

1 **BEFORE THE SUPREME COURT OF THE STATE OF NEVADA**

2 **Case No. 71130**

3 **SIERRA PACKAGING & CONVERTING, LLC,**

4 **Appellant,**

5 **vs.**

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9 Clerk of Supreme Court

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

15 **Respondents.**

16 **Appeal from an Order Denying Petition for Judicial Review**
17 **First Judicial District Court of Nevada**
18 **District Court Case No. 14-OC-001951-B**

19 **RESPONDENT'S ANSWERING BRIEF**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant, SIERRA PACKAGING & CONVERTING, LLC is a Nevada domestic limited liability Company, at all times in active status with the Nevada Secretary of State. SIERRA PACKAGING & CONVERTING, LLC is represented by attorney Timothy E. Rowe, Esq. of the law firm of McDONALD CARANO WILSON, LLP.

The NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION is a government agency, under the DIVISION OF INDUSTRIAL RELATIONS ("DIR") of the DEPARTMENT OF BUSINESS AND INDUSTRY. The NEVADA OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION is represented by Division Counsel Salli Ortiz.

NEVADA OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION
DIVISION OF INDUSTRIAL RELATIONS



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1 **I. JURISDICTIONAL STATEMENT**

2 This is an appeal of an underlying administrative agency Final Order issued
3
4 by the Nevada Occupational Safety and Health Review Board ("Review Board")
5 on July 28, 2014. Petitioner, Sierra Packaging & Converting, LLC ("Sierra
6 Packaging") filed a petition for judicial review in the First Judicial District Court
7 of Nevada on August 22, 2014. The District Court denied Sierra Packaging's
8 petition in an Order dated August 31, 2015, with the Notice of Entry of Order filed
9 on August 1, 2016. Sierra Packaging timely filed its notice of appeal to the
10 Supreme Court on August 26, 2016.

11
12 **II. ROUTING STATEMENT**

13 This matter is presumptively assigned to the Court of Appeals pursuant to
14
15 NRAP 17(b)(4), being that this is an appeal involving an administrative agency.

16
17 **III. STATEMENT OF THE ISSUES**

18 The issue before the Supreme Court is whether the Review Board committed
19
20 an error of law or was arbitrary or capricious in upholding the Nevada
21 Occupational Safety and Health Administration's ("Nevada OSHA")
22 September 10, 2013, Citation and Notification of Penalty issuing a "Serious"
23 violation of 29 CFR 1910.132(f)(1)(iv), and imposing a \$3,825 penalty.

24
25 **IV. STATEMENT OF THE CASE**

26 This matter arises from an administrative Decision after a hearing conducted
27
28 by the Review Board. Pursuant to Chapter 618 of the Nevada Revised Statutes,

1 Nevada OSHA conducted a safety and health inspection of a Sierra Packaging
2 facility from August 16, 2013, through August 19, 2013. Joint Appendix ("JA")
3
4 20. On September 10, 2013, Nevada OSHA issued a Citation and Notification of
5 Penalty ("Citation") against Sierra Packaging. *Id.* Sierra Packaging contested the
6 one "Serious" citation item, to which DIR filed a Complaint with the Review
7 Board on October 8, 2013. JA 32-37. A hearing was conducted on March 12, 2014.
8
9 JA 330:15. The Review Board issued its Decision, on April 11, 2014, affirming
10 the contested citation item. JA 330-345. On July 28, 2014, the Findings of Fact,
11 Conclusions of Law, and Final Order were entered. JA 346-352. On August 22,
12 2014, Sierra Packaging filed a Petition for Judicial Review with the First Judicial
13 District Court. JA 353. The matter was fully briefed, oral arguments were
14 presented, and on August 31, 2015, the Honorable James T. Russell issued his
15 Order denying Sierra Packaging's Petition. JA 369-381. The Notice of Entry of
16 Order was filed on August 1, 2016. JA 382.
17
18

19 Sierra Packaging then filed its appeal with this Court on August 26, 2016.
20

21 **V. STATEMENT OF THE FACTS**

22 On August 9, 2013, Nevada OSHA received an anonymous complaint,
23 including a photograph, alleging various safety and/or health violations by Sierra
24 Packaging. JA 4. The complaint noted:
25

- 26 • Employees climbing in racking without fall protection; and
- 27
28

- Employees operating powered industrial trucks without a certificate of training.

