comm'n 1994);
5 Rabinowitz Occupational Safety and Health Law, 2008, 2d Ed., page 156. The factors are that
6 it: 1) established work rules to prevent the violation from occurring; 2) adequately
7 communicated those rules to its employees; 3) took steps to discover violations of those
8 rules, and; 4) effectively enforced the safety rules and took disciplinary action when
9 violations were discovered. *Id.* If **any one** of these factors is lacking, the defense fails.

10 Here, Sierra Packaging presented evidence on only the first factor, i.e., that its safety
11 policy prohibits employees from climbing the racking. No evidence was provided in support
12 of the remaining three factors.

13 Since Sierra Packaging failed to meet its burden to establish this defense, the Review
14 Board did not act with a capricious disregard when it rejected it.

15 Sierra Packaging's other arguments are without merit.

16 The Review Board's Decision was ultimately based on the credible testimony of CSHO
17 Cox, the plain language of the cited standard, and the corroborating testimonial and
18 documentary evidence in the record.

19 Pursuant to NRS 233B.135(2), the Review Board's Decision is presumed reasonable
20 and lawful. Accordingly the burden shifts to Sierra Packaging, as the Petitioner, to prove that
21 the Decision is invalid and must be reversed or set aside based on one of the enumerated
22 reasons listed under NRS 233B.135(3). NRS 233B.135(2). Sierra Packaging did not meet that
23 burden.

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1 CONCLUSION

2 Having heard oral arguments and considered the pleadings and briefs submitted in
3 this matter, as well as the record on appeal, the Court finds as follows:

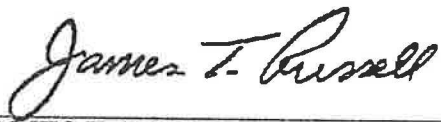
4 The Review Board's finding that the identified employees were maintenance
5 employees given access to fall protection equipment by Sierra Packaging, triggering the
6 requirements of 29 CFR 1910.132(f)(1)(iv), is supported by substantial evidence.

7 Further, the Petitioner failed to identify an abuse of discretion or error of law that
8 would warrant a reversal of the decision.


9 Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Review
10 Board's Decision is affirmed and Sierra Packaging & Converting, LLC's Petition for Judicial
11 Review is DENIED.

12 IT IS HEREBY FURTHER ORDERED that Sierra Packaging & Converting, LLC
13 submit its abatement certification and any other supporting documentation to Respondent
14 within 30 days of this signed Order.

15 Dated this 31st day of August, 2015.

16
17 
18 JAMES T. RUSSELL, District Judge

19 Submitted by:

20
21 
22 SALLI ORTIZ, Division Counsel
23 Nevada State Bar No. 9140
24 Nevada Division of Industrial Relations

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Washoe County School District

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SUSAN MENRIWETHEN
CLERK
BY  DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CARSON CITY

SIERRA PACKAGING & CONVERTING,
LLC,

Petitioner,

vs.

THE DIVISION OF INDUSTRIAL
RELATIONS OF THE DEPARTMENT OF
BUSINESS AND INDUSTRY, STATE OF
NEVADA; THE OCCUPATIONAL
SAFETY AND HEALTH REVIEW
BOARD; THE CHIEF ADMINISTRATIVE
OFFICER OF THE OCCUPATIONAL
SAFETY AND HEALTH
ADMINISTRATION OF THE DIVISION
OF INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA,

Respondents.

Case No.: ~~CX~~14-OC-00195-1B

Dept. No. 1

CASE APPEAL STATEMENT

Petitioner, SIERRA PACKAGING & CONVERTING, LLC ("Sierra"), submits the following Case Appeal Statement pursuant to Nevada Rules of Appellate Procedure 3(F):

I. Appellant filing this Case Appeal Statement:

Sierra Packaging & Coverting, LLC

II. The judge issuing the decision, judgment, or order appealed from:

The Honorable James T. Russell, First Judicial District Court, Dept. 1.

III. Parties to the proceedings in the District Court:

Sierra Packaging & Converting, LLC

Nevada Division of Industrial Relations
Nevada Occupational Safety and Health Review Board

IV. Parties Involved in this Appeal:

Appellant: Sierra Packaging & Converting, LLC
Respondent: Nevada Occupational Safety and Health Review Board
Respondent: Nevada Division of Industrial Relations

V. The name, law firm, address and telephone number of all counsel on appeal and the party or parties whom they represent:

Timothy E. Rowe, Esq.
MCDONALD CARANO WILSON LLP
100 West Liberty Street, 10th Floor
P.O. Box 2670
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Attorneys for Appellant, Sierra Packaging & Converting, LLC

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Carson City, NV 89703
Attorneys for Respondent Nevada Division of Industrial Relations

Fred Scarpello
Scarpello & Huss Ltd.
600 E. William St., Ste. 300
Carson City, NV 89701
Attorney for Respondent Nevada Occupational Safety and Health Review Board

VI. Indicate whether Appellant was represented by appointed or retained counsel in the district court:

Appellant was represented by retained counsel in the District Court.

VII. Indicate whether Appellant is represented by appointed or retained counsel on appeal:

Appellant is represented by retained counsel on appeal.

VIII. Indicate whether Appellant was granted leave to proceed in forma pauperis and the date of entry of the District Court order granting such leave:

Not applicable

IX. Indicate the date the proceedings commenced in the District Court:

The original Petition for Judicial Review in this case was filed on August 22, 2014.

X. Nature of the Action

This is an appeal from a District Court Order denying Appellant's Petition for

Judicial Review in a contested case before the Nevada Occupational Safety and Health Review Board.

XI. Prior proceedings before the Nevada Supreme Court.

None.

XII. Child custody or visitation.

Not applicable.

XIII. Possible settlement.

Settlement of the case is possible.

The undersigned does hereby affirm that pursuant to NRS 239B.030, the preceding does not contain the social security number of any person

DATED this 25th day of August, 2016.

McDONALD CARANO WILSON LLP

By:


TIMOTHY E. ROWE, ESQ.

Attorneys for
Appellant Sierra Packaging & Converting, LLC

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP, and that on the 25th day of August, 2016, I served the preceding **CASE APPEAL STATEMENT** via Reno Carson Messenger Service to the following parties

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Carole Davis

468910

Judge: RUSSELL, JUDGE JAMES
TODD

Case No. 14 OC 00195 1B

Ticket No.
CTN:

SIERRA PACKAGING &
CONVERTING, LLC

By:

-vs-

CHIEF ADMINISTRATIVE
OFFICER

DRSPND

By:

Dob:
Lic:
DEPARTMENT OF BUSINESS
AND INDUSTRY

Sex:
Sid:
DRSPND

By: ORTIZ, SALLI

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RENO, NV 89509

Dob:
Lic:
DIVISION OF INDUSTRIAL
RELATIONS

Sex:
Sid:
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NEVADA OCCUPATIONAL
SAFETY AND HEALTH REVIEW
BOARD

Sex:
Sid:
DRSPND

By:

Dob:
Lic:
OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION

Sex:
Sid:
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Sex:
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Dob:
Lic:

Sex:
Sid:

Plate#:
Make:
Year:
Type:
Venue:
Location:
Accident:

SIERRA PACKAGING &
CONVERTING, LLC

PLNTPET

Bond:
Type:

Set:
Posted:

Charges:

Ct.
Offense Dt:
Arrest Dt:
Comments:
Cvr:

Ct.
Offense Dt:
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Comments:
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Ct.
Offense Dt:
Arrest Dt:
Comments:
Cvr:

Sentencing:

