

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 71130

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Elizabeth A. Brown
Clerk of Supreme Court

SIERRA PACKAGING & CONVERTING, LLC,

Appellant,

vs.

**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.

JOINT APPENDIX, VOLUME 2

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IN THE SUPREME COURT OF THE STATE OF NEVADA

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, **JOINT APPENDIX VOLUME 2** filed in **Case No. 71130** does not contain the social security number of any person.

Date: December 14, 2016.

/s/ Timothy E. Rowe

Timothy E. Rowe

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NRAP 30(f)(2), I hereby certify that I am an employee of McDonald Carano Wilson LLP and a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

Dated: December 14, 2016.

/s/ Carole Davis

Carole Davis

BEFORE THE NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

-oOo-

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,)	DOCKET NO:
)	RNO 14-1684
Complainant,)	
)	
vs.)	
)	
SIERRA PACKAGING & CONVERTING, LLC,)	
)	
<u>Respondent.</u>)	

HEARING

Wednesday, March 12, 2014

Occupational Health & Safety Administration
 4600 Kietzke Lane
 Building B, Suite 111
 Reno, Nevada

Reported by: ERIC V. NELSON, CCR #57, CRR

SUNSHINE LITIGATION SERVICES (775) 323-3411

A P P E A R A N C E SBOARD MEMBERS PRESENT

JOE ADAMS, Chairman
NICOLE BAKER
JAMES I. BARNES

LEGAL ADVISOR

FRED SCARPELLO
Attorney at Law

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1 RENO, NEVADA, WEDNESDAY, MARCH 12, 2014, 1:46 P.M.

2 -o0o-

3
4 CHAIRMAN ADAMS: We will go ahead and go on the
5 record. We will have Mr. Scarpello set the record.

6 MR. SCARPELLO: Thank you, Mr. Chairman.

7 This hearing shall come to order and be
8 conducted pursuant to Chapter 618 of the Nevada Revised
9 Statutes. The contested matters shall be heard in a
10 quasi-judicial forum pursuant to Chapter 618 of the Nevada
11 Administrative Code and applicable Nevada Revised Statutes
12 conferring jurisdiction.

13 The hearing proceedings will be transcribed by
14 a Certified Court Reporter.

15 You are further notified that all meetings and
16 contested hearings are open to the public, but deliberations
17 which involve alleged misconduct, professional competence,
18 and/or character may be privately conducted. However, any
19 final decisions will be made publicly, all in accordance
20 with Chapter 241 of the Nevada Revised Statutes, commonly
21 known as the Nevada Open Meeting Law.

22 The current matter to be heard is identified as
23 Case No. RNO 14-1684 entitled Chief Administrative Officer
24 of the Occupational Safety and Health Administration,
25 Division of Industrial Relations of the Department of

SUNSHINE LITIGATION SERVICES (775) 323-3411

1 Business and Industry, State of Nevada, Complainant, versus
2 Sierra Packaging and Converting, LLC, Respondent.

3 The regulations for the Nevada Industrial
4 Safety and Health Enforcement Program, as adopted, pursuant
5 to the Nevada Administrative Procedure Act and Chapter 618
6 of the Nevada Revised Statutes will be followed, in addition
7 to the mandates of the Nevada Administrative Procedure Act
8 in general under Chapter 233B of Nevada Revised Statutes.
9 You should note particularly, however, NRS 233B.123 with
10 regard to the admissibility of evidence and consideration of
11 objections accordingly. Specifically NRS 233B.123(1)
12 provides:

13 "Irrelevant, immaterial or unduly
14 repetitious evidence shall be excluded. Evidence
15 may be admitted, except where precluded by statute,
16 if it is of a type commonly relied upon by
17 reasonable and prudent people in the conduct of
18 their affairs. Agencies shall give effect to the
19 rules of privilege recognized by law. Objections
20 to evidentiary offers may be made and shall be
21 noted in the record. Subject to these requirements,
22 when a hearing will be expedited and the interests
23 of the parties will not be prejudiced substantially,
24 any part of the evidence may be received in written
25 form."

1 All objections shall be addressed to the
2 Chairman and shall be ruled upon by the Chairman after, and
3 if necessary in the discretion of the Chairman, consultation
4 with Board members and legal counsel.

5 The Board reserves the right to inquire of the
6 parties, witnesses and attorneys or representatives at any
7 stage during the hearing.

8 The parties are urged to present their cases in
9 view of the overall time allotted pursuant to the notice of
10 hearing as sent to all parties. However, the Board reserves
11 the right to order briefs on any issues not fully present at
12 the time of the hearing due to any delays in presentation or
13 other factors.

14 At the conclusion of the hearing, the Board may
15 enter its order immediately or take the matter under
16 advisement and, likewise, may direct counsel to prepare
17 proposed findings of fact and conclusions of law. A formal
18 written decision will be sent to the parties by certified
19 mail.

20 After final decision, the Board may direct the
21 prevailing party to prepare final findings of fact and
22 conclusions of law in furtherance of the Board's decision.

23 At this time, I would like to introduce the
24 members of the Nevada Occupational Safety and Health Review
25 Board. To my far right is Miss Nicole Baker; seated next to

1 her Mr. Joe Adams, the Chairman; to my left, Mr. Jim Barnes.
2 My name is Fred Scarpello. I'm independent contract legal
3 counsel to the Board but not a state employee nor voting
4 member of the Board.

5 The parties will proceed with the Complainant
6 presenting its case in chief, and then the Respondent will
7 proceed with presentation of its case. Upon conclusion, the
8 Complainant and Respondent will each be given the
9 opportunity of closing argument.

10 Counsel for each party may choose to waive
11 opening statement. However, the Board requires that each
12 counsel first inform the Board of the identity and number of
13 witnesses to be present and the evidence expected to be
14 brought forward through each witness.

15 The Complainant may now proceed accordingly.

16 CHAIRMAN ADAMS: We have both evidence packages
17 which I understand have been stipulated to.

18 MS. ORTIZ: Yes.

19 MR. ROWE: That is correct, Your Honor.

20 CHAIRMAN ADAMS: So we have OSHA's Exhibit 1 is
21 all. And then are there two separate exhibits, Mr. Rowe?

22 MR. ROWE: There are actually four exhibits,
23 Mr. Chairman. There is A, B, C and D.

24 CHAIRMAN ADAMS: So A through D. Those will be
25 numbered in that order and so they are on the record.

1 (Complainant's Exhibit No. 1 admitted.)

2 (Respondent's Exhibits A through D admitted.)

3 CHAIRMAN ADAMS: Nothing else needs to be
4 cleared up before we go to openings.

5 MR. SCARPELLO: Mr. Chairman, one point of
6 housekeeping. Complainant counsel provided these
7 photographs, which are the same as those provided in the
8 evidence packet, and with the representation that they may
9 be clearer than those included. She has shown those to
10 Mr. Rowe, and it appears to be acceptable if they will be
11 assistive to the Board; is that right, counsel?