Id.

The photograph provided showed three employees working/climbing on racking without fall protection. JA 42-44. For the sake of clarity, Nevada OSHA concurrently submits its Supplemental Appendix ("SA") containing better quality inspection photographs found at JA 42-53. *See also* SA 1.

Nevada OSHA assigned Compliance Safety and Health Officer ("CSHO") Jennifer Cox ("CSHO Cox") to conduct an inspection, number 317224608, of Sierra Packaging's Reno-Stead warehouse. JA 5-6. The inspection opened on August 16, 2013, at which time CSHO Cox conducted an Opening Conference with Sierra Packaging personnel. JA 5-8. CSHO Cox also conducted a walk-around inspection. JA 8-10.

During CSHO Cox's inspection, she verified the location and authenticity of the complaint photograph as being taken inside the Sierra Packaging Reno-Stead warehouse. JA 42-46, SA 1-3. The three people in the photographs were identified by Maintenance Manager Steve Tintinger ("Maint. Mgr. Tintinger") as temporary maintenance Employees Caal, Gonzalez, and Soto. JA 8-9. CSHO Cox interviewed each of those employees identified, with the help of a Spanish speaking translator. JA 14-16.

In Employee Gonzalez's statement to CSHO Cox he admitted that: i) he was

1 climbing on the racks; ii) he was assigned by a supervisor to put the stabilizers on
2 the racks; iii) he was not aware he was not supposed to climb the racks; iv) he had
3 not been provided any safety training; and v) he was not aware of any safety
4 program. JA 14. During the interview, Employee Gonzalez produced a five point
5 harness, six foot lanyard and a three foot shock plate to CSHO Cox. JA 9.

6
7 Employee Caal's statement said he was working on a ladder while the other
8 two employees were climbing on the racking. JA 15. He stated he is aware of the
9 safety training, harness, and other personal protective equipment ("PPE") the
10 company provides and that the training was provided in Spanish. *Id.* Employee
11 Caal's statement asserts Maint. Mgr. Tintinger assigned the employees to the task
12 of securing metal between the racks, further stating that Maint. Mgr. Tintinger told
13 him to use "fall protection (5 point harness and ladder)." *Id.* He also stated that
14 management did not oversee work being done. *Id.*

15
16 Employee Soto stated that he was trained on fall protection or other PPE,
17 and is aware of company safety policies. JA 16.

18
19 Upon discussing the inspection with Sierra Packaging management, it
20 became apparent to CSHO Cox that even management had a lack of basic
21 understanding regarding the limitations of the harness system CSHO Cox was
22 presented with during the employee interviews. JA 9.

23
24 On September 10, 2013, Nevada OSHA issued its Citation for Inspection
25 Number 317224608, for lack of training. JA 20-31.

Sierra Packaging contested only one of the citations items issued on September 10, 2013. JA 32. The citation item at issue, states:

- **Citation 1, Item 1: SERIOUS**

29 CFR 1910.132(f)(1)(iv): The employer shall provide training to each employee 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:

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

JA 29.

A hearing before the Review Board was held on March 12, 2014. JA 330:15

At the hearing, CSHO Cox testified to her inspection, including the interview statements and conversations she had with management and the reasons for the Citation, also noting the difficulty of the inspection due to conflicting information from *everyone*. JA 252:4 through 291:2; JA 280:24 through 281:2.

During her testimony, CSHO Cox remarked that neither employees nor management could answer the basic questions regarding fall protection or the proper use of the harness she was provided with. JA 260:5 through 264:24. Though one employee was able to retrieve a five point harness during the interviews, none of the employees demonstrated basic knowledge, training, or understanding of its use or limitations. *Id.* Despite the communication barrier, it was apparent that Sierra Packaging provided employee *access* to fall protection, however did not provide any training or limitations to its access whatsoever. *Id.* Ultimately, CSHO

1 Cox issued the citation item for lack of training. JA 29, 270:7 through 271:3.

2 David Hodges, Sierra Packaging's Safety Manager ("Safety Mgr. Hodges"),
3 testified to his experience and role within Sierra Packaging and its safety program.
4
5 JA 291:19 through 305:25.

