

## EXHIBIT 3

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AUG - 1 2016

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

9 SIERRA PACKAGING & CONVERTING, LLC,  
 Petitioner,

10 vs.

11 THE DIVISION OF INDUSTRIAL RELATIONS  
 OF THE DEPARTMENT OF BUSINESS AND  
 12 INDUSTRY, STATE OF NEVADA; THE  
 OCCUPATIONAL SAFETY AND HEALTH  
 13 REVIEW BOARD; THE CHIEF  
 ADMINISTRATIVE OFFICER OF THE  
 14 OCCUPATIONAL SAFETY AND HEALTH  
 ADMINISTRATION OF THE DIVISION OF  
 15 INDUSTRIAL RELATIONS OF THE  
 DEPARTMENT OF BUSINESS AND  
 16 INDUSTRY, STATE OF NEVADA,

Case No: 14-OC-00195-1B

Dept. No: 1

17 Respondents.

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

20 TO: All interested parties

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

24 **DATED** this 29 day of July, 2016.

25 DIVISION OF INDUSTRIAL RELATIONS

26 By: \_\_\_\_\_

Salli Ortiz, Division Counsel  
 Division of Industrial Relations  
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## 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 MERRITT WETHER

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 Penalty<sup>1</sup>, containing safety citations and proposed penalties, issued by Respondent Chief Administrative Officer of

<sup>1</sup> 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 177<sup>2</sup>.

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 <sup>2</sup> 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." <sup>3</sup>  
26

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27  
28 <sup>3</sup> 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. <sup>4</sup> 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. <sup>5</sup> Substantial evidence is "evidence that a reasonable  
7 person could accept as adequately supporting a conclusion," <sup>6</sup> 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."<sup>7</sup> 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 <sup>4</sup> See Apeceche v. White Pine Co., 96 Nev. 723, 616 P.2d 975 (1980).

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

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

<sup>7</sup> 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 possible<sup>8</sup>. 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 <sup>8</sup> 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](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 31<sup>st</sup> 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

24 R:\Legal\FY2015\District Court\Sierra Packaging\FINAL Order Denying PJR (1st Judicial) - Sierra Packaging.docx  
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## EXHIBIT 2

## EXHIBIT 2

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SUSAN HERRIN WETHER

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 Penalty<sup>1</sup>, containing safety citations and proposed penalties, issued by Respondent Chief Administrative Officer of

<sup>1</sup> 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 177<sup>2</sup>.

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 <sup>2</sup> 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 REIVEW

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." <sup>3</sup>  
26

27  
28 <sup>3</sup> 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. <sup>4</sup> 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. <sup>5</sup> Substantial evidence is "evidence that a reasonable  
7 person could accept as adequately supporting a conclusion," <sup>6</sup> 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."<sup>7</sup> 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 <sup>4</sup> See Apeceche v. White Pine Co., 96 Nev. 723, 616 P.2d 975 (1980).

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

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

<sup>7</sup> 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 possible<sup>8</sup>. 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 <sup>8</sup> 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](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,



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

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

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

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

Sierra Packaging's other arguments are without merit.

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

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

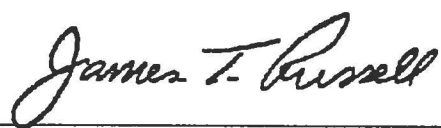
4 The Review Board's finding that the identified employees were maintenance  
5 employees given access to fall protection equipment by Sierra Packaging, triggering the  
6 requirements of 29 CFR 1910.132(f)(1)(iv), is supported by substantial evidence.

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

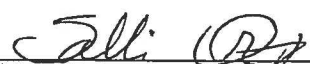
9 Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Review  
10 Board's Decision is affirmed and Sierra Packaging & Converting, LLC's Petition for Judicial  
11 Review is DENIED.