No.	Filed	Action	Operator	Fine/Cost	Due
1	08/25/16	CASE APPEAL STATEMENT	1BCCOOPER	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
2	08/25/16	NOTICE OF APPEAL Receipt: 45863 Date: 08/25/2016	1BCCOOPER	24.00	0.00
3	08/01/16	NOTICE OF ENTRY OF ORDER DENYING PETITION FOR JUDICIAL REVIEW	1BJHIGGINS	0.00	0.00
4	08/31/15	SUMMARY JUDGMENT	1BJHIGGINS	0.00	0.00
5	08/31/15	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BJULIEH	0.00	0.00
6	08/31/15	ORDER DENYING PETITION FOR JUDICIAL REVIEW	1BJULIEH	0.00	0.00
7	07/13/15	HEARING HELD: The following event: PETITION HEARING scheduled for 07/13/2015 at 3:30 pm has been resulted as follows: Result: HEARING HELD Judge: RUSSELL, JUDGE JAMES TODD Location: DEPT I	1BJULIEH	0.00	0.00
8	07/01/15	TRIAL DATE MEMO	1BCCOOPER	0.00	0.00
9	06/22/15	ORDER VACATING HEARING ORDER TO SET	1BCGRIBBLE	0.00	0.00
10	05/27/15	TRIAL DATE MEMO	1BCFRANZ	0.00	0.00
11	05/14/15	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCCOOPER	0.00	0.00
12	05/14/15	ORDER FOR HEARING	1BCCOOPER	0.00	0.00
13	05/12/15	REQUEST FOR SUBMISSION	1BJULIEH	0.00	0.00
14	04/13/15	REQUEST FOR ORAL ARGUMENT	1BCCOOPER	0.00	0.00
15	03/30/15	RESPONDENTS REPLY BRIEF	1BCCOOPER	0.00	0.00
16	02/23/15	RESPONDENT DIVISION OF INDUSTRIAL RELATION'S ANSWERING BRIEF	1BCGRIBBLE	0.00	0.00
17	12/24/14	NOTICE OF ENTRY OF ORDER APPROVING STIPULATION TO EXTEND BRIEFING SCHEDULE	1BCFRANZ	0.00	0.00
18	12/17/14	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BJHIGGINS	0.00	0.00
19	12/17/14	ORDER	1BJHIGGINS	0.00	0.00
20	12/16/14	STIPULATION TO EXTEND BRIEFING SCHEDULE	1BVANESSA	0.00	0.00
21	11/24/14	EXCERPTS OF RECORD VOLUME 2	1BJHIGGINS	0.00	0.00
22	11/24/14	EXCERPTS OF RECORD VOLUME 1	1BJHIGGINS	0.00	0.00
23	11/24/14	PETITIONER'S OPENING BRIEF	1BJHIGGINS	0.00	0.00
24	10/29/14	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCCOOPER	0.00	0.00
25	10/29/14	STIPULATION AND ORDER TO EXTEND TIME FOR FILING PETITIONERS OPENING BRIEF	1BCCOOPER	0.00	0.00
26	09/15/14	CERTIFICATE OF MAILING	1BJHIGGINS	0.00	0.00
27	09/15/14	CERTIFICATION OF RECORD	1BJHIGGINS	0.00	0.00

No.	Filed	Action	Operator	Fine/Cost	Due
28	09/15/14	TRANSMITTAL OF RECORD ON APPEAL	1BJHIGGINS	0.00	0.00
29	08/27/14	DIVISION OF INDUSTRIAL RELATIONS' STATEMENT OF INTENT TO PARTICIPATE	1BVANESSA	0.00	0.00
30	08/26/14	FILE RETURNED AFTER SUBMISSION - ORDER ENTERED	1BCCOOPER	0.00	0.00
31	08/26/14	ORDER BRIEFING SCHEDULE	1BCCOOPER	0.00	0.00
32	08/22/14	PLAINTIFF'S/PETITIONER'S INITIAL APPEARANCE AFFIRMATION PURSUANT TO NRS 239.030	1BJHIGGINS	0.00	0.00
33	08/22/14	PETITION FOR JUDICIAL REVIEW Receipt: 35826 Date: 08/25/2014	1BJHIGGINS	265.00	0.00
Total:				289.00	0.00
Totals By: COST				289.00	0.00
INFORMATION				0.00	0.00
*** End of Report ***					

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SUSAN MERRIWETHER
CLERK
BY: *[Signature]*
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

SIERRA PACKAGING & CONVERTING, LLC,
Petitioner,

vs.

THE DIVISION OF INDUSTRIAL RELATIONS
OF THE DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA; THE
OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD; THE CHIEF
ADMINISTRATIVE OFFICER OF THE
OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION OF THE DIVISION OF
INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA,

Case No. 14-OC-00195-1B

Dept. No. 1

Respondents.

ORDER DENYING PETITION FOR JUDICIAL REVIEW

On August 22, 2014, SIERRA PACKAGING & CONVERTING, LLC ("Sierra Packaging"), filed its petition for judicial review of the Nevada Occupational Safety and Health Administration Review Board's (Review Board) April 11, 2014, Decision and its July 28, 2014, Findings of Fact, Conclusions of Law, and Final Order. The Review Board's Decision affirmed the September 10, 2013, Citation and Notification of Penalty¹, containing safety citations and proposed penalties, issued by Respondent Chief Administrative Officer of

¹ The Citation and Notification of Penalty also alleged a violation of 29 CFR 1910.132(d)(1), but this violation was not contested. As a result, no further allegations were made in NV OSHA's Complaint, the Review Board did not address it in its Decision, and it is not the subject of this Petition.

1 the Occupational Safety and Health Administration of the Division of Industrial Relations of
2 the Department of Business and Industry, State of Nevada (NV OSHA).

3
4 FACTS

5 Respondent NV OSHA, a section of the Division of Industrial Relations ("Division") of
6 the Nevada Department of Business and Industry, is responsible for enforcing the provisions
7 of Chapter 618 of the Nevada Revised Statutes and the federal Occupational Safety and
8 Health Act ("OSH Act"), 29 USCS § 651 pursuant to Section 18 of the OSH Act. The Review
9 Board, created pursuant to NRS 618.565, consists of five members: two members are
10 representatives of management, two of labor, and the fifth is a representative of the general
11 public. The Review Board conducts formal, fact finding hearings in contested cases involving
12 citations issued by NV OSHA.

13 The Citation at issue in this proceeding was based on the results of a NV OSHA
14 investigation, Inspection No. 317224608, conducted at Sierra Packaging's Reno, NV,
15 manufacturing site. ROA 177².

16 On August 9, 2013, NV OSHA received a referral complaint from an anonymous
17 source alleging various safety and/or health violations by Sierra Packaging:

- 18 • Employees climbing in racking without being protected from falls; and
19 • Employees operating powered industrial trucks without certificate of
20 training.

21 EOR 115.

22 The anonymous source provided with this referral complaint photographs of three
23 employees working/climbing on racking without any fall protection. EOR 153-155.

24 Based on this referral complaint, Jennifer Cox, a Compliance Safety and Health
25 Officer ("CSHO") with NV OSHA, conducted an inspection, number 317224608, on
26 August 16, 2013. EOR 116.

27 ///

28

² A copy of Petitioner's Excerpts of Record ("EOR"), Volume 1 and Volume 2, are on file with the Court. Citations are made to both the EOR and the Record on Appeal ("ROA").

1 CSHO Cox conducted an investigation and verified the location and authenticity of the
2 photographs provided in the referral complaint as being taken in the Sierra Packaging's
3 Reno-Stead warehouse. The employees were identified by Maintenance Manager Steve
4 Tintinger ("Maint. Mgr. Tintinger"), as temporary maintenance Employees Caal, Soto, and
5 Gonzalez. EOR 119-120.

6 CSHO Cox interviewed each employee identified in the photographs, with the
7 assistance of a Spanish speaking translator provided by Sierra Packaging. EOR 120; 125-127.

8 Employee Gonzalez admitted in his statement to CSHO Cox that: 1) he was climbing on
9 the racks; 2) he was assigned by a supervisor to put the stabilizers on the racks; 3) he was not
10 aware he was not supposed to climb the racks; 4) he had not been provided any safety
11 training, and; 5) he was not aware of any safety program. During the interview, Employee
12 Gonzalez was able to provide to CSHO Cox a five-point body harness, six foot lanyard and a
13 three foot shock plate. EOR 120, 125.

14 On cross-examination, CSHO Cox confirmed she did not know where the harness was
15 retrieved from, nor had she specifically asked if the harness was for employees to use while
16 working on the racks or whether it was just general fall protection equipment located in the
17 plant. ROA 111:6-20. CSHO Cox stated she simply asked to see the fall protection, and the
18 five-point body harness, six foot lanyard and a three foot shock plate was what was provided
19 to her. ROA 111:21-22.

20 Employee Caal stated he was working on a ladder, while the other two employees were
21 climbing on the racking. He stated he is aware of the safety training, harness, and other
22 personal protective equipment ("PPE") the company provides and that the training was
23 provided in Spanish. According to Employee Caal, Maint. Mgr. Tintinger assigned the
24 employees to secure metal between the racks. EOR 126. He also stated that management did
25 not oversee work being done. *Id.*

26 Employee Soto stated he was trained on fall protection or other PPE and is aware of
27 company safety policies (i.e. no climbing on racks, running on production floor, etc.).
28 EOR 127.