6 Safety Mgr. Hodges testified that he conducts employee training and works
7 in conjunction with Truckee Meadows Community College ("TMCC") when
8 additional expertise for specialized training is needed, and admitted his own lack of
9 experience in fall protection training. JA 292:11-15, 294:22 through 295:7, 302:22-
10 25. He testified that the only area where the company would require the use of fall
11 protection would be maintenance functions. JA 295:8-22. Safety Mgr. Hodges
12 further stated that employees did not require fall protection training for the racks as
13 the employees are not permitted to work or stand on the racks pursuant to the
14 company safety program. JA 296:13-23. He also testified that he was aware that
15 two of the individuals identified in the photographs on top of the racks were
16 trained in fall protection to change lightbulbs. JA 304:23 through 305:6.

17
18 Maint. Mgr. Tintinger also testified on behalf of Sierra Packaging. JA 315:8
19 through 320:9. He testified that he recalled instructing employees to install the
20 stabilization plates on the racks, though could not recall who specifically he
21 instructed. JA 316:17 through 317:6, 317:15-19. Though Maint. Mgr. Tintinger
22 admitted that he was trained on some fall protection equipment himself, he made it
23 clear he did not hire, oversee, or train the employees that were assigned to stabilize
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1 the racks. JA 318:21 through 320:1. He also testified that he knew those employees
2 had fall protection PPE and had seen them use it before. JA 319:17-23.

3
4 The Review Board filed its Decision on April 11, 2014, affirming Citation 1,
5 Item 1, and the proposed penalty of \$3,825. JA 330-345. The Review Board
6 specifically found the testimony and evidence presented by and through CSHO
7 Cox credible, which evidence established the cited violation. JA 338:22-24,
8 350:16-17. The Review Board determined that Maint. Mgr. Tintinger's testimony
9 was unsupported and "did not rebut that of CSHO Cox, the employee witness
10 statements and the facts in evidence." JA 339:22-23. The Final Order on this
11 matter was issued on July 28, 2014. JA 346-352.

12
13
14 On August 22, 2014, Sierra Packaging filed its Petition for Judicial Review
15 in the First Judicial District Court. JA 353. This matter was fully briefed and oral
16 arguments were conducted before the Honorable James T. Russell. On
17 August 31, 2015, Judge Russell issued his Order which concluded:
18

19
20 Sierra Packaging focuses extensively on the use of the word
21 "required" in the cited standard. It also seeks to narrow the definition
22 of "required", as used in the cited standard, to mean there is only one
23 option for compliance. Since Sierra Packaging did not require its
24 employees to use fall protection when working on the storage racks, as
25 the task could be accomplished without the need for fall protection,
26 Sierra Packaging maintains the standard does not apply.

27 As to the definition itself, it is not so narrowly structured as to
28 admit to only one option possible [citations omitted]. Definitions of
"required" also encompass circumstances where someone in authority
instructs, expects, or calls for someone to do something.

...

Neither section of 29 CFR 1910.132 states the requirement to
provide PPE, or training on its use and limitations, is task-specific. In

1 this context, working at heights is the “hazard” requiring the use of
2 protective equipment, and the five-point harness systems are the
3 protective equipment provided.

4 ...

5 Sierra Packaging argues providing “access” to fall protection
6 equipment is irrelevant to OSHA establishing a violation occurred, as
7 it does not show Sierra Packaging “required” use of the PPE.

8 ...

9 The “rule of access” standard based on “reasonable
10 predictability” of employee exposure has subsequently been applied
11 with relative consistency by the OSHRC:

12 ...[A]lthough phrased differently by some courts, the standard
13 derived from *Gilles & Cotting, Inc.*—which ultimately requires,
14 simply, that the agency prove that it was reasonably predictable that
15 one or more **employees had been, were, or would be exposed to
16 the hazard presented by the violative condition at issue**—has been
17 endorsed by a majority of the federal appellate courts that have
18 considered the issue and remains the prevailing standard of proof with
19 respect to employee exposure under the federal OSHA.” Or.
20 Occupational Safety & Health Div. v. Moore Excavation, Inc., 307 P.3d
21 510, 516, 257 Ore. App. 567, 576-577(2013)(quoting Secretary of
22 Labor v. Field & Associates, Inc., 19 OSH Cas (BNA) 1379, 1383
23 (2001))(internal citations omitted).

24 ...