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 31<sup>st</sup> 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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26  
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28

# **EXHIBIT 1**

# **EXHIBIT 1**

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5 trowe@mcwlaw.com  
Attorneys for Appellant and Petitioner  
6 *Sierra Packaging & Converting, LLC*

REC'D & FILED

2014 AUG 22 PM 3:35

ALAN GLOYER  
J. HICONS  
BY \_\_\_\_\_ CLERK  
DEPUTY

7  
8 **IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
9 **IN AND FOR CARSON CITY**

\*\*\*\*\*

10 SIERRA PACKAGING & CONVERTING,  
11 LLC,

12 Petitioner,

13 vs.

14 NEVADA OCCUPATIONAL SAFETY AND  
15 HEALTH REVIEW BOARD and the CHIEF  
16 ADMINISTRATIVE OFFICER OF THE  
17 OCCUPATIONAL SAFETY AND HEALTH  
18 ADMINISTRATION OF THE DIVISION OF  
19 INDUSTRIAL RELATIONS OF THE  
20 DEPARTMENT OF BUSINESS AND  
INDUSTRY, STATE OF NEVADA

21 Respondents.

Case No.: 140200195 1B  
Dept. No.: I

22 **PETITION FOR JUDICIAL REVIEW**

23 The Petitioner, SIERRA PACKAGING & CONVERTING, LLC, by and through its  
24 attorney, Timothy E. Rowe, Esq., of McDonald Carano Wilson LLP, hereby appeals the Findings  
25 of Fact, Conclusions of Law and Final Order ("Order") rendered by the NEVADA  
26 OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD, ("Board") on July 28, 2014. A  
27 copy of the Order is attached hereto as Exhibit 1. The appeal is filed pursuant to NRS 233B.130.

28 The grounds upon which this review is sought are:

1. The Order rendered by the Board prejudices substantial rights of the Petitioner because it is:

- a. affected by error of law;
- b. clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and
- c. arbitrary and capricious and based upon an abuse of discretion by the Board.

WHEREFORE, Petitioner prays as follows:

1. The court grant judicial review of the Order filed on July 28, 2014, by the Board;
2. The court vacate and set aside the Order issued by the Board; and
3. For such other and further relief as the court deems just and proper.

The undersigned does hereby affirm that the preceding does not contain the social security number of any person

Dated this 21<sup>st</sup> day of August 2014.

McDONALD CARANO WILSON LLP

By: T. E. Rowe  
TIMOTHY E. ROWE, ESQ.  
P. O. Box 2670  
Reno, NV 895005-2670  
Attorneys for the Petitioner  
*Sierra Packaging & Converting, LLC*


McDONALD-CARANO-WILSON  
100 WEST LIBERTY STREET, 10<sup>TH</sup> FLOOR • RENO, NEVADA 89501  
P.O. BOX 2670 • RENO, NEVADA 89505-2670  
PHONE 775-788-2000 • FAX 775-788-2020

**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 on the 22nd day of August, 2014, I certify that I served copies of the preceding **PETITION FOR JUDICIAL REVIEW** via Reno Carson Messenger Service upon the following parties:

Nevada Occupational Safety and Health Review Board  
c/o Fred Scarpello, Attorney at Law  
Scarpello & Huss, Ltd.  
Bank of America Center  
600 W. William St., Ste. 300  
Carson City, NV 89701

Salli Ortiz, Esq., Division Counsel  
Division of Industrial Relations  
400 West King St., Suite 201A  
Carson City, NV 89433

  
Sandra Pelham

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INDEX OF EXHIBITS

<u>EXHIBIT #</u>	<u>DESCRIPTION</u>	<u>NO. OF PAGES</u>
1.	Findings of Fact, Conclusions of Law & Final Order	8

 McDONALD-CARANO-WILSON<sup>2</sup>  
100 WEST LIBERTY STREET, 10<sup>TH</sup> FLOOR • RENO, NEVADA 89501  
P.O. BOX 2670 • RENO, NEVADA 89505-2670  
PHONE 775-788-2000 • FAX 775-788-2020

# EXHIBIT 1

# EXHIBIT 1

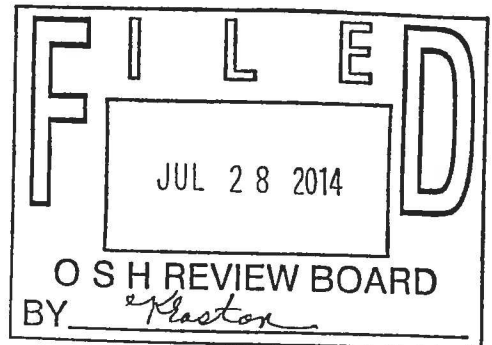


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JUL 29 2014

NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD



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,

Complainant,

vs.

