IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 71130

FILED

AUG 07 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
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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 REPLY BRIEF

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I. ARGUMENT

There are two reasons this court should reverse the decisions entered by the Nevada Occupational Safety and Health Review Board (Board) and the First Judicial District Court.

First, OSHA did not prove the allegations of the citation and complaint asserted in this matter. Both the citation in the complaint allege Sierra Packaging employees used fall protection systems to access the top-tier of the racking system in the Sierra Packaging facility without adequate training on how to use the fall protection equipment. OSHA's allegation wasn't true and the Board specifically found in Finding No. 7 of its decision that Sierra Packaging employees were not using fall protection equipment while installing the stabilizers on the racking system. (JA 362, lines13,14) Clearly, the allegations of the citation and complaint were not proven and were not the reason the violation was upheld by the Board. The decisions of the Board and the District Court should be reversed simply because the allegations of the complaint and citation were not true.

Second, OSHA has misinterpreted the regulation at issue in this case and misapplied the "rule of access" in its attempt to enforce its unreasonable position concerning employee access to safety equipment. The real reason the violation was upheld had nothing to do with the allegations of the citation and complaint. The real reason the violation was upheld was based solely on the fact Sierra Packaging

employees had access to the fall protection equipment. This real reason for upholding the violation is succinctly expressed in the District Court decision:

> "Providing maintenance employees access to the harness system without the training to teach them the uses and limitations of such equipment, make it reasonably predictable these employees had been, 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 provision 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 training on the safe use of such equipment." (Order Denying Petition for Judicial Review, JA 377, lines 16 - 23.)

OSHA and the Board misapplied the "rule of access" by asserting simple access to safety equipment makes it reasonably predictable employees will be exposed to fall hazards. As argued in Sierra Packaging's Supplemental Opening Brief, simple access to fall protection equipment does not make exposure to fall hazards reasonably predictable unless the employees are required to use the equipment.

This misapplication of the "rule of access" leads to a misinterpretation of 29 CFR 1910.132 (f)(1)(iv). This regulation clearly requires training in the use of personal protective equipment (PPE) only when employees's job duties require the use of that PPE. 29 CFR 1910.132 (f)(1)(iv) requires training in the use of personal protective equipment only when an employee is required to use the equipment in the performance of their job duties because employers have no reason to train an

employee in the use of PPE unless their job duties require the use of that PPE. OSHA and the Board's interpretation of the regulation to require training in the use of PPE simply because an employee has access to PPE, regardless of whether they are required to use it in their work or not, expands the application of the regulation well beyond its plain meaning. The Board's decision should be reversed because it incorrectly equated access to fall protection equipment with use of fall protection equipment and ignored the cited regulation's language requiring training only when the employee is required to use fall protection in the equipment in the performance of their job duties.

II. 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 equates access to safety equipment with the use of safety equipment. Because the Board wrongly concludes simple access to safety equipment makes it reasonably predictable employees will be exposed to hazards, the Board has ignored the plain meaning of 29 CFR 1910.132 (f)(1)(iv). The plain meaning of this regulation does not require training in the use of PPE unless employees are required to use doing their jobs. This Court should reverse the Board's decision because this regulation does not apply to the facts of this case and because the Board's 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 7th day of August, 2017.

McDONALD CARANO LLP

By: _____

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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 1,298 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 7th day of August, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 7th day of August, 2017, a copy of the foregoing **APPELLANT'S SUPPLEMENTAL 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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