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

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

...
Accordingly, no error of law was committed by the Review
Board when it found the cited standard applied to the situation at hand.
...
As evident in the Decision, the Review Board relied heavily on
the testimony of the NV OSHA inspector. During her testimony, CSHO
Cox went through the four specific elements of OSHA’s prima facie

case, making reference to the documentary evidence that supported each. ...The Review Board specifically found the testimony and evidence presented by and through CSHO Cox credible...

...

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.

JA 375:1 through 380:18.

VI. SUMMARY OF THE ARGUMENT

The April 11, 2014, Review Board Decision and August 31, 2015, District Court Order properly upheld Nevada OSHA's September 10, 2013, Citation issuing a "Serious" violation of 29 CFR 1910.132(f)(1)(iv). The Review Board and District Court appropriately applied the "rule of access" standard concluding that the employees had access to safety harnesses made available to them by Sierra Packaging without any training on use, limitations or understanding.

VII. ARGUMENT

A. Standard of Review

A reviewing court shall not substitute its judgment for that of an agency in regards to the weight of the evidence on a question of fact, nor may it revisit any credibility determinations. NRS 233B.135(3); Law Offices of Barry Levinson, P.C. v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-384 (2008). The standard for such review is whether the agency's decision was clearly erroneous, arbitrary, capricious, or characterized by abuse of discretion. NRS 233B.135(3)(e) and (f);

1 see Ranieri v. Catholic Community Services, 111 Nev. 1057, 1061, 901 P.2d 158,
2 161 (1995).

3
4 The Court's review is confined to the record before the agency. Law Offices
5 of Barry Levinson, 124 Nev. 355, 362. To be valid, the agency's decision must be
6 supported by substantial evidence in the record. McCracken v. Fancy, 98 Nev. 30,
7 31, 639 P.2d 552, 553 (1982). "The agency's fact-based conclusions of law are
8 entitled to deference, and will not be disturbed if they are supported by substantial
9 evidence." Law Offices of Barry Levinson, 124 Nev. 355, 362 (internal quotes and
10 citations omitted). Substantial evidence has been defined as that evidence "which a
11 reasonable mind might accept as adequate to support a conclusion." Schepcoff v.
12 SIIS, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993).

13
14 Questions of law are reviewed de novo. See SIIS v. United Exposition
15 Services Co., 109 Nev. 28, 30, 846 P.2d 294, 295 (1993). Statutory construction is
16 a question of law which invites independent appellate review of the administrative
17 decision. Maxwell v. SIIS, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993). However,
18 the court must give deference to the agency's interpretation of statutes that it
19 administers. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 843, 104 S. Ct. 2778,
20 2782, 81 L. Ed. 2d 694, 703 (1984).

21
22 In the instant case, the principal issue is whether the Review Board's finding,
23 that management's and employees' lack of basic knowledge regarding fall
24 protection issues, including proper use of PPE, triggered the cited standard, is
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supported by substantial evidence in the record. 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. The reviewing court "must uphold the fact finder's determinations if the record contains such relevant evidence as reasonable minds might accept as adequate to support a conclusion, *even if it is possible to draw different conclusions from the evidence.*" Loomis Cabinet Co. v. OSHRC, 20 F.3d 938, 942 (9th Cir. Cal. 1994) (emphasis added).

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 Appellant, 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.

B. The Review Board Properly Found the Cited Standard, 20 CFR 1910.132(f)(1)(iv), Applied to the Situation at Issue

1. The Cited Standard Does Not Define "Required" as Narrowly as Argued by Sierra Packaging.

Sierra Packaging argues that the Review Board committed an error of law by finding the cited standard applied to the "conduct or work conditions at issue." Opening Brief 13-14. Specifically, Sierra Packaging argues that the standard does not apply to the situation at issue because its employees were not "required" to use fall protection to accomplish the storage racks task.

1 The standard at issue is 29 CFR 1910.132(f)(1)(iv), which states, in
2 relevant part:

3
4 Training. The employer shall provide training to each employee who is
5 required by this section to use PPE. Each such employee shall be
6 trained to know at least the following: The limitations of the PPE.