12 MS. ORTIZ: Yes, it is the last attempt at
13 making picture on page 41 clearer.

14 CHAIRMAN ADAMS: So, Miss Ortiz, prepared for
15 opening?

16 **OPENING STATEMENTS**

17 MS. ORTIZ: Thank you, Mr. Chairman. This
18 issue involves the standard 29 CFR 1910.132 subsection
19 (f)(14), and that reads that the employer shall provide
20 training on use of personal protective equipment. The
21 evidence presented and the testimony given today by my one
22 witness, which is the investigator in this case, Miss
23 Jennifer Cox, will show that at the time that she conducted
24 her investigation, she was made aware that the employees
25 there were not entirely sure on the actual acceptable

1 minimum length, minimum required distance from the suitable
2 anchor point to the ground. And because of that lack of
3 knowledge, it was exposing employees to a fall that exceeded
4 15 feet. To be exact, it was 15 feet, 7 inches.

5 She will show that how she was able to
6 determine that there was training issues here, she will show
7 that she was trying to help educate as part of that, and we
8 will be able to show that since the people she was talking
9 to did not themselves know the proper procedures and the
10 proper distances for safe use of the PPE, they couldn't
11 possibly have taught anybody else those proper procedures.

12 For those reasons we will be asking that you
13 affirm the citation in this case as well as the proposed
14 penalty.

15 CHAIRMAN ADAMS: Mr. Rowe, your opening.

16 MR. ROWE: Yes, Mr. Chairman. This case is a
17 little unusual in that the citation wasn't because there
18 were employees working in an area that caused some kind of
19 hazard or danger. The citation is for not training those
20 employees.

21 And the evidence we intend to present today
22 will be that there would have been absolutely no reason for
23 this employer to train these employees to be working on that
24 rack system because the employees weren't supposed to be on
25 the rack system. And in fact, the company has standard

1 working rules that preclude employees from being on the rack
2 system and regularly discipline employees if they are caught
3 in any manner trying to climb on those racks.

4 So the defense of this matter is that it is
5 kind of a common sense defense in that under the
6 circumstances of this case, there was no reason for the
7 employer to expect or know that a hazard existed and no
8 reason to train employees to use fall protection on those
9 racks because those employees were not supposed to be on
10 those racks. So we will do that through three separate
11 witnesses, Your Honor.

12 We have Mr. Sean Tracy, who is the plant
13 manager; we have Mr. Steve Tintinger who will testify, he is
14 the maintenance manager; and we have Mr. Dave Hudson who
15 will testify, who is the safety manager for the company.
16 Thank you.

17 CHAIRMAN ADAMS: Thank you. Miss Ortiz, are
18 you prepared?

19 MS. ORTIZ: Yes, Mr. Chairman, I call Jennifer
20 Cox to the witness stand, please.

21 (One witness was sworn: Jennifer Cox.)

22 MS. ORTIZ: Mr. Chairman, before we begin, I
23 forgot to do the housekeeping thing. Can we invoke the rule
24 of exclusion here since they are all witnesses?

25 MR. ROWE: Sure. Sean Tracy is our company

1 rep, and so he will stay, if that is all right. You are not
2 to talk about the case while you are out there.

3 (Two witnesses excluded.)

4 **JENNIFER COX**

5 called as a witness on behalf of the Complainant,

6 having been duly sworn,

7 was examined and testified as follows:

8 **DIRECT EXAMINATION**

9 BY MS. ORTIZ:

10 Q Miss Cox, can you please state your name for
11 the record and spell your last name?

12 A Jennifer Cox, C-o-x.

13 Q And where are you currently employed?

14 A The State of Nevada, Enforcement.

15 Q The Nevada OSHA?

16 A Yes.

17 Q How long have you been employed by Nevada OSHA?

18 A Eight years.

19 Q What is your current position?

20 A Enforcement Officer OSHA.

21 Q How long have you been in that position?

22 A Eight years.

23 Q In the eight years you have been with OSHA,
24 approximately how many investigations have you conducted?

25 A Five hundred.

1 Q What was your work experience prior to becoming
2 a Nevada OSHA investigator?

3 A Prior to working for the State as an CSHO, I
4 was a safety coordinator at Amazon.com, and prior to that I
5 was in the military.

6 Q Can you briefly describe what work you did in
7 those positions?

8 A In the military I was a maintenance supervisor
9 and at Amazon.com a safety coordinator and insured that the
10 safety rules and policies were enforced.

11 Q Can you briefly describe your educational
12 background?

13 A I have a BA in environmental studies and a
14 minor in biology.

15 Q Have you received any additional training since
16 you have been with Nevada OSHA?

17 A Yes, I have.

18 Q Could you briefly describe the additional
19 training in general?

20 A Approximately 20 to 25 classes, anywhere from
21 fall protection to combustible dust to scaffolding, to name
22 a few.

23 Q And is your training ongoing?

24 A Yes, it is. Currently in a respiratory class.

25 Q Are you familiar with Sierra Packaging?

1 A Yes, I am.

2 Q How are you familiar with them?

3 A After conducting an investigation I was
4 assigned the investigation.

5 Q At what location?

6 A At the Reno location.

7 Q Were you there to conduct an investigation?

8 A Yes, I was.

9 Q And why were you there?

10 A My supervisor gave me a referral and a picture
11 of three individuals standing on top of racking and with two
12 items of complaint on it. One employee was actually on the
13 racking without fall protection, and I believe the second
14 one was no forklift certification.

15 Q Could you turn in that evidence packet to page
16 41? Would that be the picture -- let me back up. Do you
17 recognize that picture?

18 A Yes, I do.

19 Q How are you familiar with that picture?

20 A This was handed to me along with the referral.

21 Q So this is the picture you were just talking
22 about that you got?

23 A Yes.

24 Q That caused the investigation to be done?

25 A Yes. Little bit better quality.

1 Q Can you tell me what you see in this picture
2 that made you understand was the purpose for your
3 investigation?

4 A At first I only saw two individuals. After
5 closer look, there are three individuals standing on a third
6 tier of the racking.

7 Q Could you try to give us a general description
8 for the record on where those three people are located?

9 A So you have the one person in the center, the
10 person to the right is very hard to see because they have
11 dark blue clothes on, but they are standing next to the pole
12 upright, and on the left side of that you will see another
13 individual standing next to a pole.

14 Q I'm looking at the picture here. When you say
15 the gentleman to the right, is that the one that looks like
16 he is holding some sort of orange container?

17 A Yes.

18 Q So that is what you mean when you are talking
19 about the right, and then on the left, is that the first
20 pole that appears in the picture?

21 A Well, if you count poles, left to right, you
22 got one, two, three. On the third pole from the left is an
23 individual standing right next to it. That is the one that
24 is hard to see with the pink container.

25 Q When you talk about the individual on the left,

1 are they located next to the first pole?