SIERRA PACKAGING & CONVERTING, LLC,  
Respondent.

DOCKET NO: RNO14-1684

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

This matter was heard by the Nevada Occupational Safety and Health Review Board ("Board") on March 12, 2014. Complainant, the Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations, was represented by Salli Ortiz, Division Counsel. Respondent, Sierra Packaging & Converting, LLC, was represented by Timothy E. Rowe, Esq., McDonald Carano Wilson. The hearing was conducted pursuant to Chapter 618 and 233B of the Nevada Revised Statutes.

The Board, having heard testimony, admitted documentary evidence in this matter, considered the parties' respective arguments, and being fully advised regarding the underlying subject matter, renders the following findings of fact and conclusions of law:

**PRELIMINARY FINDINGS**

1. Complainant serves as the Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations, Department of Business and Industry ("NV OSHA"), which is the agency of the State of Nevada responsible for the administration of Occupational Safety and Health.

2. On October 8, 2013, NV OSHA filed a Complaint with the Board alleging violations of Nevada statutes, referenced in Exhibit "A," attached thereto.

///

1 3. Respondent, Sierra Packaging & Converting, LLC, is a Nevada limited liability  
2 company with business and mailing address at 11005 Stead Blvd, Reno, NV 89506. On  
3 August 16-19, 2013, Sierra Packaging & Converting, LLC ("Respondent"), was conducting  
4 business and maintaining a place of employment at 11005 Stead Blvd., Reno, NV, as defined  
5 by NRS 618.155.

6 4. Pursuant to NRS 618.315, jurisdiction has been conferred upon NV OSHA over the  
7 working conditions of Respondent's worksite.

8 5. Compliance Safety and Health Officer ("CSHO"), Jennifer Cox, conducted a safety  
9 inspection at Respondent's manufacturing site in Stead, Nevada, based on photographs  
10 received showing employees standing on "racking" without fall protection.

11 6. NV OSHA issued Citation and Notification of Penalty, Inspection No. 317224608  
12 on September 10, 2013, as a result of alleged code violations discovered at the worksite. A  
13 copy of the Citation was attached to the Summons and Complaint as Exhibit "A" served upon  
14 the Respondent and is incorporated herein by reference.

15 7. The parties stipulated to admit Complainant's Exhibit 1 and Respondent's Exhibits  
16 A through D.

#### 17 **ALLEGED VIOLATION<sup>1</sup>**

18 8. Citation 1, Item 1, charged a "Serious" violation of 29 CFR 1910.132(f)(1)(iv), for  
19 failure to provide training to each employee required by the standard to use personal  
20 protective equipment (PPE). A penalty of \$3,825 was imposed.

#### 21 **EVIDENCE**

22 9. At the hearing, CSHO Cox testified as to the basis for Citation 1, Item 1, having  
23 investigated Respondent's Stead, Nevada, manufacturing site during a walk-around  
24 inspection with Respondent personnel, Messrs. O'Grady and Tracy.

25 10. CSHO Cox conducted a safety inspection based on photographs received showing  
26 employees standing on "racking", described as shelving-type assemblies upon which  
27  
28

---

<sup>1</sup> Since Citation 2, Item 1, alleging a violation of 29 CFR 1910.132(d)(1) [no workplace hazard assessment done to determine necessity for PPE], classified as Other with no proposed penalty, was not contested, it is not addressed here.

1 products were placed and stored. The employees were not utilizing any fall protection  
2 devices, as confirmed by interviews and in photographic exhibits at pgs. 41 (A-C) and 42A.  
3 The employees were identified by Maintenance Supervisor Tintinger as those of Respondent.