1 Following her employee interviews, CSHO Cox discussed her findings with several
2 management personnel. EOR 46-48. That discussion revealed the lack of knowledge from
3 management regarding the limitations of the harness system. *Id.* CSHO Cox took the time
4 to have Maint. Mgr. Tintinger model the harness while she explained to everyone the safety
5 features. *Id.*

6 In regards to the report that employees were operating powered industrial trucks
7 without certification, CSHO Cox found it invalid, therefore no violation was found regarding
8 this item of the complaint. EOR 120.

9 On September 10, 2013, NV OSHA issued a Citation and Notification of Penalty
10 ("Citations") for inspection number 317224608. EOR 131-142. On September 26, 2013, Sierra
11 Packaging filed a Notice of Contest of the Citation, contesting only Citation 1, Item 1:

12 29 CFR 1910.132(f)(1)(iv): The employer shall provide training to each employee
13 who is required by this section to use personal protective equipment (PPE). Each
such employee shall be trained to know the limitations of the PPE:

14 Facility; employees used a fall arrest system consisting of a five point body
15 harness, six foot lanyard with a three foot shock pack to access the top tier
16 racking located 15 feet, 7 inches high. The lack of knowledge of the minimum
17 required distance from a suitable anchorage point to ground exposed user to an
unarrested fall of 15 feet, 7 inches.

18 EOR 140; 143. The violation was classified as "Serious", with a proposed penalty of \$3,825.
19 EOR 143.

20 NV OSHA filed a Complaint with the Review Board on October 8, 2013. EOR 144-148.
21 Sierra Packaging served its Answer on October 23, 2013. EOR 149-152. The Review Board
22 heard the matter at an evidentiary hearing held on March 12, 2014. ROA 43. Testimony was
23 given at the hearing by several individuals, including CSHO Cox and Maint. Mgr. Tintinger.
24 ROA 72.

25 On April 11, 2014, the Review Board issued its written Decision affirming NV OSHA's
26 Citation 1, Item 1, and the proposed penalty of \$3,825. EOR 1-16. The Review Board
27 specifically found the testimony and evidence presented by and through CSHO Cox credible,
28 which evidence established the cited violation. EOR 21:16-17. The Review Board specifically

1 found Maint. Mgr. Tintinger's testimony was "unsupported". EOR 21:18-19. The Final Order
2 on this matter was issued on July 28, 2014. EOR 17.

3 Sierra Packaging timely filed the instant Petition for Judicial Review.
4

5 ISSUES

6 Although Sierra Packaging admits that maintenance workers do have some job tasks
7 that require them to work at heights, and does not dispute that it did not directly provide fall
8 protection training to employees, or training regarding the limitations of fall protection PPE,
9 Sierra Packaging argues such was not required as employees are prohibited from climbing on
10 the racking, and the task assigned could have been accomplished on ladders. Specifically,
11 Sierra Packaging argues that, since these temporary maintenance employees were not
12 required to work at heights, there was no requirement to train them on fall protection, so
13 there can be no violation.

14 Sierra Packaging also argues that simple "access" to a harness does not trigger the
15 cited standard.

16 STANDARD OF REVIEW

17 Pursuant to NRS 233B.135(2), the Review Board's final order "shall be deemed
18 reasonable and lawful until reversed or set aside in whole or in part by the court." "The
19 agency's fact-based conclusions of law are entitled to deference, and will not be disturbed if
20 they are supported by substantial evidence." Law Offices of Barry Levinson, P.C. v. Milko, 124
21 Nev. 355, 362, 184 P.3d 378, 383-384(2008)(internal quotes and citations omitted). The
22 burden of proof is on the party attacking or resisting the decision to show that the final
23 decision is invalid . . .". NRS 233B.135(2). An appellate court's review of findings of fact is
24 explicitly limited by NRS 233B.135(3) which prohibits a reviewing court from "substitut[ing]
25 its judgment for that of the agency as to the weight of evidence on a question of fact." ³
26

27
28 ³ See also, Construction Indus. v. Chalue, 119 Nev. 348, 351-352, 74 P.3d 595, 597 (2003) (We review
an administrative body's decision for clear error or an arbitrary abuse of discretion); State, Dep't Mtr.
Veh. v. Jones-West Ford, 114 Nev. 766 (1998) (Our role in reviewing an administrative decision is

1 The task of the Review Board is to receive and weigh the evidence; an appellate court
2 is not to substitute its judgment for that of the administrative law judge on matters of weight,
3 credibility or issues of fact. ⁴ On issues of fact, the court's review of an agency decision is
4 limited to whether substantial evidence exists to support the findings of fact, and Nevada
5 case law mandates an appellate court affirm the decision of an Appeals Officer if the decision
6 is supported by substantial evidence. ⁵ Substantial evidence is "evidence that a reasonable
7 person could accept as adequately supporting a conclusion," ⁶ and is less stringent than
8 standards requiring "clear and convincing" or "beyond a reasonable doubt." A reviewing
9 court "will not reweigh the evidence or pass on the credibility of witnesses."⁷ Therefore, this
10 Court must only answer the question whether substantial evidence exists to support the
11 Review Board's Findings of Fact, Conclusions of Law, and Final Order.

12 13 DISCUSSION

14 Petitioner Sierra Packaging argues that:

- 15 • The Review Board committed an error of law by finding the cited standard applied to
16 the "conduct or work conditions at issue", specifically because
 - 17 ○ Its employees were not "required" to use fall protection to accomplish the
assigned task of installing stabilizing plates on the racking system, and
 - 18 ○ The task could have been accomplished using ladders;
- 18 • The Review Board committed an error of law by admitted hearsay statements from
19 three of Sierra Packaging's employees whom it had allegedly failed to train;
- 20 • The Decision was arbitrary and capricious as the Review Board "ignored relevant
evidence and reached its decision without sufficient evidentiary support"; and
- 21 • The Decision was arbitrary and capricious because the Review Board rejected Sierra
22 Packaging's defense that the employees' actions of climbing on the racks, an activity
23 that required fall protection, was employee misconduct, violating Sierra Packaging's
policy that expressly prohibited any employee from climbing on the racks.

24
25 identical to that of the district court—to review the evidence before the agency so that a determination
can be made as to whether the agency decision was arbitrary, capricious, or an abuse of discretion).

26 ⁴ See Apeceche v. White Pine Co., 96 Nev. 723, 616 P.2d 975 (1980).

27 ⁵ Manwill v. Clark County, 123 Nev. 238, 162 P.3d 876 (2007).

28 ⁶ Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-492 (2003).

⁷ Desert Valley Construction v. Hurley, 120 Nev. 499, 502, 96 P.3d 739, (2004).

1 Sierra Packaging focuses extensively on the use of the word “required” in the cited
2 standard. It also seeks to narrow the definition of “required”, as used in the cited standard, to
3 mean there is only one option for compliance. Since Sierra Packaging did not require its
4 employees to use fall protection when working on the storage racks, as the task could be
5 accomplished without the need for fall protection, Sierra Packaging maintains the standard
6 does not apply.

7 As to the definition itself, it is not so narrowly structured as to admit to only one
8 option possible⁸. Definitions of “required” also encompass circumstances where someone in
9 authority instructs, expects, or calls for someone to do something.

10 Here, Safety Manager Hodges admitted maintenance employees are required to have
11 fall protection training, because they are the ones sometimes required to work at heights.
12 EOR 77:15-22. Maint. Mgr. Tintinger identified the three employees pictured as temporary
13 maintenance employees. EOR 119-120. Safety Mgr. Hodges further testified that he was
14 aware that two of the three individuals identified in the photographs on top of the racks were
15 trained in fall protection to change lightbulbs. EOR 86:23 through 87:6. Harnesses are made
16 available to maintenance employees by Sierra Packaging, and Maint. Mgr. Tintinger admitted
17 he had at times observed the identified employees with fall protection PPE. EOR 101:15-23.

18 Moreover, one of the employees interviewed specifically stated that Maint. Mgr.
19 Tintinger instructed them to install the plates between the racks using a five-point harness
20 and a ladder, but this employee decided to use the ladder instead of the harness. EOR 126.

21 Further, the standard states “The employer shall provide training to each employee
22 who is required *by this section* to use PPE.” 29 CFR 1910.132(f)(1)(emphasis added). The first
23 part of that section provides some context:

24 Application. Protective equipment, including personal protective equipment for . . .
25 extremities . . . and protective shields and barriers, shall be provided, used, and
26 maintained in a sanitary and reliable condition *wherever it is necessary by reason of
hazards of processes or environment*, . . . encountered in a manner capable of causing

27 ⁸ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/required> (last visited
28 February 20, 2015); The New Oxford American Dictionary,
http://www.oxforddictionaries.com/us/definition/american_english/require (last visited July 20, 2015).