2 A Yes, ma'am.

3 Q Did you do an opening conference when you
4 arrived?

5 A Yes, I did.

6 Q Who was present for the opening conference?

7 A I did the opening conference with Mr. O'Grady.

8 Q Who is Mr. O'Grady?

9 A He was the -- I need to look at my report to
10 get his exact title.

11 Q Would it be your narrative report?

12 A Yes.

13 Q Can we turn to page 7.

14 A Yes, Sierra Packaging and Converting, he was
15 the sales rep.

16 Q That is the only person present for the opening
17 conference?

18 A Yes, ma'am.

19 Q Did you explain the purpose of the opening
20 conference to him?

21 A Yes.

22 Q What did you explain was the purpose of that
23 investigation?

24 A It was a partial inspection to a complaint,
25 requested permission to come in to do the inspection, gave

1 him a 618 that authorizes to do an inspection, told him his
2 rights, informed him he had a right to denial. After some
3 consideration he did grant entry into the facility.

4 Q After you did the opening conference what did
5 you do?

6 A Then I finished up the opening conference, then
7 what I wanted to do, I requested to go to the outbound area.
8 I wanted to verify that the picture was actually the same as
9 in the location facility.

10 Q Did you find the location?

11 A Yes, I did.

12 Q That you are referring to?

13 A Yes.

14 Q Did you by any chance take a picture of that
15 location?

16 A Yes, I did.

17 Q Could you turn to page 42B? Would that be the
18 picture that you took of that location?

19 A Yes.

20 Q And you are satisfied that that is an accurate
21 representation of the exact same rack system that is in the
22 complaint?

23 A Yes.

24 Q What else did you do after that?

25 A Once I verified that it was at their facility,

1 I showed the picture to Mr. O'Grady. Mr. O'Grady
2 immediately called over several of his supervisors. I asked
3 him to identify if he knew who the individuals were on the
4 racking. He identified them as the maintenance section
5 personnel, and he called the maintenance supervisor over.

6 Q Do you remember who the maintenance supervisor
7 was?

8 A Steve Tintinger.

9 Q What did you discuss with them once they came
10 over?

11 A I requested to do an interview of the
12 individuals that were within the picture.

13 Q Did they allow you to?

14 A Yes, they did.

15 Q And were you able to find those employees and
16 take statements from them?

17 A Yes, I did.

18 Q Let me direct you to pages 13 through 15 of
19 your evidence packet. Are these the statements that you
20 took from the employees?

21 A Yes, they are.

22 Q Can you summarize what you found out from those
23 employees regarding this particular incident in the picture
24 that you showed them?

25 A First off, I asked them if they were the actual

1 individuals in the pictures. Two of the three stated that
2 they were. One did not say he was up on the racking. The
3 one in the middle that was standing on top, he did admit to
4 standing on the racking, and the second individual told me
5 that he was not standing on the racking, he was standing on
6 a ladder.

7 Q Could you refer back to picture 41, please? Do
8 you know which of those individuals or can you point out to
9 us which of those individuals was saying they were standing
10 on a ladder?

11 A It would be the one by the first pole.

12 Q Do you see a ladder anywhere near there?

13 A There looks to be one underneath it offset to
14 his right.

15 Q To your perception, in this picture there is a
16 ladder but it is not directly under him?

17 A Correct.

18 Q What else did the employees tell you when you
19 were interviewing them?

20 A I did ask the employees if they were authorized
21 to be up on the racking. They said, no, they were not.

22 Q Did they explain why they were?

23 A They were all very nervous at the time of the
24 inspection, and they stated that they knew they shouldn't
25 have but they were trying to get the job done, they were

1 putting in a metal piece that was missing in the racking.

2 Q Did you ask them about fall protection?

3 A Yes, I did.

4 Q And what did they say about that?

5 A They told me that the employer did provide them
6 with some fall protection and that they should have been
7 using it, their fall protection, which was a five-point body
8 harness, six-foot liner, three-foot shop pack.

9 Q Did you ask them, did you test their knowledge
10 of how to use the fall protection properly?

11 A Yes, I did. The first individual that I
12 interviewed, I asked for him to get the fall protection for
13 me so I could take a look at it. He left, he came back
14 within a couple minutes with a fall protection system, the
15 five-point body harness, six-foot liner and three-foot shop
16 pack.

17 I asked him certain questions, what was the
18 anchor point required for this. The reason for asking that
19 is because it is 5,000 pounds, and the racking was not
20 engineered for that. He told me that the required anchorage
21 point needed to hold 200 pounds.

22 Q Let me back up a minute. You were talking
23 about the requirement is 5,000 pounds and the rack isn't
24 designed for that. Can you explain what you are talking
25 about?

1 First of all, when you are talking about the
2 5,000, where does that number come from?

3 A That is per the manufacturer. All of them have
4 the 5,000 pounds required for the anchor point per
5 individual.

6 Q The manufacturer of the fall protection he
7 showed you?

8 A Yes.

9 Q And what does that mean? Where does that 5,000
10 pounds come from? Is it what you are standing on, what you
11 are anchored to?

12 A It is what the anchor point is connected to.
13 That is the force that the anchor point needs to hold if the
14 individual would fall. Basically, if you hang your car off
15 of it, that is good anchor point. That is a good reference
16 that I use for when I'm talking to the individuals.

17 Q And you are saying that the rack was not
18 designed to be able to support your car off of it?

19 A Not to my knowledge, but you would have to be
20 an engineer to make that determination for sure.

21 Q But that is what prompted you to ask them these
22 questions?

23 A Yes.

24 Q Now we can go forward. You said that they
25 answered that it was only supposed to be able to support 200

1 pounds?

2 A Two hundred pounds.

3 Q What else did they tell you in response to your
4 quizzing?

5 A I also asked them what the required fall
6 distance for the system that they had, how far did they have
7 to fall before it fully engaged and stopped them. And they
8 did not know.

9 Q Is that something they should know?

10 A Yes. It is very important to know your fall
11 distance so you do not hit the floor. You are working at 10
12 foot and it is required 17.5, which is conservative fall
13 clearance distance required for a system before you hit the
14 floor or the ground, whatever is beneath you.

15 Q As a hypothetical, if you were to hit -- what
16 kind of ground was there there?

17 A It was cement.

18 Q So as a hypothetical, if someone was to fall
19 from the top of the rack and land on the ground, what types
20 of injuries would you expect to see?

21 MR. ROWE: Objection. No foundation.

22 MS. ORTIZ: It is a hypothetical. She's got
23 the experience, she's said she's done countless inspections,
24 she is an been in this job for eight years, and I asked it
25 as a hypothetical situation.

1 CHAIRMAN ADAMS: Allow the question. I think
2 with her experience. Again, it is just a hypothetical, so
3 not asking for any injuries could result, in her opinion,
4 her knowledge of.

5 MS. ORTIZ: Thank you.

6 THE WITNESS: I have seen individuals die from
7 a 9-foot fall, and I have seen also individuals alive from a
8 32-foot fall. It depends on how they land.

9 BY MS. ORTIZ:

10 Q But the worst that could happen --

11 A Would be death.

12 Q -- in that situation. Now once you
13 determined -- was that all that you questioned the employees
14 on were those points on the proper procedures?