7 While the word “required” is not defined, 29 CFR 1910.132(a) provides some
8 context:

9 Application. Protective equipment, including personal protective
10 equipment for eyes, face, head, and extremities, protective clothing,
11 respiratory devices, and protective shields and barriers, **shall be**
12 **provided**, used, and maintained in a sanitary and reliable condition
13 **wherever it is necessary by reason of hazards of processes or**
14 **environment**, chemical hazards, radiological hazards, or mechanical
15 irritants encountered in a manner **capable of causing injury or**
16 **impairment in the function of any part of the body** through
17 absorption, inhalation or physical contact.

18 (Emphasis added.)

19 Neither section of 29 CFR 1910.132 states the requirement to provide PPE, or
20 training on its use and limitations, is task-specific. In this context, working at heights
21 is the “hazard” requiring the use of protective equipment, and the five-point harness
22 systems are the protective equipment provided.

23 In an attempt to obfuscate this point, Sierra Packaging’s Opening Brief,
24 cites two definitions for the word “required” found in The New Oxford American
25 Dictionary, which are “cause to be necessary . . . specify as compulsory...”.
26 Opening Brief 15. It concludes that this “means that there is no other option for
27 compliance.” *Id.* However, that definition in the Oxford dictionary also includes
28

1 situations “(Of someone in authority) instruct[ing] or expect[ing] (someone) to do
2 something . . .”. The New Oxford American Dictionary,
3 http://www.oxforddictionaries.com/us/definition/american_english/require (last
4 visited July 20, 2015). This does not lead to the inarguable conclusion that there is
5 no other option. Similarly, Merriam-Webster defines “required” as “to claim or ask
6 for by right and authority”, “to call for as suitable or appropriate” or “to impose a
7 compulsion or command on”. Merriam-Webster Dictionary, [http://www.merriam-](http://www.merriam-webster.com/dictionary/required)
8 [webster.com/dictionary/required](http://www.merriam-webster.com/dictionary/required) (last visited February 20, 2015).

11 As stated, Sierra Packaging contends the word “required” found in the
12 standard:

14 [M]eans doing work tasks for which protective equipment is
15 mandated. Because the undisputed evidence presented to the Board
16 demonstrated that none of the three employees interviewed by Ms.
17 Cox were assigned tasks that mandated the use of fall protection, the
18 Board erred as a matter of law in sustaining this violation.

19 Opening Brief 11.

20 This conclusory statement is without legal or even evidentiary support.

21 Neither the standard nor the definitions listed above support the contention
22 that “required” means it is the “only” way, because it is simply not true. For
23 instance, while fall protection standards apply in some situations by law,
24 compliance with those standards could also just be required by company policy.
25 Similarly, requirement could be shown by having a supervisor, as happened here,
26 telling an employee to use fall protection.
27
28

1 None of the definitions cited negate the appropriateness of the Review
2 Board's application of the standard to these circumstances.

3
4 **2. The Cited Standard Does Not Narrow the Applicability of Its**
5 **Requirements to a Task-Specific Basis.**

6 Sierra Packaging does not dispute that the three employees identified in this
7 inspection were not trained in fall protection issues.

8 Rather, Sierra Packaging argues that fall protection equipment was not
9 required because the assigned task of installing stabilizing plates on the racking
10 system could have been performed without it:

11
12 Viewing the stabilization plates as a redundant safety system and
13 determining that they could be easily installed using ladders, Sierra
14 decided its maintenance department should reinstall the plates.

15 Opening Brief 5 (footnote omitted).

16 No evidence or argument regarding this assessment was ever presented,
17 which is why no citation to the record was proffered. Moreover, while Sierra
18 Packaging goes into great detail in Footnote 1 regarding the "ladders" that were
19 available for employees' use, no evidence was submitted that such ladders were
20 provided to employees for this job or that there were enough available ladders. *See*
21 Opening Brief 5, Fn. 1. Interestingly, while Sierra Packaging prefaces this
22 information by saying "It is important to note", the information was apparently not
23 important enough to be included in the hearing before the Review Board. *Id.*

24 While Sierra Packaging is attempting to limit this Court's review of the
25 Decision to its narrow filter, the Review Board evaluated the entire situation in
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1 reaching a Decision. The weight of the evidence is a determination for the Review
2 Board and is not reviewable by this Court. NRS 233B.135(3); Law Offices of
3 Barry Levinson, 124 Nev. 355.
4