1 injury or impairment in the function of any part of the body through absorption,
2 inhalation or physical contact.

3 29 CFR 1910.132(a)(emphasis added). Neither section of 29 CFR 1910.132 states the
4 requirement to provide PPE, or training on its use and limitations, is task-specific. In this
5 context, working at heights is the "hazard" requiring the use of protective equipment, and the
6 five-point harness systems are the protective equipment provided.

7 Sierra Packaging does not dispute that the three employees identified in this
8 inspection were not trained in fall protection issues. CSHO Cox testified all three employees
9 demonstrated very little basic knowledge, training, or understanding of the use or limitations
10 of PPE. EOR 42:2 through 44:14, 53:1 - 23, 68:3 through 69:14. Additionally CSHO Cox
11 testified that, when she met with the five Sierra Packaging management representatives, they
12 also failed to demonstrate knowledge of PPE use or limitations, including the fall distances
13 required for a lanyard. EOR 46-48. They were unable to confirm or document any employee
14 knowledge or training in the use of the five-point harness system. EOR 43:24 through 44:14.

15 Sierra Packaging argues providing "access" to fall protection equipment is irrelevant to
16 OSHA establishing a violation occurred, as it does not show Sierra Packaging "required" use
17 of the PPE.

18 Establishing employee exposure is an element of OSHA's prima facie case. In 1976, the
19 federal Occupational Safety and Health Review Commission (OSHRC) expressly disavowed
20 proof of actual exposure as a requirement, given OSHA's preventative purpose, and
21 developed the "rule of access". Secretary of Labor v. Gilles & Cotting, Inc., 3 BNA OSHC
22 2002, 1976 WL 5933 at *4 (OSHRC, Feb 20, 1976) ("On balance we conclude that a rule of
23 access based on reasonable predictability is more likely to further the purposes of the Act
24 than is a rule requiring proof of actual exposure.").

25 The "rule of access" standard based on "reasonable predictability" of employee
26 exposure has subsequently been applied with relative consistency by the OSHRC:

27 The Secretary could establish exposure by showing that employees were actually
28 exposed to the hazard, or that it was reasonably predictable that during the course of
their normal work duties, employees might be in the 'zone of danger' posed by the

1 [violative] condition; see generally Mark A. Rothstein, *Occupational Safety and*
2 *Health Law* §5:13 (2013 ed). And, although phrased differently by some courts, the
3 standard derived from *Gilles & Cotting, Inc.*—which ultimately requires, simply, that
4 the agency prove that it was reasonably predictable that one or more **employees had**
5 **been, were, or would be exposed to the hazard presented by the violative**
6 **condition at issue**—has been endorsed by a majority of the federal appellate courts
7 that have considered the issue and remains the prevailing standard of proof with
8 respect to employee exposure under the federal OSHA.

9 Or. Occupational Safety & Health Div. v. Moore Excavation, Inc., 307 P.3d 510, 516, 257 Ore.
10 App. 567, 576-577(2013)(quoting Secretary of Labor v. Field & Associates, Inc., 19 OSH Cas
11 (BNA) 1379, 1383 (2001))(internal citations omitted).

12 The Ninth Circuit is among the majority of federal courts that have endorsed the “rule
13 of access” standard, so long as it is reasonably predictable employees have access to a zone of
14 danger/hazard. R. Williams Constr. Co. v. OSHRC, 464 F.3d 1060, 1064 (9th Cir. 2006).

15 Here, Safety Manager Hodges admitted maintenance employees are sometimes
16 required to work at heights. EOR 77:15-22. Harness systems are made available to
17 maintenance employees by Sierra Packaging, and Maint. Mgr. Tintinger admitted he had at
18 times observed the identified employees with fall protection PPE. EOR 101:15-23.

19 Providing maintenance employees access to the harness system, without the training
20 to teach them the uses and limitations of such equipment, makes it reasonably predictable
21 these employees had been, were, and continue to be exposed to fall hazards.

22 While Sierra Packaging argues the Review Board’s finding that providing its
23 employees access to fall protection equipment does not mean it “required” its use, this
24 position fails to provide a basis for finding the final Decision erroneous. The Review Board
25 has taken the reasonable stance that when an employer provides fall protection equipment, it
26 must also provide the training on the safe use of such equipment.

27 Despite Sierra Packaging’s argument that the assigned task could have been
28 accomplished on ladders, the record shows no evidence to support the contention that the
entire task could be accomplished with ladders, or that there were sufficient ladders available
to the identified employees. Regardless, the availability and sufficiency of ladders does not
negate the facts Sierra Packaging provided PPE, Maint. Mgr. Tintinger instructed the

1 employees to use the PPE for this task, and had previously seen the employees using the PPE,
2 yet no training was provided.

3 Accordingly, no error of law was committed by the Review Board when it found the
4 cited standard applied to the situation at hand.

5 Sierra Packaging's argument, that the Review Board committed an error of law by
6 admitting hearsay statements, is without merit.

7 The three employees identified in this inspection were interviewed by CSHO Cox, with
8 the help of a Sierra Packaging-provided translator. They provided information relevant to the
9 inspection, including the fact that harnesses were provided by Sierra Packaging, that they
10 had been directed to use the harnesses for the assigned task, and that they had received no
11 fall protection training. None of these employees were present at the hearing.

12 However, the Nevada Supreme Court has supported the assertion that hearsay
13 evidence can be regarded as substantial evidence for the purposes of an administrative
14 hearing and that therefore hearsay evidence can be the basis of an administrative decision.
15 *See Dept. of Motor Vehicles v. Kiffe*, 101 Nev. 729, 709 P.2d 1017 (1985), *see also Schaefer v.*
16 *United States*, 633 F.2d 945 (Ct.Cl. 1980). Thus the Review Board properly considered this
17 information, and its Decision is without an error of law.

18 Additionally, there is no support for Sierra Packaging's contention that the Review
19 Board ignored relevant evidence in reaching its Decision.

20 Sierra Packaging is correct that the Review Board's Decision does not explicitly
21 mention the testimony of Sean Tracy, Sierra Packaging's Plant Operations Manager ("Plant
22 Ops Mgr."). No support is offered for the position that the Review Board is required to
23 mention every witness or document submitted in its Decision, before it can be valid.

24 Here, the Review Board presumably found the testimony to be irrelevant, not
25 necessitating a credibility finding. This is supported by the fact that, even if Plant Ops Mgr.
26 Tracy's testimony is accepted as true, it does not negate the relevant facts discussed supra,
27 which form the basis of the violation.

28 ///

1 Simply because the Review Board did not find the testimony of a witness or some
2 documents noteworthy does not mean that testimony and evidence was “ignored”. There is
3 no evidence that the Review Board failed to recognize the importance of the documentary or
4 testimonial evidence.

5 The Review Board’s Decision is not capricious, as it is supported by the specifically-
6 determined-credible testimony of CSHO Cox, the submitted evidence, and even Sierra
7 Packaging’s own testimony.

8 As evident in the Decision, the Review Board relied heavily on the testimony of the NV
9 OSHA inspector. During her testimony, CSHO Cox went through the four specific elements of
10 OSHA’s prima facie case, making reference to the documentary evidence that supported
11 each. She distinctly explained how everyone she spoke with at the facility regarding the
12 harness provided demonstrated very little basic knowledge, training, or understanding of the
13 use or limitations of the PPE. EOR 42:2 through 44:14, 53:1-23; 68:3 through 69:14. The
14 Review Board specifically found the testimony and evidence presented by and through
15 CSHO Cox credible, which evidence established the cited violation. EOR 21:16-17.

16 The only contradictory evidence presented by Sierra Packaging regarding the
17 employees’ statements or CSHO Cox’ testimony regarding the harness was Maint. Mgr.
18 Tintinger’s testimony, which the Review Board found was “unsupported”. EOR 21:18-19.

19 The Review Board’s credibility determinations regarding the witnesses are not subject
20 to review. NRS 233B.135(3); Law Offices of Barry Levinson, 124 Nev. 355. Due to the fact
21 that CSHO Cox was found credible, the Review Board gave more weight to the evidence
22 presented through her, than through the evidence presented through Sierra Packaging. This
23 is a proper function of the Review Board, and the weight it chose to give any evidence is also
24 not subject to review. NRS 233B.135(3); Law Offices of Barry Levinson, 124 Nev. 355.