15 A I also asked them how they -- they did know how
16 to don the equipment and they did know how to inspect the
17 equipment.

18 Q They did not know how?

19 A They did.

20 Q They did know how to inspect it. Did they know
21 how to maintain it?

22 A That's part of the inspection process is
23 maintaining it and store it correctly.

24 Q Once you finished talking to them what did you
25 do?

1 A After I finished talking to them, we went and I
2 spoke with management and explained to them what my findings
3 were.

4 Q When you say "management," who are you
5 referring to?

6 A I'm talking about Mr. O'Grady, Mr. Hodges,
7 Steve Tintinger, and there were two other individuals. I
8 don't remember their names off the top of my head.

9 Q And you said you explained to them what your
10 findings were after your interviews?

11 A Yes.

12 Q What was the response?

13 A Mainly what I did is I went to them and
14 explained to them what the fall clearance distance was,
15 because I was quite concerned.

16 Q Did you ask them if they knew what the correct
17 fall distances were?

18 A Yes, I did.

19 Q What specifically did you ask them?

20 A I asked them if they knew what the fall
21 clearance distance was for equipment that they had issued
22 for their personnel.

23 Q What response did you get from them?

24 A They did not know.

25 Q They did not know.

1 A I tried to explain to them.

2 Q You did?

3 A Yes.

4 Q Let me direct you to page 11 of the evidence
5 packet. Can you identify what this is?

6 A That is a drawing I used for trying to explain
7 the fall clearance distance and anchor point requirements.

8 Q Who were you trying to explain this to when you
9 made this drawing?

10 A Mr. Hodges, Mr. O'Grady, and the maintenance
11 manager and the two other individuals.

12 Q Did you do anything besides this diagram?

13 A Yes, I did. Because Mr. O'Grady stated that he
14 was having a hard time understanding this. I can understand
15 because it is a little stick figure.

16 So what I did was I asked the maintenance
17 personnel to go get the fall protection equipment, and I
18 actually had him don it and put it on and showed him the
19 distance.

20 Q Who went and got the fall protection?

21 A Steve. The maintenance supervisor.

22 Q And who tried it on for you?

23 A Steve.

24 Q So you used him as the model to show what you
25 meant; is that what you are saying?

1 A Yes, I had him stand, I took the harness, stood
2 back, made it taut and then, okay, now imagine this instead
3 of vertical -- I mean instead of horizontally, vertically
4 because you add this with the person's height, and then shop
5 pack is three-foot, and then you have a two-foot safety
6 factor, which brings up the fall clearance distance 17.5
7 feet.

8 Q So while you were using Mr. Tintinger as a
9 model, you were also explaining what you were doing?

10 A Yes.

11 Q How did that conversation conclude?

12 A I believe they understood what I was getting
13 at.

14 Q Did you then conduct a closing conference?

15 A Yes, I did.

16 Q And what was the nature of that?

17 A I didn't conduct it that day. I did an opening
18 I believe on the 16th, a couple days later I did a closing
19 conference with them and recommended a serious citation for
20 no hazard assessment.

21 Q Now you were given -- did you take any other
22 pictures during your inspection of the worksite?

23 A Yes, I did.

24 Q Could you turn to page 42A, please? Do you
25 recognize that?

1 A Yes.

2 Q Could you explain what that is?

3 A That is a picture of the rack.

4 Q Is that a picture that you took?

5 A Yes, it is.

6 Q And the description, the comments underneath

7 that, was that yours?

8 A Yes.

9 Q Going to page 43, do you recognize that?

10 A Yes.

11 Q And what is that?

12 A That is a grinder.

13 Q Is this also a picture that you took?

14 A Yes, it is.

15 Q Did you do a citation for the grinder?

16 A No, I did not.

17 Q Why is that?

18 A Because at the time when the maintenance

19 supervisor went to get his personnel, I asked him if I could

20 accompany him. When he was walking to that area I observed

21 the three individuals were using grinders on a metal

22 racking, and I asked Mr. O'Grady to stop the work, which he

23 did, and I pointed out to him that this grinder did not have

24 a guard on it. And Mr. O'Grady stated that that is not

25 their company policy, that they are not allowed to do that.

1 And because of the three grinders, the other two did have
2 the guards on them. And he also stated that if his
3 management would have seen it, they would have immediately
4 stopped it.

5 Q Can you turn to page 44, please? Is this a
6 picture you took?

7 A Yes, it is.

8 Q What does this depict?

9 A It depicts the insulation on an extension cord
10 being damaged.

11 Q Did you cite a violation for this?

12 A No, I did not.

13 Q Why not?

14 A Once again, I pointed this out to Mr. O'Grady,
15 Mr. O'Grady says once again that he had just purchased all
16 new extension cords for their people, that once again, if
17 they would have seen it, it would have been "tooken" out of
18 service.

19 Q Can we look at page 45, please? Are 45 and 46
20 the same equipment?

21 A Yes, it is.

22 Q And what do they depict?

23 A This I was just trying to get the brand name of
24 it and show the brand name of the offhand grinder.

25 Q And what is the picture on 47? Is this also

1 yours?

2 A 47? Yes, it is.

3 Q What is that a picture of?

4 A That is a picture of the diameter of the
5 abrasive wheel to insure that it does require the grinder --
6 I mean a guard. When they are two inches they are not
7 required a guard. Anything over two inches is required a
8 guard.

9 Q Does that one require a guard?

10 A Yes, it is. Four-inch. This is the one that
11 did not. This is the one that they had to take out of
12 service.

13 Q So while you were there you saw other
14 violations, but based on what the explanation was and the
15 fact that they were able to immediately abate them, you
16 chose not to do a citation to them?

17 A Correct.

18 Q Have you ever done an inspection of this
19 company before?

20 A This is my first time at this facility.

21 Q Had you ever met any of the management that you
22 ran into? Have you ever met them before that day?

23 A Yes, I have.

24 Q Where?

25 A Mr. O'Grady, I did an inspection at Chevrolet

1 about six years ago, and he was working there. He was a
2 salesman I believe there.

3 Q What about the other management people?

4 A No, I did not, have not.

5 Q And the employees?

6 A No.

7 Q So you wrote or you recommended a violation of
8 29 CFR 1910.132 subsection (f)(14); is that correct?

9 A Yes.

10 Q And can you summarize what you understand that
11 standard to mean?

12 A For the training?

13 Q Yes.

14 A The employer shall provide training to the
15 employee that they understand what personal protective
16 equipment that is provided to them by the employer.

17 Q Why did that standard apply in this case?

18 A Because the employee with the five-point body
19 harness, I asked him where he got the PPE, and he said it
20 was provided to him by his employer.

21 Q To be clear, what is that standard supposed to
22 protect employees from?

23 A Misuse or not knowing the restrictions or the
24 limitations to the personal protective equipment.

25 Q Your understanding based on your interview of

1 these employees, were they able to display the minimum
2 requirement as far as knowledge goes?