4 11. CSHO Cox testified that she interviewed and obtained witness statements from  
5 employees Caal, Soto, and Gonzalez with the assistance of an interpreter employee of  
6 Respondent. Each employee's statement provided the information each had in regards to  
7 the racking: Employee Caal's statement said that Maintenance Supervisor Tintinger had told  
8 him to use fall protection; Employee Soto stated he was instructed not to climb on the racks;  
9 and, Employee Gonzalez stated he was not aware he should not climb on the racks. All three  
10 employees demonstrated very little basic knowledge, training, or understanding of the use or  
11 limitations of PPE, even when one employee retrieved a five-point harness available at the  
12 facility.

13 12. CSHO Cox testified that when she met with the five respondent management  
14 representatives, including Maintenance Supervisor Tintinger, they also failed to demonstrate  
15 knowledge of PPE use or limitations, including the fall distances required for a lanyard.  
16 They were also unable to confirm or document any employee knowledge or training in the  
17 use of the five-point harness.

18 13. CSHO Cox testified to the difficulties caused by the language barrier and limited  
19 translation resources available in interviewing the three employees.

20 14. CSHO Cox testified that the cited standard was applicable under the facts in  
21 evidence, as the Respondent had furnished to the employees the five-point harness fall arrest  
22 PPE, without the mandatory training in its use. CSHO Cox also referenced her findings to  
23 support the classification of the violation as "Serious" in accordance with the operations  
24 manual and enforcement guidelines.

25 15. Respondent called as a witness its Safety Manager David Hodges, who testified  
26 that he conducts employee training and works in conjunction with Truckee Meadows  
27 Community College ("TMCC") when additional expertise for specialized training is needed.

28 ///

1 16. Safety Manager Hodges testified that, because Respondent is in the  
2 manufacturing business, fall protection is not regularly an issue since their limited  
3 maintenance work generally requires only the use of a ladder. Because of that, Respondent  
4 does not provide any fall protection, PPE, or training. He stated that no employees required  
5 fall protection for the racks, because they were not permitted to work or stand on the racks  
6 pursuant to the company safety program.

7 17. Safety Manager Hodges explained that the company safety program consisted of a  
8 three-part disciplinary action plan: for a first violation a verbal reprimand, a second  
9 violation a written reprimand and, on a third, termination.

10 18. Safety Manager Hodges testified that because Respondent had only occupied the  
11 Stead worksite for two weeks, there had been no time for a hazard assessment.

12 19. Safety Manager Hodges testified that company safety rules prohibit employees  
13 climbing on racks and such conduct is specifically addressed in the Respondent's safety  
14 handbook. For any work above ground level, employees are instructed to use ladders or  
15 forklifts, depending on the work.

16 20. Safety Manager Hodges admitted that he lacks expertise in fall protection and  
17 instead relies on TMCC for any training when required. He stated that only maintenance  
18 employees are required to have fall protection training, because they are the only ones  
19 sometimes required to work at heights.

20 21. Respondent's Stead Maintenance Manager, Steve Tintinger, testified that  
21 employees observed on the racks were only temporary employees, there to attach stabilizers  
22 to the racks that were inadvertently left out when reassembled at the new plant facility  
23 during the move. He made it clear that he had no involvement in their hiring, nor had he  
24 trained them in fall protection.

## 25 FINDINGS OF FACT

26 1. Respondent employees demonstrated very little basic knowledge, training, or  
27 understanding of the use or limitations of PPE for fall protection.

28 ///

2. Respondent management representatives similarly demonstrated very little basic knowledge, training or understanding of the use or limitations of PPE for fall protection.

3. Respondent management testimony established that maintenance employees require fall protection training.

4. Respondent employees had access to the five-point safety harness, but Respondent failed to properly train employees in the appropriate use of such fall protection.

5. Stead Maintenance Manager Tintinger admitted he had at times observed the identified employees with fall protection PPE, yet he had never trained them on use, nor did he verify or document such training.