5 To begin, CSHO Cox had to establish that the employees shown in the
6 pictures anonymously submitted were actually employees of Sierra Packaging (and
7 not, e.g., employees of a vendor hired by Sierra Packaging). The Opening Brief
8 acknowledges that "One of Sierra's managers was able to identify the employees
9 in the pictures as maintenance employees...". Opening Brief 6.
10

11 Safety Mgr. Hodges admitted that he lacks expertise in fall protection and
12 instead relies on TMCC for any training when required. JA 294:20 through 295:1.
13 He stated that only maintenance employees are required to have fall protection
14 training, because they are the only ones sometimes required to work at heights. JA
15 295:15-22. To be clear, Employees Caal, Gonzalez, and Soto were maintenance
16 employees, as identified and acknowledged by Sierra Packaging. *See* Opening
17 Brief 6.
18
19

20 Maint. Mgr. Tintinger admitted he had at times observed the identified
21 employees with fall protection PPE. JA 319:17-23.
22

23 Despite this, Sierra Packaging insists that this specific task did not "require"
24 fall protection, or training on fall protection issues. Reference is made to Maint.
25 Mgr. Tintinger's testimony, where he stated that:
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27 [T]here was nothing about the work that had been assigned that
28 would have required the employees to climb on the racks. ... He

1 additionally testified that no one at Sierra had provided any of the
2 three employees with fall protection equipment to do the assigned
3 task.

4 Opening Brief 10.

5 The second part of this contention was contradicted, as mentioned in the
6 Opening Brief, by one of the employees interviewed, who stated that Maint. Mgr.
7 Tintinger instructed them to install the plates between the racks using a five-point
8 harness and a ladder, but this employee decided to use the ladder instead of the
9 harness. Opening Brief 8; JA 15.

11 Sierra Packaging also raised the point that "[t]he translation was performed
12 by a fourth Sierra employee, not a trained translator." Opening Brief 6. The
13 implication is that this was somehow inappropriate. This position is untenable for
14 two reasons. First, since this was Sierra Packaging's translator, it is reasonable to
15 presume the translator was acting in the best interests of Sierra Packaging. There is
16 no indication that the translator would have a reason to fabricate or manipulate the
17 interviews to Sierra Packaging's detriment. Secondly, since that employee was
18 offered as a translator, it is also reasonable to presume that the company found his
19 language skills adequate for the purposes of communicating with the other
20 Spanish-speaking employees. Again, there is no indication the translator's
21 language skills were inadequate to the task, so there is no basis to reject the
22 interview statements. Moreover, this issue was raised before the Review Board, so
23 it was considered when the Review Board determined what weight to give to this
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1 evidence.

2 Additionally, CSHO Cox testified that one of the employees readily
3 retrieved, during the interview, a five-point harness available to him. JA 260:11-16.
4 She distinctly explained how everyone she spoke with at the facility regarding the
5 harness provided demonstrated very little basic knowledge, training, or
6 understanding of the use or limitations of the PPE. JA 260:2 through 262:14, 271:1-
7 23; 286:3 through 287:14. The Review Board specifically found CSHO Cox to be
8 credible. JA 350:16-17.

9 No contradictory evidence was presented by Sierra Packaging regarding the
10 employee's statement, or CSHO Cox' testimony regarding the harness, other than
11 Maint. Mgr. Tintinger's testimony, which the Review Board specifically found was
12 "unsupported". JA 350:18-19.

13 Safety Mgr. Hodges admitted maintenance employees are sometimes
14 required to work at heights. JA 295:15-22. Harness systems are made available to
15 maintenance employees by Sierra Packaging, and Maint. Mgr. Tintinger admitted
16 he had at times observed the identified employees with fall protection PPE.
17 JA 319:15-23.

18 As Sierra Packaging admitted maintenance employees are sometimes
19 required to work at heights, and as the cited standard does not limit its applicability
20 to a task-specific basis, the Review Board's Decision is not erroneous.
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1 **3. The Fact that the Review Board Did Not Rely on Federal OSHA**
2 **Decisions to Reach Its Decision Does Not Constitute an Error of**
3 **Law.**

4 While Sierra Packaging dismisses the Review Board's finding, that providing
5 its employees access to fall protection equipment does not mean it "required" its
6 use, this position is disingenuous at best.