3 A No.

4 Q Did you observe anything else at the facility
5 that would require fall protection besides that rack?

6 A I did tell the individuals that they were
7 required to wear it on a scissor lift and any other
8 maintenance functions, that they would be required.

9 Q They didn't say it was only for the rack that
10 you saw?

11 A No, they did not.

12 Q They didn't say that it was only supposed to be
13 for one piece of equipment?

14 A Correct.

15 Q Did they tell you if those were assigned
16 specifically to them?

17 A The one individual that I had to go get the
18 fall protection equipment said it was given to him, provided
19 to him by his employer.

20 Q Now, when you talked to management following
21 your interview with the employees, did they indicate that
22 they knew their employees were not properly trained?

23 A No, they did not.

24 Q But they did display to you that they
25 themselves were confused on the standards?

1 A Yes, they did.

2 Q On the requirements -- excuse me -- of fall
3 protection.

4 In the normal course of your inspections do you
5 prepare any required documents?

6 A Yes. We do the narrative and the 1-B's, 1-A's.

7 Q If you turn to page 16, please. Do you
8 recognize this document?

9 A Yes, I do.

10 Q Would you describe what that is, please?

11 A That is the citation for the training.

12 Q On page 16, that is the citation or is that the
13 worksheet?

14 A Worksheet.

15 Q Can you tell us how you came to the conclusion
16 that this particular violation was considered to be serious?

17 A Due to the severity of their lack of knowledge,
18 if they misuse the fall protection and use it at the wrong
19 height, hit the ground, it could cause death or permanent
20 disability or broken bones.

21 Q Could you have considered this as other than a
22 serious violation instead?

23 A No, I could not.

24 Q Why not?

25 A Because the severity of the injury would be

1 death, broken bones or disability, permanent disability.

2 Q Let's talk about how you came to the penalty
3 amount calculation. That would be on page 16 as well; is
4 that correct?

5 A Yes.

6 Q Can you explain to us how you got from \$5,000,
7 which is what is listed here in the GBP -- first of all, can
8 you tell us what the GBP stands for?

9 A Gravity base penalty.

10 Q What does that denote?

11 A That is a base penalty depending on the
12 probability and the severity once that is factored together.

13 Q So for any lesser probability high severity
14 violation, the base penalty would be \$5,000?

15 A Yes.

16 Q Now, it was adjusted -- that amount was
17 decreased; is that correct?

18 A Yes.

19 Q Can you explain to us the factors that led to
20 the decrease?

21 A Depending on the size of the company with what
22 amount of employees they had, they got a 10 percent off for
23 their size.

24 Q Is that because they are smaller?

25 A Yes, ma'am. And good faith is that they did

1 have a written safety program was the reason they got 15
2 percent on that. They had zero on history because they
3 hadn't been cited within the past five years.

4 Q And because of those calculations, those
5 credits, is it fair to call them, because of those credits
6 their penalty was reduced from 5,000 to your proposed
7 adjusted penalty; is that correct?

8 A Yes, ma'am.

9 MS. ORTIZ: I have no further questions.

10 CHAIRMAN ADAMS: Mr. Rowe.

11 MR. ROWE: Thank you.

12 **CROSS-EXAMINATION**

13 BY MR. ROWE:

14 Q Miss Cox, let -- can I approach the witness,
15 Your Honor?

16 CHAIRMAN ADAMS: Yes, you may.

17 BY MR. ROWE:

18 Q Let me show you this copy of the picture we
19 have been discussing of the three individuals in it that is
20 a little better quality. Have you seen that one before?

21 A Yes.

22 Q Are any of those individuals wearing fall
23 protection?

24 A No, they are not.

25 Q Now you indicated that you took three

1 statements; is that correct?

2 A Yes, I did.

3 Q Would you turn to the statements, please? I'm
4 sorry, pages 13 through 15. Do you see page 13?

5 A Yes, sir.

6 Q That is a statement from a Mr. Gonzalez?

7 A Yes, sir.

8 Q Can you point out to me in the picture which
9 employee Mr. Gonzalez is?

10 A No, I cannot. I do not remember that.

11 Q Do you have any information that would tell you
12 which one it was?

13 A No, I do not.

14 Q Would you read the statement, please?

15 A "Employee did climb racking to fix metal.
16 Oswaldo Gimenes, supervisor lead, instructed
17 employee to put metal in correct position. Did
18 not follow up on or inspect work of employee.
19 Employee was not aware he could not climb the racks."

20 Q Let me stop you. Is there anything in that
21 statement that would tell you which employee number this
22 particular person was?

23 A No, there is not.

24 Q How about the statement on page 14? Do you
25 know which person that was?

1 A To answer your question, on all three of them,
2 I cannot identify the statements to the individuals.

3 Q So you can't connect them up?

4 A I did at the time of the inspection, but it's
5 been a while and I don't remember.

6 Q Did you interview anybody other than these
7 three folks that are identified in the statements?

8 A No, I did not.

9 Q Why do you do these statements? What is the
10 purpose of them?

11 A To get the employees's concerns and to see what
12 their knowledge is.

13 Q Knowledge of what?

14 A For this inspection, it was to get their
15 history and see what they knew of the situation of the
16 violation, if it was them and what their training was.

17 Q If they tell you something you think is
18 important, do you put it in the statement?

19 A Yes.

20 Q Why do you have these folks sign these?

21 A To make sure I did not misinterpret them or
22 that they are comfortable with it and that is actually what
23 they told me.

24 Q What is the significance of the stars that are
25 put on the statement?

1 A It was translated and it is the person that did
2 the translation for me.

3 Q So it looks like all three statements were done
4 through a translator; is that correct?

5 A Yes, it is.

6 Q You indicated earlier I think in the testimony
7 that all of these individuals were pretty nervous about your
8 interview?

9 A Oh, yes.

10 Q In statement one, it says that the employee
11 didn't know, he was not aware he was supposed to be on the
12 racks. Do you see that statement?

13 A Correct.

14 Q It doesn't indicate anything about fall
15 protection, does it?

16 A Correct.

17 Q And it doesn't indicate anything about the
18 employer providing fall protection, does it?

19 A No, it does not.

20 Q So I assume that those were important things
21 that you would have written down if this employee had told
22 you that; correct?

23 A Well, if we write down everything that the
24 employee tells us, then the witness statements would
25 probably be 10 pages long.

1 Q So are you telling me then --

2 A I just tried to do the highlight of it.

3 Q So you are telling me that if this employee
4 told you that they were using fall protection or that the
5 employer had provided that fall protection, you didn't think
6 that was important to put in the statement?

7 A At the time when the individual went to get the
8 fall protection, I was focused in on questioning his
9 knowledge of it.

10 Q Well, was this the individual that went and got
11 the fall protection?

12 A I believe so, but I cannot say a hundred
13 percent certain.

14 Q Well, you didn't put any of that in the
15 statement. Why not?

16 A I cannot answer that.

17 Q Would you look at -- let me ask you this:
18 Statement number one refers to a gentleman by the name of
19 Oswaldo Gimenes. Do you see that?