6. The three identified employees were assigned a *non-manufacturing* work task by their supervisor, Stead Maintenance Manager Tintinger, to attach stabilizers to racking fixtures which extended approximately 15 feet in height.

7. The three identified employees were not wearing any fall protection while working on this *non-manufacturing* task.

8. There is no evidence anyone supervised the work of the three identified employees.

9. The Board specifically finds the testimonial and documentary evidence presented by and through CSHO Cox is credible.

10. The testimony by Stead Maintenance Manager Tintinger was unsupported, and did not rebut that of CSHO Cox, the employee witness statements, or the facts in evidence.

### CONCLUSIONS OF LAW

1. Nevada Administrative Code 618.788(1) places the burden of proof, to establish a violation occurred, on NV OSHA. NV OSHA must "prove by a preponderance of the evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition." *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 1981 CCH OSHD P25, 578 (No. 78-6247, 1981). Nevada OSHA has met its burden of proving these elements in the citation.

1           2. 29 CFR 1910.132(f)(1)(iv) states: "The employer shall provide training to each  
2 employee who is required by this section to use personal protective equipment (PPE). Each  
3 such employee shall be trained to know the limitations of the PPE." This standard was  
4 applicable because the identified employees were provided access to the five-point fall  
5 protection harnesses by Respondent.

6           3. The standard was violated because Respondent failed to provide the associated  
7 mandatory training for said PPE.

8           4. The three identified employees were exposed to serious potential fall hazards when  
9 they were assigned the racking work task, while lacking the most basic knowledge of fall  
10 protection or use of PPE.

11           5. Respondent's management knew, or should have known with the exercise of  
12 reasonable diligence, that the identified employees were given access to PPE equipment  
13 without the required training and were assigned a work task that required fall protection,  
14 exposing them to serious potential fall hazards.

15           6. NV OSHA proved by a preponderance of the evidence that Respondent violated the  
16 applicable standard by failing to provide training to each employee required by the standard  
17 to use protective equipment and to be trained to know the limitations of PPE equipment, as  
18 set forth in 29 CFR 1910.132(f)(1)(iv).

19           7. Once NV OSHA has proven its *prima facie* case of a violation of an occupational  
20 safety or health standard, the burden of proof shifts to the employer to assert and prove any  
21 affirmative defense.

22           8. While Respondent raised the affirmative defense of unpreventable or  
23 unforeseeable employee misconduct, it failed to provide evidence sufficient to support that  
24 defense. In addition to the foregoing findings and conclusions, Respondent provided no  
25 evidence that it adequately communicated safety policies and rules to employees for safely  
26 carrying out a job that reasonably required use of a fall arrest system.

27           9. The defense of unpreventable employee misconduct must fail because violative  
28 conditions were foreseeable, in plain view and reasonably preventable.



10. Citation 1, Item 1 was properly characterized as a Serious violation, as a potential un-arrested fall involving lack of PPE or employee training in PPE use creates exposure to a substantial probability for death or serious injury.

11. The penalty was correctly calculated in the amount of \$3,825.

12. The findings of fact are based upon a preponderance of the evidence in the record.

### ORDER

1. Citation 1, Item 1 issued to Sierra Packaging & Converting, LLC, by Nevada OSHA on September 10, 2013, is hereby AFFIRMED.

2. The proposed fine of THREE THOUSAND, EIGHT HUNDRED TWENTY-FIVE DOLLARS (\$3,825) for Citation 1, Item 1, is hereby affirmed.

3. Any of the Findings of Fact that are more appropriately deemed Conclusions of Law shall be so deemed. Any of the Conclusions of Law that are more appropriately deemed Findings of Fact shall be so deemed.