7 It is undisputed that the five-point harness was provided to these employees
8 by Sierra Packaging. *See* JA 319:17-23. No argument was made, nor any
9 evidence submitted, that these employees would not be required to use this harness
10 during their employment with Sierra Packaging, only an insistence that they were
11 not required to use it *for the specific task*. The standard does not indicate training is
12 only required on a task-by-task basis. Even assuming for the sake of argument that
13 this was true, it still does not relieve Sierra Packaging of the duty to train these
14 employees on how to properly use this harness that it provided to its employees.
15 While the employee had no difficulty providing the harness to CSHO Cox, no one
16 present, employee or management, was able to answer even basic questions
17 regarding its limitations. JA 261:24 through 262:14, 264:1 through 266:13.

18 Sierra Packaging notes that decisions of the Occupational Safety and Health
19 Review Commission ("OSHRC") "*indicate*" that the word "required" does not
20 include situations like this one. Opening Brief 14. It needs to be made clear that
21 any decision from the OSHRC is not controlling law on any State that administers
22 its own OSHA plan, it can only be persuasive. The Review Board has previously
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1 maintained that an employer giving unrestricted access to fall protection PPE, as
2 was done here, makes the fall protection standards applicable. As such, the fact
3 that the Review Board declined to look to any OSHRC decision in reaching its
4 own Decision here does not equate to an error of law.

6 Regardless, for the sake of thoroughness, the two OSHRC cases cited in the
7 Opening Brief will be addressed.

9 In Union Oil Co. of California, Chicago Refinery, 13 BNA OSHC 1673 (No.
10 85-0111, 1988), the OSHRC noted that there was another regulation that specified
11 the employees affected therein were *not* required to use fire PPE. *See* Opening
12 Brief 17. No such regulation or conflicting standard applies here, therefore it is
13 distinguishable from the case at bar.

15 In St. Lawrence Food Corp., dba Primo Foods, 22 BNA OSHC 1145 (Nos.
16 04-1734 and 04-1735, 2007), Sierra Packaging claims that a violation was found
17 because the employer required employees to climb on top of tank trailers which
18 mandated the use of fall protection, and no alternative to the fall protection
19 equipment was given. Opening Brief 17-18. However, the citation item that
20 corresponds to the one here was found valid by the OSHRC because the employer
21 provided the harness to do the job, without *any* training, something that was shown
22 when the employee incorrectly wearing the harness asked the CSHO for help on
23 proper use. St. Lawrence Food Corp., 22 OSHC 1145 at 65-67. Interestingly, an
24 additional citation under 29 CFR 1910.132(a) was also upheld, for employees
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1 working atop other tanks with no fall protection. *Id.* at 63-66. The CSHO testified
2 that compliance could have been achieved by *either* harness use or a fixed
3 platform, but neither was provided. Despite testimony that the employees' actions
4 were "absolutely not" in compliance with the company's fall protection policy, the
5 OSHRC found that none of the information rebutted the CSHO's finding of a
6 violation. *Id.*

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9 Here, Sierra Package made the harness available to maintenance employees,
10 at least one of these employees stated that Maint. Mgr. Tintinger told them to use
11 the harness and the ladder, both Maint. Mgr. Tintinger and Safety Mgr. Hodges
12 testified that maintenance employees are the ones that work at heights, and no
13 training was ever provided to the employees for the provided harness. JA 295:8-22.
14 As such, the Review Board's Decision is not negated by the rationale of the St
15 Lawrence Food Corp. case.
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18 Thus, the Review Board did not commit an error of law.

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20 **4. Sierra Packaging Has Not Met Its Burden Under**
NRS 233B.135(2).

21 As noted above, the Review Board's Decision is presumed reasonable and
22 lawful. NRS 233B.135(2). Accordingly the burden shifts to Sierra Packaging to
23 prove that the Decision is invalid and must be reversed or set aside based on one of
24 the enumerated reasons listed under NRS 233B.135(3). *Id.* Sierra Packaging did
25 not meet that burden.
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28 Even though Sierra Packaging claims "[d]efinitively, the task assigned to