25 Finally, Sierra Packaging’s argument that the Decision is arbitrary and capricious
26 because the Review Board improperly rejected Sierra Packaging’s “employee misconduct”
27 defense is not supported by the record. Sierra’s defense that the employees’ actions of
28 climbing on the racks, an activity that required fall protection, was employee misconduct,

1 violating Sierra' policy that expressly prohibited any employee from climbing on the racks."
2 Opening Brief 1:16-18.

3 To establish the affirmative defense of employee misconduct, four (4) factors must be
4 shown by the employer. See Capform, Inc., 16 OSH Cases 2040, 2043 (Rev. Comm'n 1994);
5 Rabinowitz Occupational Safety and Health Law, 2008, 2d Ed., page 156. The factors are that
6 it: 1) established work rules to prevent the violation from occurring; 2) adequately
7 communicated those rules to its employees; 3) took steps to discover violations of those
8 rules, and; 4) effectively enforced the safety rules and took disciplinary action when
9 violations were discovered. *Id.* If **any one** of these factors is lacking, the defense fails.

10 Here, Sierra Packaging presented evidence on only the first factor, i.e., that its safety
11 policy prohibits employees from climbing the racking. No evidence was provided in support
12 of the remaining three factors.

13 Since Sierra Packaging failed to meet its burden to establish this defense, the Review
14 Board did not act with a capricious disregard when it rejected it.

15 Sierra Packaging's other arguments are without merit.

16 The Review Board's Decision was ultimately based on the credible testimony of CSHO
17 Cox, the plain language of the cited standard, and the corroborating testimonial and
18 documentary evidence in the record.

19 Pursuant to NRS 233B.135(2), the Review Board's Decision is presumed reasonable
20 and lawful. Accordingly the burden shifts to Sierra Packaging, as the Petitioner, to prove that
21 the Decision is invalid and must be reversed or set aside based on one of the enumerated
22 reasons listed under NRS 233B.135(3). NRS 233B.135(2). Sierra Packaging did not meet that
23 burden.

24 ///

25 ///

26 ///

27 ///

28 ///

1 CONCLUSION

2 Having heard oral arguments and considered the pleadings and briefs submitted in
3 this matter, as well as the record on appeal, the Court finds as follows:

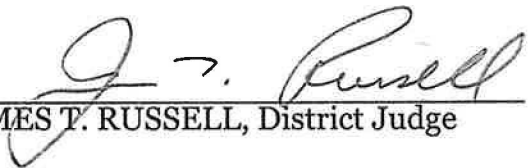
4 The Review Board's finding that the identified employees were maintenance
5 employees given access to fall protection equipment by Sierra Packaging, triggering the
6 requirements of 29 CFR 1910.132(f)(1)(iv), is supported by substantial evidence.

7 Further, the Petitioner failed to identify an abuse of discretion or error of law that
8 would warrant a reversal of the decision.


9 Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Review
10 Board's Decision is affirmed and Sierra Packaging & Converting, LLC's Petition for Judicial
11 Review is DENIED.

12 IT IS HEREBY FURTHER ORDERED that Sierra Packaging & Converting, LLC
13 submit its abatement certification and any other supporting documentation to Respondent
14 within 30 days of this signed Order.

15 Dated this 31st day of August, 2015.

16
17 
18 JAMES T. RUSSELL, District Judge

19 Submitted by:

20 
21 SALLI ORTIZ, Division Counsel
22 Nevada State Bar No. 9140
23 Nevada Division of Industrial Relations

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SUSAN MERRIWETHER
CLERK

BY  DEPUTY

Salli Ortiz, Division Counsel
Nevada Bar No. 9140
DIVISION OF INDUSTRIAL RELATIONS (DIR)
400 West King Street, Suite 201
Carson City, Nevada 89703
Telephone: (775) 684-7286
Facsimile: (775) 687-1621
Attorney for Respondent DIR

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

SIERRA PACKAGING & CONVERTING, LLC,
Petitioner,

vs.

THE DIVISION OF INDUSTRIAL RELATIONS
OF THE DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA; THE
OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD; THE CHIEF
ADMINISTRATIVE OFFICER OF THE
OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION OF THE DIVISION OF
INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA,

Case No: 14-OC-00195-1B

Dept. No: 1

Respondents.

**NOTICE OF ENTRY OF
ORDER DENYING PETITION FOR JUDICIAL REVIEW**

TO: All interested parties

NOTICE IS GIVEN that the duly executed ORDER was entered by the Court on
August 31, 2015, in the above-captioned case; and, a copy of Order Denying Petition for
Judicial Review is attached.

DATED this 29 day of July, 2016.

DIVISION OF INDUSTRIAL RELATIONS

By: 

Salli Ortiz, Division Counsel
Division of Industrial Relations
400 W. King Street, Ste. #201
Carson City, NV 89703
ATTORNEY FOR RESPONDENT DIR

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations (DIR), and that on this date, I caused to be served a true and correct copy of **NOTICE OF ENTRY of ORDER** by the method indicated below, and addressed to the following:

Person(s) Served:

SIERRA PACKAGING & CONVERTING
TIMOTHY ROWE ESQ
PO BOX 2670
RENO NV 89505-2670

U.S. Mail

☒ via State Mail room (regular or certified) circle one
☐ deposited directly with U.S. Mail Service
☐ Overnight Mail
☐ Interdepartmental Mail
☐ Messenger Service
☐ Facsimile fax number: _____

Person(s) Served:

JESS LANKFORD CAO OSHA
DIVISION OF INDUSTRIAL RELATIONS
1301 N GREEN VALLEY PKWY #200
HENDERSON NV 89074

U.S. Mail

☐ via State Mail room (regular or certified) circle one
☐ deposited directly with U.S. Mail Service
☐ Overnight Mail
☒ Interdepartmental Mail
☐ Messenger Service
☐ Facsimile fax number: _____


Person(s) Served:

NV OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD
C/O FRED SCARPELLO ESQ
600 E WILLIAM ST STE 300
CARSON CITY NV 89701

U.S. Mail

☒ via State Mail room (regular or certified) circle one
☐ deposited directly with U.S. Mail Service
☐ Overnight Mail
☐ Interdepartmental Mail
☐ Messenger Service
☐ Facsimile fax number: _____

DATED this 29 day of July, 2016.


State of Nevada Employee

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SUSAN MERRIWETHER
CLERK

BY _____ DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

SIERRA PACKAGING & CONVERTING, LLC,
Petitioner,

vs.

THE DIVISION OF INDUSTRIAL RELATIONS
OF THE DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA; THE
OCCUPATIONAL SAFETY AND HEALTH
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OCCUPATIONAL SAFETY AND HEALTH
ADMINISTRATION OF THE DIVISION OF
INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA,
Respondents.

Case No. 14-OC-00195-1B

Dept. No. 1

ORDER DENYING PETITION FOR JUDICIAL REVIEW

On August 22, 2014, SIERRA PACKAGING & CONVERTING, LLC ("Sierra Packaging"), filed its petition for judicial review of the Nevada Occupational Safety and Health Administration Review Board's (Review Board) April 11, 2014, Decision and its July 28, 2014, Findings of Fact, Conclusions of Law, and Final Order. The Review Board's Decision affirmed the September 10, 2013, Citation and Notification of Penalty¹, containing safety citations and proposed penalties, issued by Respondent Chief Administrative Officer of

¹ The Citation and Notification of Penalty also alleged a violation of 29 CFR 1910.132(d)(1), but this violation was not contested. As a result, no further allegations were made in NV OSHA's Complaint, the Review Board did not address it in its Decision, and it is not the subject of this Petition.

1 the Occupational Safety and Health Administration of the Division of Industrial Relations of
2 the Department of Business and Industry, State of Nevada (NV OSHA).

3
4 FACTS

5 Respondent NV OSHA, a section of the Division of Industrial Relations ("Division") of
6 the Nevada Department of Business and Industry, is responsible for enforcing the provisions
7 of Chapter 618 of the Nevada Revised Statutes and the federal Occupational Safety and
8 Health Act ("OSH Act"), 29 USCS § 651 pursuant to Section 18 of the OSH Act. The Review
9 Board, created pursuant to NRS 618.565, consists of five members: two members are
10 representatives of management, two of labor, and the fifth is a representative of the general
11 public. The Review Board conducts formal, fact finding hearings in contested cases involving
12 citations issued by NV OSHA.

13 The Citation at issue in this proceeding was based on the results of a NV OSHA
14 investigation, Inspection No. 317224608, conducted at Sierra Packaging's Reno, NV,
15 manufacturing site. ROA 177².