20 A Yes.

21 Q And the statement says that this was the
22 individual that instructed him to put the metal in the
23 correct positions on the racks; is that accurate?

24 A Correct.

25 Q Did you interview Oswaldo Gimenes?

1 A No, I did not.

2 Q Would you take a look at statement two, please?

3 Now this individual indicated that he had had safety

4 training, did he not?

5 A Yes, he did.

6 Q And he indicated that had been provided both in

7 English and Spanish?

8 A Yes, he did.

9 Q And he also stated that there was a company

10 policy that they weren't supposed to be on the racks;

11 correct?

12 A Yes, he did.

13 Q And according to this statement, the individual

14 says he was standing on a ladder. Do you see that?

15 A Yes.

16 Q So does that help you identify which employee

17 gave that statement?

18 A That would be the first one.

19 Q The one on the left as you are looking at the

20 picture?

21 A Yes, by the first upright.

22 Q Did you happen to ask that employee what kind

23 of ladder he was standing on?

24 A No, I did not.

25 Q According to this statement, it wasn't Oswald

1 Gimenes that directed them to put the metal on the racks, it
2 was Steve; is that accurate?

3 A Yes, sir, it is.

4 Q So his information conflicted with the
5 information in statement one, did it not?

6 A Yes, it was.

7 Q Did you by any chance interview Mr. Tintinger?

8 A I spoke with Mr. Tintinger. Usually we do not
9 interview management because it is not kept confidential.
10 What they say is representative of management.

11 Q But there is nothing here indicating whether
12 you questioned Mr. Tintinger about who, him or whether
13 Oswaldo Gimenes, told them to go do this work on the rack?

14 A Correct. Because I wasn't citing the
15 individuals up on the rack. I was citing the training.

16 Q My point is, you didn't talk to either Steve or
17 Mr. Gimenes about who in fact told them to go up there?

18 A I believe Steve was aware of the assignment. I
19 don't think that either one of them actually observed
20 individuals up on the racking.

21 Q So did the fact that there was a discrepancy
22 between these employees's statements about who gave them the
23 instructions cause you any concern?

24 A The whole inspection was very difficult. There
25 was a language barrier, it was difficult trying to get the

1 individuals identified within the picture. I got
2 conflicting statements from everyone.

3 Q Let me refer you to statement number three,
4 please. From your prior testimony it is my understanding
5 that one of these individuals, you couldn't tell whether he
6 was up on the racking or not, he didn't admit one way or the
7 other; is that accurate?

8 A I could not identify the third individual.

9 Q Does that also mean you couldn't identify that
10 he was up on the rack?

11 A I could not get the name of the third
12 individual up there. Of the three, one stated he was the
13 one in the center with the sweatshirt, and the other one
14 stated he was on the ladder, and the third one I was not
15 able to identify.

16 Q So let me ask you this. Statement number three
17 refers to an individual by the name of Herlindo Soto. Do
18 you see that? Page 15.

19 A Yes.

20 Q Is this the individual that you couldn't -- you
21 don't know whether he was up on the rack or not?

22 A I interviewed the three maintenance people at
23 the time.

24 Q But do you know whether this individual was up
25 on the rack or not?

1 A I believe this is one that said that he was
2 not. I believe.

3 Q And Mr. Soto indicated that he also had
4 received training on various subjects; correct?

5 A Yes.

6 Q And that the company did have safety rules and
7 he was aware that he shouldn't be up on the racks, if he
8 was; correct?

9 A Yes.

10 Q And there was a note here that he had no safety
11 issues at the time of the inspection. What did that mean?

12 A Usually at the end of each, not all of them,
13 but the majority of mine when I get done I ask the
14 individual if they have any safety issue concerns that they
15 would like for me to address while I'm there.

16 Q Okay.

17 A In case we miss something.

18 Q Now, do you speak Spanish?

19 A I do not.

20 Q So you wouldn't have been able then to tell
21 what communication was going on between the translator and
22 the three individuals that were being interviewed; correct?

23 A No, I would not.

24 Q So you were relying on the translator to be
25 honest in what he told you about what was happening?

1 A Yes.

2 Q These statements are not taken under oath, are
3 they?

4 A No, they are not. As you can see, this number
5 15, the individual didn't even sign it.

6 Q I see that. In your testimony you indicated
7 that one of the individuals showed you fall protection.

8 A Yes.

9 Q And I believe you said that you asked that
10 employee to retrieve the fall protection?

11 A Yes.

12 Q Did you go with them?

13 A No, I did not.

14 Q Do you know where he got it from?

15 A No, I do not.

16 Q Do you know if the translator asked him to
17 retrieve the fall protection that was supposed to be used
18 when they were on the racks or whether he asked him just to
19 retrieve the employer's fall protection, general fall
20 protection that they have on the plant?

21 A I just asked to see the fall protection, and
22 that is what was provided for me. What he said exactly I do
23 not know. I don't speak Spanish.

24 Q You don't know where it came from or what the
25 purpose was, you just know what he showed you?

1 A Yes.

2 Q Then based on those statements, neither of the
3 other witnesses showed you fall protection; correct? It was
4 just the one?

5 A Correct.

6 Q And none of the other witnesses said they used
7 fall protection; right?

8 A Correct.

9 Q In fact, the picture shows that they weren't
10 using fall protection; correct?

11 A Correct. And management didn't tell me they
12 weren't supposed to be wearing fall protection.

13 Q Did Mr. Gimenes or -- strike that. My
14 understanding again, from your testimony, was that you did
15 not talk to Mr. Tintinger or Mr. Oswaldo Gimenes about what
16 they told employees with respect to doing this work;
17 correct?

18 A Correct.

19 Q In your testimony you indicated that you were
20 looking for anchor points?

21 A I was not looking for anchor points. I was
22 questioning them what the requirements were for the anchor
23 points. I was not addressing the individuals on the
24 racking, I was addressing their level of training of what
25 equipment that they had that they were using supposedly

1 issued by the employer.

2 Q Did you happen to inspect the racks to see if
3 they had anchor points for fall protection?

4 A No, I did not.

5 Q So you don't know one way or the other whether
6 they have anchor points for fall protection?

7 A No.

8 Q Do you happen to know from your experience and
9 training as to whether or not storage racking like this
10 would generally have fall protection anchor points?

11 A I have not seen it.

12 MR. ROWE: May I have just a minute, Mr.
13 Chairman?

14 CHAIRMAN ADAMS: Yes, you may.

15 BY MR. ROWE:

16 Q It was my understanding you did testify that
17 the employer did have fall protection available for
18 operation on the scissors lift and other maintenance
19 functions; correct?

20 A That is what one of the employees told me, yes.

21 MR. ROWE: That is all the questions I have.
22 Thank you.

23 CHAIRMAN ADAMS: Miss Ortiz.

24 MS. ORTIZ: Thank you, Mr. Chairman.
25

REDIRECT EXAMINATION

BY MS. ORTIZ:

Q Miss Cox, when you were asking the questions regarding the knowledge on how to use the personal protective equipment, were you tailoring those questions specifically for the rack?