1 these employees could have been safely performed without the use of protective
2 equipment”, this was not “definitively” shown. Opening Brief 16. While one
3 employee was able to perform his task with the use of the ladder, the other two
4 employees pictured were in other areas of the racking. No evidence was presented
5 that all three could have accomplished their tasks from ladders, just as there was no
6 evidence presented that there were multiple ladders available for their use.
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9 The Review Board has taken the reasonable, logical, and legal stance that
10 when an employer provides fall protection equipment to its employees, it must also
11 provide the training on the safe use of such equipment. Similarly, it is reasonable
12 to presume that an employer only provides this type of pricey, specialized,
13 equipment if its employees are required to use it as part of their assigned job tasks,
14 regardless as to whether it was required for *all* tasks assigned to the employee.
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17 In order for Sierra Packaging’s argument to stand, this Court would have to
18 determine that the applicable CFR only required employers to provide training to
19 its employees for safety equipment when it is required for *every single task*
20 assigned to the employee. Such an interpretation of the CFR is unsupportable. It
21 is unreasonable, and would render the CFR useless, if an employer was not
22 required to provide training to its employees for safety equipment that it requires
23 for use in *some* tasks but not all. By contrast, the Review Board’s position is
24 reasonable, that if an employee is provided with safety equipment, which the
25 employer requires be used *at any point in time* for a task assigned to him or her, the
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1 employer must provide the appropriate training for the safety equipment.

2 Sierra Packaging's continued insistence that the specific task that was being
3 done during the inspection could have been accomplished without fall protection
4 does not change the fact that at least one employee stated they were told to use fall
5 protection. JA 15. It does not change the fact both Maint. Mgr. Tintinger and
6 Safety Mgr. Hodges admitted maintenance workers, which these three employees
7 were, do require fall protection for some of their tasks. Due to that, it does not
8 change the fact that these employees needed to be trained on fall protection issues,
9 so they could at the very least identify the limitations of the PPE they were
10 provided. There is no error of law.

11 The Review Board specifically found CSHO Cox credible. This
12 determination is not subject to review. NRS 233B.135(3); Law Offices of Barry
13 Levinson, 124 Nev. 355. Due to the fact that CSHO Cox was found credible, the
14 Review Board gave more weight to the evidence presented through her, than
15 through the evidence presented through Sierra Packaging. This is a proper function
16 of the Review Board, and the weight it chose to give any evidence is also not
17 subject to review. NRS 233B.135(3); Law Offices of Barry Levinson, 124 Nev.
18 355.

19 Sierra Packaging management's testimony established that maintenance
20 employees require fall protection training. These employees had ready access to
21 the five-point safety harness owned by Sierra Packaging, yet had no idea of even
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1 the basic limitations. These employees were maintenance employees, but had not
2 been provided the proper training. The fact that they were “temporary” employees
3 does not change that requirement.
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5 While Sierra Packaging argues that the Review Board ignored the plain
6 language of the standard, the reality is Sierra Packaging is petitioning this Court to
7 force the Review Board to agree with its argument. *See* Opening Brief 10, 19.
8 Since Sierra Packaging has failed to show an error of law was committed, the
9 presumption regarding the reasonableness and lawfulness of the Review Board’s
10 Decision remains. *See* NRS 233B.135(2).
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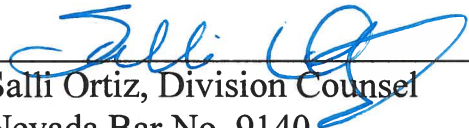
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VIII. CONCLUSION

None of Sierra Packaging's arguments provide a basis for rebutting the reasonableness and lawfulness of the Review Board's Decision. The extremely narrow reading of the cited standard, which Sierra Packaging endorses, is not supported by the plain language of the standard or any other statutory or case law. By contrast, the Review Board's Decision is amply supported by the credible testimonial and submitted documentary evidence, as well as the plain language of the cited standard. Accordingly, the District Court's August 31, 2015, Order, should be AFFIRMED.

NEVADA OCCUPATIONAL SAFETY AND
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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 17 day of January, 2017.



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AFFIRMATION

PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Respondent Division
of Industrial Relations' Answering Brief filed in or submitted for Supreme Court
Case **71130**

☒ Does not contain the social security number of any person

or

Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

or

B. For the Administration of a public program or for an application
for a federal or state grant.

Dated this 17 day of January, 2017.



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CERTIFICATE OF SERVICE

Pursuant to NRAP 16, I hereby certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations, and that on this date, I caused to be served the true and original document described herein by the method indicated below, and addressed to the following:

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State of Nevada Employee