16 On August 9, 2013, NV OSHA received a referral complaint from an anonymous
17 source alleging various safety and/or health violations by Sierra Packaging:

- 18 • Employees climbing in racking without being protected from falls; and
19 • Employees operating powered industrial trucks without certificate of
20 training.

20 EOR 115.

21 The anonymous source provided with this referral complaint photographs of three
22 employees working/climbing on racking without any fall protection. EOR 153-155.

23 Based on this referral complaint, Jennifer Cox, a Compliance Safety and Health
24 Officer ("CSHO") with NV OSHA, conducted an inspection, number 317224608, on
25 August 16, 2013. EOR 116.

26 ///

27 _____
28 ² A copy of Petitioner's Excerpts of Record ("EOR"), Volume 1 and Volume 2, are on file with the Court.
Citations are made to both the EOR and the Record on Appeal ("ROA").

1 CSHO Cox conducted an investigation and verified the location and authenticity of the
2 photographs provided in the referral complaint as being taken in the Sierra Packaging's
3 Reno-Stead warehouse. The employees were identified by Maintenance Manager Steve
4 Tintinger ("Maint. Mgr. Tintinger"), as temporary maintenance Employees Caal, Soto, and
5 Gonzalez. EOR 119-120.

6 CSHO Cox interviewed each employee identified in the photographs, with the
7 assistance of a Spanish speaking translator provided by Sierra Packaging. EOR 120; 125-127.

8 Employee Gonzalez admitted in his statement to CSHO Cox that: 1) he was climbing on
9 the racks; 2) he was assigned by a supervisor to put the stabilizers on the racks; 3) he was not
10 aware he was not supposed to climb the racks; 4) he had not been provided any safety
11 training, and; 5) he was not aware of any safety program. During the interview, Employee
12 Gonzalez was able to provide to CSHO Cox a five-point body harness, six foot lanyard and a
13 three foot shock plate. EOR 120, 125.

14 On cross-examination, CSHO Cox confirmed she did not know where the harness was
15 retrieved from, nor had she specifically asked if the harness was for employees to use while
16 working on the racks or whether it was just general fall protection equipment located in the
17 plant. ROA 111:6-20. CSHO Cox stated she simply asked to see the fall protection, and the
18 five-point body harness, six foot lanyard and a three foot shock plate was what was provided
19 to her. ROA 111:21-22.

20 Employee Caal stated he was working on a ladder, while the other two employees were
21 climbing on the racking. He stated he is aware of the safety training, harness, and other
22 personal protective equipment ("PPE") the company provides and that the training was
23 provided in Spanish. According to Employee Caal, Maint. Mgr. Tintinger assigned the
24 employees to secure metal between the racks. EOR 126. He also stated that management did
25 not oversee work being done. *Id.*

26 Employee Soto stated he was trained on fall protection or other PPE and is aware of
27 company safety policies (i.e. no climbing on racks, running on production floor, etc.).
28 EOR 127.

1 Following her employee interviews, CSHO Cox discussed her findings with several
2 management personnel. EOR 46-48. That discussion revealed the lack of knowledge from
3 management regarding the limitations of the harness system. *Id.* CSHO Cox took the time
4 to have Maint. Mgr. Tintinger model the harness while she explained to everyone the safety
5 features. *Id.*

6 In regards to the report that employees were operating powered industrial trucks
7 without certification, CSHO Cox found it invalid, therefore no violation was found regarding
8 this item of the complaint. EOR 120.

9 On September 10, 2013, NV OSHA issued a Citation and Notification of Penalty
10 ("Citations") for inspection number 317224608. EOR 131-142. On September 26, 2013, Sierra
11 Packaging filed a Notice of Contest of the Citation, contesting only Citation 1, Item 1:

12 29 CFR 1910.132(f)(1)(iv): The employer shall provide training to each employee
13 who is required by this section to use personal protective equipment (PPE). Each
such employee shall be trained to know the limitations of the PPE:

14 Facility; employees used a fall arrest system consisting of a five point body
15 harness, six foot lanyard with a three foot shock pack to access the top tier
16 racking located 15 feet, 7 inches high. The lack of knowledge of the minimum
17 required distance from a suitable anchorage point to ground exposed user to an
unarrested fall of 15 feet, 7 inches.

18 EOR 140; 143. The violation was classified as "Serious", with a proposed penalty of \$3,825.
19 EOR 143.

20 NV OSHA filed a Complaint with the Review Board on October 8, 2013. EOR 144-148.
21 Sierra Packaging served its Answer on October 23, 2013. EOR 149-152. The Review Board
22 heard the matter at an evidentiary hearing held on March 12, 2014. ROA 43. Testimony was
23 given at the hearing by several individuals, including CSHO Cox and Maint. Mgr. Tintinger.
24 ROA 72.

25 On April 11, 2014, the Review Board issued its written Decision affirming NV OSHA's
26 Citation 1, Item 1, and the proposed penalty of \$3,825. EOR 1-16. The Review Board
27 specifically found the testimony and evidence presented by and through CSHO Cox credible,
28 which evidence established the cited violation. EOR 21:16-17. The Review Board specifically

1 found Maint. Mgr. Tintinger's testimony was "unsupported". EOR 21:18-19. The Final Order
2 on this matter was issued on July 28, 2014. EOR 17.

3 Sierra Packaging timely filed the instant Petition for Judicial Review.

4 5 ISSUES

6 Although Sierra Packaging admits that maintenance workers do have some job tasks
7 that require them to work at heights, and does not dispute that it did not directly provide fall
8 protection training to employees, or training regarding the limitations of fall protection PPE,
9 Sierra Packaging argues such was not required as employees are prohibited from climbing on
10 the racking, and the task assigned could have been accomplished on ladders. Specifically,
11 Sierra Packaging argues that, since these temporary maintenance employees were not
12 required to work at heights, there was no requirement to train them on fall protection, so
13 there can be no violation.

14 Sierra Packaging also argues that simple "access" to a harness does not trigger the
15 cited standard.

16 STANDARD OF REVIEW

17 Pursuant to NRS 233B.135(2), the Review Board's final order "shall be deemed
18 reasonable and lawful until reversed or set aside in whole or in part by the court." "The
19 agency's fact-based conclusions of law are entitled to deference, and will not be disturbed if
20 they are supported by substantial evidence." Law Offices of Barry Levinson, P.C. v. Milko, 124
21 Nev. 355, 362, 184 P.3d 378, 383-384(2008)(internal quotes and citations omitted). The
22 burden of proof is on the party attacking or resisting the decision to show that the final
23 decision is invalid . . .". NRS 233B.135(2). An appellate court's review of findings of fact is
24 explicitly limited by NRS 233B.135(3) which prohibits a reviewing court from "substitut[ing]
25 its judgment for that of the agency as to the weight of evidence on a question of fact." ³

26
27
28 ³ See also, Construction Indus. v. Chaloe, 119 Nev. 348, 351-352, 74 P.3d 595, 597 (2003) (We review
an administrative body's decision for clear error or an arbitrary abuse of discretion); State, Dep't Mtr.
Veh. v. Jones-West Ford, 114 Nev. 766 (1998) (Our role in reviewing an administrative decision is

1 The task of the Review Board is to receive and weigh the evidence; an appellate court
2 is not to substitute its judgment for that of the administrative law judge on matters of weight,
3 credibility or issues of fact. ⁴ On issues of fact, the court's review of an agency decision is
4 limited to whether substantial evidence exists to support the findings of fact, and Nevada
5 case law mandates an appellate court affirm the decision of an Appeals Officer if the decision
6 is supported by substantial evidence. ⁵ Substantial evidence is "evidence that a reasonable
7 person could accept as adequately supporting a conclusion," ⁶ and is less stringent than
8 standards requiring "clear and convincing" or "beyond a reasonable doubt." A reviewing
9 court "will not reweigh the evidence or pass on the credibility of witnesses."⁷ Therefore, this
10 Court must only answer the question whether substantial evidence exists to support the
11 Review Board's Findings of Fact, Conclusions of Law, and Final Order.

