IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 71130

SIERRA PACKAGING & CONVERTING, LLC,

Appellants,

v.

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; AND THE OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD,

Respondents.

Appeal from Order Denying Petition for Judicial Review
District Court Case No. 14OC001951B
First Judicial District Court of Nevada

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The citation issued by OSHA and at issue in this appeal alleges the following violation:

> 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.

Thus, according to the citation, Sierra was cited because employees used a five-point body harness and were not trained to know the limitations of the body harness. However, the allegations of the citation and the subsequent complaint issued by OSHA were never really at issue in the Board proceeding because the Board never required OSHA to prove those allegations. Instead, the Board only required OSHA to prove Sierra employees had access to the body harnesses at the place of employment.

The Board decision upholds the citation not because Sierra employees used body harnesses without training or because Sierra employees were required to use harnesses in the performance of assigned tasks, but simply because one Sierra employee was able to access a body harness during the OSHA inspection and show

it to the OSHA inspector. That decision is affected by error of law because it misapplies the regulation upon which the citation and complaint were based. That regulation is applicable only when an employee's assigned tasks require the use of fall protection and the employee is not properly trained to use that fall protection. The Board's decision should be reversed because of that error.

1. OSHA Did Not Prove the Allegation of the Complaint, and the Board Did Not Require OSHA to Prove the Allegations of the Complaint.

The complaint issued by OSHA alleges Sierra violated 29 CFR 1910.132 (f)(iv) based on the allegations set forth in the citation. See complaint, paragraphs 5, 7 and 8. (JA 35): However, the record in this matter contains no evidence any Sierra employee used a five-point body harness to access the top tier of the inventory racks at Sierra's Stead facility. In fact, the Board found in Finding No. 7 that the three employees assigned to the task of attaching the stabilizer bars to the racking system did not wear fall protection. (JA 362) Thus, there could be no violation of the applicable regulation based on the citation because there is no evidence in the record that any Sierra employee actually used a five-point body harness to access the racking system at the Stead facility. Nonetheless, the Board upheld the citation despite the fact the specific allegations of the citation and complaint were never proven by OSHA.

Neither the citation nor the complaint alleged Sierra was in violation of the regulation simply because its employee had access to the fall protection equipment.

That was not the violation alleged, and it is not a violation of the regulation cited by OSHA. Nonetheless, the Board upheld the regulation for exactly that reason. Doing so constitutes clear error and requires reversal of the Board decision.

2. The Board Erred As A Matter Of Law Because Sierra Employees Were Not Required To Use Fall Protection.

As argued in Sierra's opening brief, the Board had to conclude the standard Sierra was charged with violating applied to the conduct or work conditions at issue. See *AM Wrecking Corp. v. Secretary Labor*, 351 F. 3d 1254, 1261 (D.C. 2003). Here the regulation allegedly violated by Sierra was 29 CFR 1910.132 (f)(1)(iv). The plain language of the regulation provides that it only applies to employees who were required to use protective equipment in their assigned work tasks. In its answering brief, OSHA attempts to overcome the Board's disregard of the plain language of the regulation by arguing 29 CFR 1910.132 is not limited to specific tasks employees are required to perform. However, quick review of other subsections of 29 CFR 1910.132 quickly dispels OSHA's contention. 29 CFR 1910.132(d)(1) requires an employer to assess the workplace to determine if there are hazards present in the workplace that require the use of personal protective equipment. If so, the employer is required to identify the employees affected by the hazard and require them to use the applicable personal protective equipment. 29 CFR 1910.132 (d)(1)(i). Thus, it is crystal clear that the term "required" as used in 29 CFR 1910.132 refers to employees who are assigned work tasks that expose

them to the hazard necessitating the use of personal protective equipment.

According to OSHA, the hazard necessitating the use of personal protective equipment in this case was working at heights. However, the record in this case contains no evidence the three identified employees were assigned tasks the required them to work at heights necessitating the use of fall protection.

Here the assigned work tasks required the installation of stabilization plates on the racking system. The record establishes fall protection equipment was not required for this task since the task could have, and should have, been accomplished using ladders. (JA at 279, 296, 298, 311, 317, 15)[1] In fact, the activity that would have required fall protection, climbing on the racks, was expressly prohibited by Sierra's policies.

The record in this case contains no evidence the three involved employees were assigned any task requiring fall protection. Because these employees were not assigned tasks that required the use of fall protection, there was no obligation on the part of Sierra to train the employees in the use of fall protection, and there could be no violation of the applicable standard.

Despite the fact that the plain meaning of the applicable regulation required OSHA to prove Sierra's employees were either using the fall protection or required

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[1] Contrary to the contention made by OSHA in its answering brief, specific evidence regarding the ladders was provided to the Board at the hearing (JA 323, 324).

to use fall protection in their assigned tasks, the Board did not require OSHA to prove the employees used five-point body harnesses or were required to use the harnesses as part of their assigned job tasks. Instead, the Board applied a different standard. The Board interpreted the applicable regulation to mean that there was an obligation on the part of Sierra to train employees in the use of fall protection if the employees simply had access to the fall protection equipment regardless of whether they were required to use it or not in the performance of their assigned to work activities. See Board conclusion of law 2 and 3 (JA 362); OSHA Answering Brief, Summary of Argument, page 9, lines 10 through 17. OSHA and the Board's overly broad interpretation of 29 CFR 1910.132 is demonstrated by a statement contained in OSHA's answering brief:

> "As Sierra Packaging admitted maintenance employees are sometimes required to work at heights, and as the cited standard does not limit its applicability to a task-specific basis, the Review Board's Decision is not erroneous." (Respondent's Answering Brief, p. 17, lines 23-26)

Applied literally, this interpretation of 29 CFR 1910.132 would require Sierra to train a janitor whose job tasks never require work above the floor level in the use of fall protection simply because the janitor knew where fall protection equipment was located and had access to it.

The fact that Sierra employees may have had access to fall protection equipment does not make 29 CFR 1910.132 applicable to the circumstances of this

case. Unless the Sierra employees were required to use fall protection equipment in the performance of their assigned employment tasks, 29 CFR 1910.132 has no application to this case. Nevada OSHA failed to prove, and the Board failed to find that any of the involved Sierra employees were required to use fall protection equipment in the performance of their assigned job tasks. Thus, the board's conclusion that 29 CFR section 1910.132 was violated constitutes clear error and requires reversal under NRS 233B .135.

II. CONCLUSION

Without addressing the specific language of 29 CFR § 1910.132(f)(1), the Board erroneously concluded the regulation was applicable to Sierra employees simply because they allegedly had access to fall protection equipment. Findings of Fact, Conclusions of Law and Final Order, Finding No. 2 (JA 363). They did so despite the fact OSHA never proved the specific allegations of the citation or OSHA's subsequent complaint. The fact that Sierra employees might have had access to fall protection equipment was never the alleged violation and does not trigger the obligation to train employees as required by 29 CFR § 1910.132(f)(1). The Board decision upholding the citation constitutes clear error because the violation alleged in the citation was never proved by OSHA. It should be reversed by this Court.

AFFIRMATION

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

Dated this 31st day of March, 2017.

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CERTIFICATE OF COMPLIANCE

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 2,062 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this 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), which requires every assertion regarding matters in the record to be supported by a reference to the page 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 this brief is not in

conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 31st day of March, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano, and that on this 31st day of March, 2017, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system and others not registered will be served via U.S. mail as follows:

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