4. Any party who is aggrieved by this order may file a petition for judicial review in accordance with NRS Chapter 233B.

NEVADA OCCUPATIONAL SAFETY AND  
HEALTH REVIEW BOARD

By:

JOE ADAMS, Chairman

Submitted by:

Salli Ortiz, Division Counsel  
DIR Legal  
400 West King Street, Ste. 201  
Carson City, NV 89703

Legal/2014/OSHA Reno/Sierra Packaging1684/Finds Conclusions Order.doc

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3

4 CHIEF ADMINISTRATIVE OFFICER OF THE  
5 OCCUPATIONAL SAFETY AND HEALTH  
6 ADMINISTRATION OF THE DIVISION OF  
7 INDUSTRIAL RELATIONS OF THE DEPARTMENT  
8 OF BUSINESS AND INDUSTRY, STATE OF  
9 NEVADA,

Complainant,

vs.

10 SIERRA PACKAGING & CONVERTING, LLC,  
11 Respondent.

DOCKET NO: RNO 14-1684

12 **EVIDENCE PACKET for the DIVISION OF INDUSTRIAL RELATIONS**

Exhibit 1	DOCUMENT	PAGE(S)
	• Business Information from Secretary of State	1-2
	• Referral Report	3
	• Employer Opening Conference	4
	• Inspection Report	5
	• Inspection/Safety Narrative (OSHES-1A)	6-9
	• Written Safety Program Evaluation	10
	• CSHO Drawing	11
	• Employer Closing Conference	12
	• Employee Statements	13-15
	• Worksheet (OSHES-1B)	16-18
	• Citation and Notification of Penalty – 9/10/13	19-30
	• Contest Letter – 9/26/13	31
	• Summons & Complaint	32-36
	• Answer to Complaint	37-40
	• Photographs	41-49

23 **AFFIRMATION (Pursuant to NRS 339B.030)**

24 The undersigned affirms that the EVIDENCE PACKET FOR THE DIVISION OF  
25 INDUSTRIAL RELATIONS, in OSH Review Board, Docket No. RNO 14-1684, does not  
26 contain the social security number of any person.

Dated this \_\_\_\_\_ day of March, 2014.

Submitted by:

27  
28 Salli Ortiz, Division Counsel  
Division of Industrial Relations

R:\Legal\FY2014\OSHA Reno\Sierra Packaging 1684\Bs DRAFT Sierra Packaging Evidence Cover Sheet.doc



1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD  
3

4 CHIEF ADMINISTRATIVE OFFICER  
5 OF THE OCCUPATIONAL SAFETY AND  
6 HEALTH ADMINISTRATION, DIVISION  
7 OF INDUSTRIAL RELATIONS OF THE  
8 DEPARTMENT OF BUSINESS AND  
9 INDUSTRY, STATE OF NEVADA

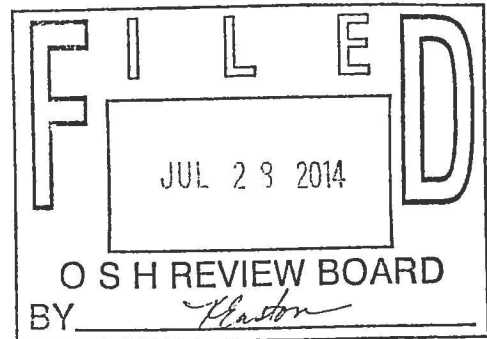
Docket No. RNO 14-1684

Complainant,

vs.

10 SIERRA PACKAGING & CONVERTING, LLC,

Respondent.  
11 \_\_\_\_\_/




12 CERTIFICATE OF MAILING

13 Pursuant to NRCP 5(b)(2)(B), I certify that I am an employee of  
14 SCARPELLO & HUSS, LTD., and that on July 28, 2014 I deposited for  
15 mailing, certified mail/return receipt requested, at Carson City,  
16 Nevada, a true copy of the **FINDINGS OF FACT, CONCLUSIONS OF LAW**  
17 **AND FINAL ORDER** addressed to:

18 Salli Ortiz, Esq., DIR Legal  
19 400 W. King Street, #201  
20 Carson City NV 89703

21 Timothy E. Rowe, Esq.  
22 McDonald Carano Wilson LLP  
23 100 W. Liberty Street, 10<sup>th</sup> Floor  
24 P. O. Box 2670  
25 Reno, NV 89505

26 DATED: July 28, 2014

27   
28 KAREN A. EASTON

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

Sierra Packaging & Converting, LLC,  
Appellant,  
vs.  
The State of Nevada Division of Industrial  
Relations of the Department of Business and  
Industry; and the Occupational  
Safety and Health Review Board,  
Respondents.