12 13 DISCUSSION

14 Petitioner Sierra Packaging argues that:

- 15 • The Review Board committed an error of law by finding the cited standard applied to
16 the "conduct or work conditions at issue", specifically because
 - 17 ○ Its employees were not "required" to use fall protection to accomplish the
assigned task of installing stabilizing plates on the racking system, and
 - The task could have been accomplished using ladders;
- 18 • The Review Board committed an error of law by admitted hearsay statements from
19 three of Sierra Packaging's employees whom it had allegedly failed to train;
- 20 • The Decision was arbitrary and capricious as the Review Board "ignored relevant
21 evidence and reached its decision without sufficient evidentiary support"; and
- 22 • The Decision was arbitrary and capricious because the Review Board rejected Sierra
23 Packaging's defense that the employees' actions of climbing on the racks, an activity
24 that required fall protection, was employee misconduct, violating Sierra Packaging's
policy that expressly prohibited any employee from climbing on the racks.

25 identical to that of the district court—to review the evidence before the agency so that a determination
can be made as to whether the agency decision was arbitrary, capricious, or an abuse of discretion).

26 ⁴ See Apeceche v. White Pine Co., 96 Nev. 723, 616 P.2d 975 (1980).

27 ⁵ Manwill v. Clark County, 123 Nev. 238, 162 P.3d 876 (2007).

28 ⁶ Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-492 (2003).

⁷ Desert Valley Construction v. Hurley, 120 Nev. 499, 502, 96 P.3d 739, (2004).

1 Sierra Packaging focuses extensively on the use of the word “required” in the cited
2 standard. It also seeks to narrow the definition of “required”, as used in the cited standard, to
3 mean there is only one option for compliance. Since Sierra Packaging did not require its
4 employees to use fall protection when working on the storage racks, as the task could be
5 accomplished without the need for fall protection, Sierra Packaging maintains the standard
6 does not apply.

7 As to the definition itself, it is not so narrowly structured as to admit to only one
8 option possible⁸. Definitions of “required” also encompass circumstances where someone in
9 authority instructs, expects, or calls for someone to do something.

10 Here, Safety Manager Hodges admitted maintenance employees are required to have
11 fall protection training, because they are the ones sometimes required to work at heights.
12 EOR 77:15-22. Maint. Mgr. Tintinger identified the three employees pictured as temporary
13 maintenance employees. EOR 119-120. Safety Mgr. Hodges further testified that he was
14 aware that two of the three individuals identified in the photographs on top of the racks were
15 trained in fall protection to change lightbulbs. EOR 86:23 through 87:6. Harnesses are made
16 available to maintenance employees by Sierra Packaging, and Maint. Mgr. Tintinger admitted
17 he had at times observed the identified employees with fall protection PPE. EOR 101:15-23.

18 Moreover, one of the employees interviewed specifically stated that Maint. Mgr.
19 Tintinger instructed them to install the plates between the racks using a five-point harness
20 and a ladder, but this employee decided to use the ladder instead of the harness. EOR 126.

21 Further, the standard states “The employer shall provide training to each employee
22 who is required *by this section* to use PPE.” 29 CFR 1910.132(f)(1)(emphasis added). The first
23 part of that section provides some context:

24 Application. Protective equipment, including personal protective equipment for . . .
25 extremities . . . and protective shields and barriers, shall be provided, used, and
26 maintained in a sanitary and reliable condition *wherever it is necessary by reason of
hazards of processes or environment*, . . . encountered in a manner capable of causing

27 ⁸ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/required> (last visited
28 February 20, 2015); The New Oxford American Dictionary,
http://www.oxforddictionaries.com/us/definition/american_english/require (last visited July 20, 2015).

1 injury or impairment in the function of any part of the body through absorption,
2 inhalation or physical contact.

3 29 CFR 1910.132(a)(emphasis added). Neither section of 29 CFR 1910.132 states the
4 requirement to provide PPE, or training on its use and limitations, is task-specific. In this
5 context, working at heights is the "hazard" requiring the use of protective equipment, and the
6 five-point harness systems are the protective equipment provided.

7 Sierra Packaging does not dispute that the three employees identified in this
8 inspection were not trained in fall protection issues. CSHO Cox testified all three employees
9 demonstrated very little basic knowledge, training, or understanding of the use or limitations
10 of PPE. EOR 42:2 through 44:14, 53:1 - 23, 68:3 through 69:14. Additionally CSHO Cox
11 testified that, when she met with the five Sierra Packaging management representatives, they
12 also failed to demonstrate knowledge of PPE use or limitations, including the fall distances
13 required for a lanyard. EOR 46-48. They were unable to confirm or document any employee
14 knowledge or training in the use of the five-point harness system. EOR 43:24 through 44:14.

15 Sierra Packaging argues providing "access" to fall protection equipment is irrelevant to
16 OSHA establishing a violation occurred, as it does not show Sierra Packaging "required" use
17 of the PPE.

18 Establishing employee exposure is an element of OSHA's prima facie case. In 1976, the
19 federal Occupational Safety and Health Review Commission (OSHRC) expressly disavowed
20 proof of actual exposure as a requirement, given OSHA's preventative purpose, and
21 developed the "rule of access". Secretary of Labor v. Gilles & Cotting, Inc., 3 BNA OSHC
22 2002, 1976 WL 5933 at *4 (OSHRC, Feb 20, 1976) ("On balance we conclude that a rule of
23 access based on reasonable predictability is more likely to further the purposes of the Act
24 than is a rule requiring proof of actual exposure.").

25 The "rule of access" standard based on "reasonable predictability" of employee
26 exposure has subsequently been applied with relative consistency by the OSHRC:

27 The Secretary could establish exposure by showing that employees were actually
28 exposed to the hazard, or that it was reasonably predictable that during the course of
their normal work duties, employees might be in the 'zone of danger' posed by the

1 [violative] condition; see generally Mark A. Rothstein, *Occupational Safety and*
2 *Health Law* §5:13 (2013 ed). And, although phrased differently by some courts, the
3 standard derived from *Gilles & Cotting, Inc.*—which ultimately requires, simply, that
4 the agency prove that it was reasonably predictable that one or more **employees had**
5 **been, were, or would be exposed to the hazard presented by the violative**
6 **condition at issue**—has been endorsed by a majority of the federal appellate courts
7 that have considered the issue and remains the prevailing standard of proof with
8 respect to employee exposure under the federal OSHA.

9 Or. Occupational Safety & Health Div. v. Moore Excavation, Inc., 307 P.3d 510, 516, 257 Ore.
10 App. 567, 576-577(2013)(quoting Secretary of Labor v. Field & Associates, Inc., 19 OSH Cas
11 (BNA) 1379, 1383 (2001))(internal citations omitted).

12 The Ninth Circuit is among the majority of federal courts that have endorsed the “rule
13 of access” standard, so long as it is reasonably predictable employees have access to a zone of
14 danger/hazard. R. Williams Constr. Co. v. OSHRC, 464 F.3d 1060, 1064 (9th Cir. 2006).

15 Here, Safety Manager Hodges admitted maintenance employees are sometimes
16 required to work at heights. EOR 77:15-22. Harness systems are made available to
17 maintenance employees by Sierra Packaging, and Maint. Mgr. Tintinger admitted he had at
18 times observed the identified employees with fall protection PPE. EOR 101:15-23.

19 Providing maintenance employees access to the harness system, without the training
20 to teach them the uses and limitations of such equipment, makes it reasonably predictable
21 these employees had been, were, and continue to be exposed to fall hazards.

22 While Sierra Packaging argues the Review Board’s finding that providing its
23 employees access to fall protection equipment does not mean it “required” its use, this
24 position fails to provide a basis for finding the final Decision erroneous. The Review Board
25 has taken the reasonable stance that when an employer provides fall protection equipment, it
26 must also provide the training on the safe use of such equipment.

27 Despite Sierra Packaging’s argument that the assigned task could have been
28 accomplished on ladders, the record shows no evidence to support the contention that the
entire task could be accomplished with ladders, or that there were sufficient ladders available
to the identified employees. Regardless, the availability and sufficiency of ladders does not
negate the facts Sierra Packaging provided PPE, Maint. Mgr. Tintinger instructed the

1 employees to use the PPE for this task, and had previously seen the employees using the PPE,
2 yet no training was provided.

3 Accordingly, no error of law was committed by the Review Board when it found the
4 cited standard applied to the situation at hand.

5 Sierra Packaging's argument, that the Review Board committed an error of law by
6 admitting hearsay statements, is without merit.

7 The three employees identified in this inspection were interviewed by CSHO Cox, with
8 the help of a Sierra Packaging-provided translator. They provided information relevant to the
9 inspection, including the fact that harnesses were provided by Sierra Packaging, that they
10 had been directed to use the harnesses for the assigned task, and that they had received no
11 fall protection training. None of these employees were present at the hearing.