A No, I was not because the employees actually told me that they were not supposed to be up there without fall protection. I had conflicting stories. I was trying to assess since they did have fall protection, they showed me the body harness, if they knew how to use the personal fall protection equipment that was given to them.

Q Knowing how to use the personal protective equipment, would that knowledge be relevant to when they used it in the scissor lift?

A No, it would not.

Q They wouldn't have the knowledge of how to properly use it?

A Scissor lift itself, the guardrails on the scissor lift is guardrails. Most companies have additional assignment that they require the employees follow, and you do not want to use that on it, you would want to use a restraint, not a fall protection. Once again, it is knowing the system and what the system is intended for.

Q So you don't even think this particular fall

1 arrest system they showed you would have been relevant to
2 some of the other things they told you they use it for?

3 A Not for the scissor lift. If they were to get
4 up and require a distance, the fall protection would work if
5 they know the limitations to it. But they need to know the
6 basics of the fall.

7 Q With that 200-pound limitation that they
8 mentioned to you, would that be appropriate in any point of
9 using that particular equipment?

10 A No, it would not.

11 Q Would you have written the citation for lack of
12 training regardless of whether you had that rack picture of
13 them standing on it?

14 A Yes, I would.

15 Q Why?

16 A By lack of knowledge of how to use the fall
17 protection could result in death if they hit the ground. If
18 they don't know what the clearance distance is and they are
19 working at 10-foot and it is required 17.5-foot, to not have
20 seven feet which is unaccounted for means they are going to
21 hit the ground.

22 Q Based on that does it matter who told them to
23 do any work on the rack?

24 A The citation is not for the employees on the
25 rack. I was asserting for the personal safety equipment if

1 they had the basic knowledge of knowing the limitations of
2 the personal protective equipment that was provided to them,
3 the five-point body harness, the six foot liner, the three
4 foot shop pack.

5 Q For the purpose of your citation, you didn't
6 need any information regarding why they were on the rack,
7 what they were doing, et cetera?

8 A Correct.

9 MS. ORTIZ: Thank you. I have no further. Mr.
10 Chairman, your indulgence, please. I have no further
11 questions. Thank you.

12 CHAIRMAN ADAMS: Mr. Rowe.

13 MR. ROWE: Thank you.

14 **RECROSS-EXAMINATION**

15 BY MR. ROWE:

16 Q Miss Cox, if I understand this correctly, you
17 had a picture of three employees on the rack, you went in,
18 you assessed the situation, you gave them a citation because
19 they didn't know about fall protection, and it had nothing
20 to do with the racks?

21 A Correct. Because the company had a policy that
22 they were not to be on the racking, as you can see the
23 interviews that you pointed out that they had company rules
24 against that. And I could not establish whether they were
25 told or not, it wasn't that clear due to the language

1 barrier.

2 Q I don't see anything in your narrative or in
3 these statements about whether you asked these employees
4 whether they do other activities that would require fall
5 protection. So you didn't ask them that question, did you?

6 A Yes, I did. I did not write it down.

7 Q So you are telling us that you asked them
8 whether they do other things regarding --

9 A Yes, that is the reason the scissor lift came
10 in.

11 Q I thought you said the management talked about
12 the scissor lift. There is nothing about the scissor lifts
13 in your narrative or in the statements regarding the
14 employees; correct?

15 A Correct.

16 MR. ROWE: That is all the questions.

17 CHAIRMAN ADAMS: Miss Ortiz, any further?

18 **FURTHER REDIRECT EXAMINATION**

19 BY MS. ORTIZ:

20 Q Could you turn to page 8 of the evidence
21 packet, please? The third paragraph down, did you write
22 that?

23 A Yes.

24 Q On there is this the statement that you
25 remembered hearing from that particular employee?

1 MR. ROWE: Mr. Chairman, could I interpose an
2 objection simply that I don't understand which paragraph we
3 are talking about, which particular paragraph, because the
4 first paragraph is a partial paragraph. Are we talking
5 about --

6 MS. ORTIZ: The third paragraph starting with,
7 "A translator was provided by the employer."

8 THE WITNESS: Yes.

9 BY MS. ORTIZ:

10 Q Was this the employee that brought you the fall
11 protection when you requested it?

12 A Yes.

13 Q And he is the one that brought it?

14 A Yes.

15 Q And those are the parts of the fall protection
16 that he brought to show you?

17 A Yes.

18 Q And he told you that that was his fall
19 protection; correct?

20 A Yes.

21 MS. ORTIZ: No further questions.

22 CHAIRMAN ADAMS: Mr. Rowe, any follow-up?

23 **FURTHER RECROSS-EXAMINATION**

24 BY MR. ROWE:

25 Q Again, Miss Cox, you didn't put any of this in

1 the statement for this employee to sign; correct?

2 A Correct.

3 MR. ROWE: That is all the questions.

4 CHAIRMAN ADAMS: Miss Ortiz.

5 MS. ORTIZ: I'm done.

6 CHAIRMAN ADAMS: Board members.

7 MEMBER BARNES: No questions.

8 CHAIRMAN ADAMS: I have no questions. The
9 witness is excused. Thank you.

10 (The witness was excused.)

11 CHAIRMAN ADAMS: Does that conclude your case,
12 Miss Ortiz?

13 MS. ORTIZ: It does. Thank you, Mr. Chairman.

14 CHAIRMAN ADAMS: Mr. Rowe, are you prepared to
15 proceed?

16 MR. ROWE: Yes, Mr. Chairman. At this time I
17 call Dave Hodges.

18 (One witness was sworn: Dave Hodges.)

19 **DAVID HODGES**

20 called as a witness on behalf of the Respondent,

21 having been duly sworn,

22 was examined and testified as follows:

23 **DIRECT EXAMINATION**

24 BY MR. ROWE:

25 Q Would you please state your full name and spell

1 your last name?

2 A David Hodges, H-e-d-g-e-s.

3 Q What is your current occupation?

4 A I'm safety manager, jack of all trades for
5 Sierra Packaging.

6 Q And how long have you held that position as the
7 safety manager?

8 A The last five years.

9 Q Would you give us just a general description of
10 what your duties include?

11 A I handle the training, especially new
12 employees, the annual training we do with all of our
13 employees, the specialized training through TMCC we do with
14 their employees, just anything to do with safety. I handle
15 discipline if necessary. Just a whole range.

16 Q Can you explain to the Board just basically
17 where you got your background in safety knowledge?

18 A I have been in manufacturing about 40 years,
19 started with Bastian Blessing in Grand Haven, Michigan. I
20 worked with Brunswick Corporation, with Toyota Corporation,
21 Thermadyne. I was general manager with Toyota Corporation
22 responsible for safety. I have had education. I have a
23 Master's Degree from Duke University, a Bachelor's Degree,
24 Associate's Degree, and then sponsored certification
25 programs in Ohio, Kentucky, Indiana, Michigan.