No. 71130

DOCKETING STATEMENT  
CIVIL APPEALS

Electronically Filed  
Sep 14 2016 02:17 p.m.  
Tracie K. Lindeman  
Clerk of the Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District First Department No. 1  
County Carson City Judge James T. Russell  
District Ct. Case No. CV15-OC-001951B

**2. Attorney filing this docketing statement:**

Attorney Timothy E. Rowe Telephone 775-788-2000

Firm McDonald Carano Wilson LLP

Address 100 West Liberty Street, 10th Floor  
Reno, Nevada 89501

Client(s) Appellant, Sierra Packaging & Converting, LLC

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Salli Ortiz Telephone 775-684-7286

Firm Division Counsel

Address Division of Industrial Relations  
4000 W. King St., Ste. #201  
Carson City, NV 89703

Client(s) Respondent, Division of Industrial Relations

Attorney \_\_\_\_\_ Telephone \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

Client(s) \_\_\_\_\_

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |  |   |
|--|---|
| <input type="checkbox"/> Judgment after bench trial                | <input type="checkbox"/> Dismissal:                                     |
| <input type="checkbox"/> Judgment after jury verdict               | <input type="checkbox"/> Lack of jurisdiction                           |
| <input type="checkbox"/> Summary judgment                          | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                          | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief         | <input type="checkbox"/> Other (specify): _____                         |
| <input type="checkbox"/> Grant/Denial of injunction                | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief        | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input checked="" type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____             |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

This is an appeal of a District Court Order denying a petition for judicial review of a decision by the Nevada Occupational Safety and Health Administration Review Board (NOSHA Review Board).

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Is the NOSHA Review Board Decision upholding a Nevada OSHA citation and penalty affected by error of law and subject to reversal pursuant to NRS 233B.135(3).

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

**13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This case is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(4).

**14. Trial.** If this action proceeded to trial, how many days did the trial last?     N/A    

Was it a bench or jury trial? \_\_\_\_\_

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

## TIMELINESS OF NOTICE OF APPEAL

**16. Date of entry of written judgment or order appealed from** August 31, 2015

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

**17. Date written notice of entry of judgment or order was served** July 29, 2016

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☐ NRCP 59          Date of filing \_\_\_\_\_

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

☐ Delivery

☐ Mail



**19. Date notice of appeal filed** August 25, 2016

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

**20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)

**SUBSTANTIVE APPEALABILITY**

**21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- |  |  |
|--|--|
| <input type="checkbox"/> NRAP 3A(b)(1)         | <input type="checkbox"/> NRS 38.205              |
| <input type="checkbox"/> NRAP 3A(b)(2)         | <input checked="" type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3)         | <input type="checkbox"/> NRS 703.376             |
| <input type="checkbox"/> Other (specify) _____ |  |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRS 233B.150 provides for an appeal of final district court decision in a contested administrative agency proceeding.

**22. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Petitioner: Sierra Packaging & Converting, LLC

Respondent: The State of Nevada Division of Industrial Relations of the  
Department of Business and Industry; and The Occupational Safety and Health  
Review Board.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

The real party in interest in the Division of Industrial Relations.

**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Appellant, Sierra Packaging and Converting, LLC: the NIOSH Review Board Decision is affected by error of law.

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**25. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

**26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):**

N/A

**27. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Sierra Packaging & Converting, LLC  
Name of appellant

Timothy E. Rowe  
Name of counsel of record

September 14, 2016  
Date

  
Signature of counsel of record

Nevada, Washoe County  
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 14th day of September, 2016, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Salli Ortiz, Division Counsel  
Division of Industrial Relations (DIR)  
400 West King Street, Suite 201  
Carson City, Nevada 89703

Dated this 14th day of September, 2016

  
Signature