12 However, the Nevada Supreme Court has supported the assertion that hearsay
13 evidence can be regarded as substantial evidence for the purposes of an administrative
14 hearing and that therefore hearsay evidence can be the basis of an administrative decision.
15 *See Dept. of Motor Vehicles v. Kiffe*, 101 Nev. 729, 709 P.2d 1017 (1985), *see also Schaefer v.*
16 *United States*, 633 F.2d 945 (Ct.Cl. 1980). Thus the Review Board properly considered this
17 information, and its Decision is without an error of law.

18 Additionally, there is no support for Sierra Packaging's contention that the Review
19 Board ignored relevant evidence in reaching its Decision.

20 Sierra Packaging is correct that the Review Board's Decision does not explicitly
21 mention the testimony of Sean Tracy, Sierra Packaging's Plant Operations Manager ("Plant
22 Ops Mgr."). No support is offered for the position that the Review Board is required to
23 mention every witness or document submitted in its Decision, before it can be valid.

24 Here, the Review Board presumably found the testimony to be irrelevant, not
25 necessitating a credibility finding. This is supported by the fact that, even if Plant Ops Mgr.
26 Tracy's testimony is accepted as true, it does not negate the relevant facts discussed supra,
27 which form the basis of the violation.

28 ///

1 Simply because the Review Board did not find the testimony of a witness or some
2 documents noteworthy does not mean that testimony and evidence was “ignored”. There is
3 no evidence that the Review Board failed to recognize the importance of the documentary or
4 testimonial evidence.

5 The Review Board’s Decision is not capricious, as it is supported by the specifically-
6 determined-credible testimony of CSHO Cox, the submitted evidence, and even Sierra
7 Packaging’s own testimony.

8 As evident in the Decision, the Review Board relied heavily on the testimony of the NV
9 OSHA inspector. During her testimony, CSHO Cox went through the four specific elements of
10 OSHA’s prima facie case, making reference to the documentary evidence that supported
11 each. She distinctly explained how everyone she spoke with at the facility regarding the
12 harness provided demonstrated very little basic knowledge, training, or understanding of the
13 use or limitations of the PPE. EOR 42:2 through 44:14, 53:1-23; 68:3 through 69:14. The
14 Review Board specifically found the testimony and evidence presented by and through
15 CSHO Cox credible, which evidence established the cited violation. EOR 21:16-17.

16 The only contradictory evidence presented by Sierra Packaging regarding the
17 employees’ statements or CSHO Cox’ testimony regarding the harness was Maint. Mgr.
18 Tintinger’s testimony, which the Review Board found was “unsupported”. EOR 21:18-19.

19 The Review Board’s credibility determinations regarding the witnesses are not subject
20 to review. NRS 233B.135(3); Law Offices of Barry Levinson, 124 Nev. 355. Due to the fact
21 that CSHO Cox was found credible, the Review Board gave more weight to the evidence
22 presented through her, than through the evidence presented through Sierra Packaging. This
23 is a proper function of the Review Board, and the weight it chose to give any evidence is also
24 not subject to review. NRS 233B.135(3); Law Offices of Barry Levinson, 124 Nev. 355.

25 Finally, Sierra Packaging’s argument that the Decision is arbitrary and capricious
26 because the Review Board improperly rejected Sierra Packaging’s “employee misconduct”
27 defense is not supported by the record. Sierra’s defense that the employees’ actions of
28 climbing on the racks, an activity that required fall protection, was employee misconduct,

1 violating Sierra' policy that expressly prohibited any employee from climbing on the racks."

2 Opening Brief 1:16-18.

3 To establish the affirmative defense of employee misconduct, four (4) factors must be
4 shown by the employer. *See Capform, Inc.*, 16 OSH Cases 2040, 2043 (Rev. Comm'n 1994);
5 Rabinowitz Occupational Safety and Health Law, 2008, 2d Ed., page 156. The factors are that
6 it: 1) established work rules to prevent the violation from occurring; 2) adequately
7 communicated those rules to its employees; 3) took steps to discover violations of those
8 rules, and; 4) effectively enforced the safety rules and took disciplinary action when
9 violations were discovered. *Id.* If **any one** of these factors is lacking, the defense fails.

10 Here, Sierra Packaging presented evidence on only the first factor, i.e., that its safety
11 policy prohibits employees from climbing the racking. No evidence was provided in support
12 of the remaining three factors.

13 Since Sierra Packaging failed to meet its burden to establish this defense, the Review
14 Board did not act with a capricious disregard when it rejected it.

15 Sierra Packaging's other arguments are without merit.

16 The Review Board's Decision was ultimately based on the credible testimony of CSHO
17 Cox, the plain language of the cited standard, and the corroborating testimonial and
18 documentary evidence in the record.

19 Pursuant to NRS 233B.135(2), the Review Board's Decision is presumed reasonable
20 and lawful. Accordingly the burden shifts to Sierra Packaging, as the Petitioner, to prove that
21 the Decision is invalid and must be reversed or set aside based on one of the enumerated
22 reasons listed under NRS 233B.135(3). NRS 233B.135(2). Sierra Packaging did not meet that
23 burden.

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1 CONCLUSION

2 Having heard oral arguments and considered the pleadings and briefs submitted in
3 this matter, as well as the record on appeal, the Court finds as follows:

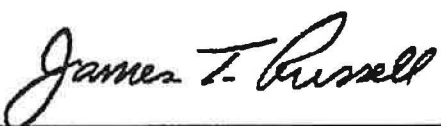
4 The Review Board's finding that the identified employees were maintenance
5 employees given access to fall protection equipment by Sierra Packaging, triggering the
6 requirements of 29 CFR 1910.132(f)(1)(iv), is supported by substantial evidence.

7 Further, the Petitioner failed to identify an abuse of discretion or error of law that
8 would warrant a reversal of the decision.


9 Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Review
10 Board's Decision is affirmed and Sierra Packaging & Converting, LLC's Petition for Judicial
11 Review is DENIED.

12 IT IS HEREBY FURTHER ORDERED that Sierra Packaging & Converting, LLC
13 submit its abatement certification and any other supporting documentation to Respondent
14 within 30 days of this signed Order.

15 Dated this 31st day of August, 2015.

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17 
18 JAMES T. RUSSELL, District Judge

19 Submitted by:

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21 
22 SALLI ORTIZ, Division Counsel
23 Nevada State Bar No. 9140
24 Nevada Division of Industrial Relations

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26
27 R:\Legal\FY2015\District Court\Sierra Packaging\FINAL Order Denying PJR (1st Judicial) - Sierra Packaging.docx
28

FIRST JUDICIAL DISTRICT COURT MINUTES

CASE NO. 14 OC 00195 1B

TITLE: SIERRA PACKAGING & CONVERTING
VS NEVADA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD and the
CHIEF ADMINISTRATIVE OFFICER OF
THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION OF THE
DIVISION OF INDUSTRIAL RELATIONS
OF THE DEPARTMENT OF BUSINESS
AND INDUSTRY, STATE OF NEVADA

07/13/15 – DEPT. I – HONORABLE JAMES T. RUSSELL
J. Harkleroad, Clerk – Not Reported

ORAL ARGUMENT

Present: Timothy Rowe, counsel for Pltf.; Salli Ortiz, counsel for Deft.

Arguments were made by counsel.

Court made its findings of fact, conclusions of law for the record,

COURT ORDERED: It will deny the petition for judicial review and Ortiz will prepare the Order for the Court.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

CIVIL COVER SHEET

Carson City
Case No. 140C 00195 1B
(Assigned by Clerk's Office)

REC'D & FILED

2014 AUG 22 PM 3:34

I. Party Information

Plaintiff(s) (name/address/phone):

Sierra Packaging & Converting, LLC

Attorney (name/address/phone):

Timothy E. Rowe, Esq.

McDonald Carano Wilson LLP, P.O. Box 2670

Reno, NV 89501 - phone: (775) 788-2000

Defendant(s) (name/address/phone):

Nevada Occupational Safety & Health Review Board and the Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business & Industry, State of Nevada

Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ Arbitration Requested

Civil Cases

Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence <input type="checkbox"/> Negligence – Auto <input type="checkbox"/> Negligence – Medical/Dental <input type="checkbox"/> Negligence – Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence – Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition

Probate	Other Civil Filing Types	
<input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Civil Petition for Judicial Review <input checked="" type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- | | | |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88 | <input type="checkbox"/> Investments (NRS 104 Art. 8) | <input type="checkbox"/> Enhanced Case Mgmt/Business |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90) | <input type="checkbox"/> Trademarks (NRS 600A) | |

August 21, 2014

Date

T.E. Rowe
Signature of initiating party or representative