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 SUPPLEMENTAL OPENING BRIEF

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I. INTRODUCTION

The complaint issued by OSHA in this administrative proceeding alleges Appellant Sierra Packaging violated 29 CFR 1910.132(F)(1)(IV) because "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 arrested fall of 15 feet, 7 inches." (JA 29) Thus, the complaint and the citation it was based on allege Sierra Packaging employees were exposed to a fall hazard because they used fall protection equipment without being trained how to use it.

These allegations were not true and were not proven by OSHA in the administrative proceeding. In fact, the Board specifically found in Finding 7 of its decision that the three employees assigned to the task of attaching the stabilizer bars to the racking system did not wear fall protection. (J.A. 362)

Nonetheless, Sierra Packaging finds itself in an administrative twilight zone in which the Board has upheld a violation of the cited regulation not because of what was alleged in the complaint, but something entirely different. That something different was the Board's finding that Sierra Packaging provided its employees with access to fall protection equipment. That finding was used as the factual premise for concluding Sierra Packaging violated the cited regulation.

Sierra Packaging respectfully submits the Board's conclusion is a result of the Board misconstruing the cited regulation and misapplying the "rule of access" in its attempt to apply the regulation to the facts of this case.

II. THE BOARD MISAPPLIED THE RULE OF ACCESS

The essence of the Board's decision and the basis of OSHA's position in this case is best stated in the District Court's decision authored by OSHA's counsel: "Providing maintenance employees access to the harness system without the training to teach them the uses and limitations of such equipment, makes it reasonably predictable these employees had been, were and continue to be exposed to fall hazards." (J.A. 377, lines 16-18) This application of the rule of access is based upon the false assumption that access to fall protection equipment necessarily means the employee will use the equipment without training and be exposed to a fall hazard.

The rule of access is a rule developed under federal law dealing with the appropriate standard of proof for proving employee exposure to work hazards. See, generally, *Oregon Occupational Safety and Health Division v. Moore Excavation, Inc.*, 257 Or. App. 567, 307 P. 3d 510 (2013). Under the rule, exposure to a work hazard can be established by showing it is reasonably predictable that during normal work duties, employees would be exposed to the "zone of danger" posed by the work hazard. Id. at 516. "As set forth by a leading treatise, federal law

dictates that the agency must show, in absence of proof of actual exposure, that 'it is reasonably predictable than employees, by operational necessity or otherwise (including inadvertence) in the course of their workers or associated activities (e.g., going to the restroom) will be in the zone of danger created by the cited condition." Id. at 517 citing *Randy S. Rabinowitz ed., Occupational Safety and Health Law*, 83 (2d Ed. 2002).

Under the Board's analysis of the rule of access in this case, simple access to fall protection equipment makes it reasonably predictable that the employee will be exposed to fall hazards. However, access to fall protection equipment alone does not make it reasonably predictable an employee will be exposed to a fall hazard. Exposure to a fall hazard only becomes reasonably predictable if the employee is required to use the fall protection equipment. A simple example demonstrates this point.

Suppose a manufacturing business hires a maintenance employee to clean and maintain the interior of its manufacturing facility. Suppose also that the tools and equipment used by the maintenance employee are stored in a utility room that also stores fall protection equipment used by other employees who clean the exterior windows of the manufacturing facility. Assume further that although the maintenance employee has full access to the fall protection equipment, he or she has no responsibilities that would ever require the use of fall protection equipment.

In this scenario, the fact that the maintenance employee has full access to the fall protection equipment in the utility room creates no exposure to a fall hazard. Clearly, it is not reasonably predictable that the maintenance employee would be exposed to a fall hazard because none of the employee's job duties require the employee to work at heights that would require the use of fall protection equipment. It only becomes reasonably predictable that the employee might be exposed to a fall hazard if the employee's job duties require the employee to work at heights where fall protection equipment is necessary.

In this case the Board applied an overly broad interpretation of the rule of access by assuming that simply having access to the fall protection equipment necessarily means that the employee would use the fall protection equipment. That assumption is inaccurate as was demonstrated in this case. The employees at issue in this case were hired to help relocate Sierra Packaging's manufacturing facility from the Sparks location to the Stead location. (J.A. 317, 318) None of the three employees were assigned job duties that would require the use of fall protection. Sierra Packaging had absolutely no reason to train these employees in the use of fall protection equipment because nothing in their job duties would have ever required them to work at heights such that they would be exposed to a fall hazard. Nonetheless, the Board upheld the citation even though it was not reasonably predictable that these three employees would ever be exposed to a fall hazard. It

did so because it incorrectly equated access to the fall protection equipment with use of the fall protection equipment and ignored the cited regulation's language requiring training only when the employee is required to use fall protection equipment in the performance of their job duties.

The fact that it is not reasonably predictable that an employee might be exposed to a fall hazard because of simply having access to fall protection equipment is the reason why the applicable regulation requires training in the use of fall protection equipment if, and only if, the employee's job duties require the use of that fall protection equipment. The Board's overly broad interpretation of the rule of access in this case essentially eliminates the reasonable predictability standard developed under federal law and allows proof of exposure when it is only possible that an employee might be exposed to a fall hazard when using fall protection equipment for some unforeseen reason unrelated to their work duties. The applicable regulation clearly requires training in the use of fall protection equipment only where employees are going to be required to use that fall protection equipment in the performance of their job duties. It does so because exposure to a fall hazard because the employee has not been trained in the use of fall protection equipment is only reasonably predictable when the employee is going to be required to use that equipment doing their job.

III. CONCLUSION

The allegations of the complaint issued by OSHA in this matter were never proven by OSHA, and found by the Board to be untrue. Nonetheless, the Board upheld the alleged violation because it misapplied the rule of access and misinterpreted the applicable regulation. This Court should reverse the Board's decision because the cited regulation does not apply to the facts of this case and because its overly broad view of the rule of access is not consistent with the applicable law.

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 19th day of July, 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 1,883 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 19th day of July, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 19th day of July, 2017, a copy of the foregoing **APPELLANT'S SUPPLEMENTAL OPENING 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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