1 Q So most of your career has been in safety
2 related --

3 A Safety related manufacturing.

4 Q -- responsibilities? Would you explain just in
5 general terms what Sierra Packaging's safety program is?

6 A We have a detailed safety manual and then a
7 safety booklet for each employee that we hand out. We do
8 yearly training based on OSHA's requirements, we do
9 specialized training for specific departments based on
10 OSHA's requirements and the requirements of those
11 departments.

12 We do a weekly safety briefing with all the
13 employees every week where we go over specific items,
14 housekeeping, safety guards, whatever it may be. The safety
15 committee meeting which we do once a month, which we go over
16 general safety of the facility, we do a safety walk-through.
17 Supervisors do a daily safety check on their safety guards
18 and such on each machine. We have quite a good program.

19 Q Let me show you what's been marked as
20 Respondent's Exhibit A and ask if you have ever seen that
21 before.

22 A Yes, that is the employee safety handbook, the
23 English version.

24 Q Is that provided to all employees?

25 A When we hire a new employee we go through this

1 with them and give them the handbook and have them read it,
2 answer any questions, and have them sign the back page of it
3 that we keep in their employee file.

4 Q Do you also have a Spanish version of that?

5 A Yes, we do.

6 Q And that is provided to your Spanish speaking
7 employees?

8 A Yes. They have a choice whichever they prefer.

9 Q Let me show you what has been marked
10 Respondent's Exhibit B and ask you what that is.

11 A That is our accident safety manual.

12 Q Would it be fair to say that that is the full
13 extent of your formal program?

14 A That is the full extent of the formal safety
15 manual, yes. In fact, we are in the process of revising
16 that currently.

17 Q Now you indicated that you do employee
18 training?

19 A Uh-huh.

20 Q Do you also do training with respect to
21 personal protective equipment?

22 A We go through personal protective equipment
23 when they go into the department, go through what is needed
24 for what particular areas. When we get into some of the
25 specific stuff like fall, we use TMCC to come in and do the

1 training for that.

2 Q Tell me a little bit about the TMCC program.

3 A We get instructors from TMCC, Scott from TMCC
4 is the head of their safety program, and we have specific
5 training. Such as the electrical trainings or things where
6 I don't feel I have the expertise, I bring Scott in to do
7 the training for the individual areas.

8 Q Does the company provide personal protective
9 equipment, things like gloves, goggles, hats, fall
10 protection, whatever is necessary?

11 A Whatever is necessary for the area. We pay for
12 safety shoes and provide safety glasses, gloves, hardhats if
13 needed, fall protection is provided in those areas where it
14 is needed.

15 Q What duties in the manufacturing process that
16 you guys go through require use of fall protection?

17 A In the manufacturing process we really don't
18 have any duties that require fall protection.

19 Q How about maintenance function?

20 A Maintenance would be the only area that
21 requires it, only when they are in a lift that they are
22 required to use fall protection.

23 Q Your company has a lot of large equipment, does
24 it not?

25 A Yes, it does.

1 Q When maintenance is being done on that
2 equipment at higher levels, does that require fall
3 protection?

4 A In some cases, yes. Some of them I have ladder
5 ways so they don't have to have the fall protection, but for
6 the most part if they are up there, they are locked into
7 place.

8 Q Is there any circumstance -- or strike that.
9 Do you train all employees on fall protection or just the
10 employees that would be doing that type of work?

11 A We only train the employees that would be doing
12 that type of work, such as the maintenance department.

13 Q Is there any circumstance that you are aware of
14 where your company has functions that would require somebody
15 to be up on the upper levels of the racks?

16 A Absolutely not.

17 Q Is there any circumstance that you are aware of
18 where employees would be required to use fall protection
19 while being on the racks?

20 A They shouldn't be on the racks.

21 Q Do you as part of your safety program monitor
22 employees for safety violations?

23 A Yes, we do.

24 Q Tell us a little bit about how that happens.

25 A Well, we are always looking for safety

1 violations, what kind of safety. It may be the supervisor,
2 myself, any member of the team, could be another employee
3 notices a safety violation, is brought to our attention. We
4 immediately discuss that with the employee involved, give
5 them a verbal warning, several times, if they persist we
6 will go into the written warning, which could result in
7 termination if it continues.

8 Q So you have a progressive discipline system for
9 people who are to be found in violation of safety standards?

10 A Absolutely.

11 Q The citation that we are discussing here was in
12 the Stead plant, was it not?

13 A Yes, it was.

14 Q Does the company also have a plant or did it
15 have a plant in Sparks?

16 A Yes, it did.

17 Q And had you done a hazard assessment in the
18 Stead plant at the time this citation was issued?

19 A It had not been completed. We just moved in
20 there, and I wasn't available to do that.

21 Q How long had the company been at the Stead
22 location at the time the citation was issued?

23 A About two weeks, little less than two weeks.

24 Q And were you involved in that move-in process?

25 A Yes, very much.

1 Q Were you present at the time the citation was
2 issued?

3 A No, I was not. I was out on medical leave.

4 Q Had you done a hazard assessment in the Sparks
5 plant?

6 A I participated in it. The plant manager had
7 done the hazardous assessment along with the SCAT program.

8 Q Let me show you what's been marked Respondent's
9 C and D and have you explain what those are, if you would,
10 please.

11 A We had a hazard assessment done as part of the
12 SCAT program through the OSHA, other arm of OSHA, safety
13 consultant training section. We do our complete safety
14 program and make recommendations of what we needed to do.

15 Q That was in the Sparks plant; right?

16 A That was in the Sparks plant in May of 2011.

17 Q Is that the same operation that is performed in
18 the Stead plant?

19 A Yes.

20 Q Did the Sparks plant have storage racks the
21 same as the Stead plant?

22 A Exact same storage racks.

23 Q Did the SCATs report identify a hazard involved
24 that would require fall protection with people on the racks?

25 A No.

1 Q Have you had any other kind of hazard
2 assessment done other than the SCATs, assessment by SCATs?

3 A Not by SCATs. This assessment was done by
4 them. We also did our own assessment at the time this was
5 done.

6 Q Have you had any other operations come in and
7 do hazard assessment?

8 A At the Stead plant we just had TMCC come in and
9 do a hazard assessment for us.

10 Q Has TMCC ever done a hazard assessment at the
11 Sparks plant?

12 A I don't believe so.

13 Q Now, are the racks that are located in Stead
14 the same racks that were in Sparks?

15 A Yes.

16 Q So they were disassembled in Sparks and
17 resembled in Stead; is that accurate?

18 A Yes.

19 Q Who did the assembly of the racks in Stead?

20 A Reno Forklift.

21 Q And why did Reno Forklift do that?

22 A Well, they are a licensed contractor for
23 assembling the racks, and that's how we had it set up with
24 the city inspectors.

25 Q Is the licensed contractor required to set up

1 racks?

2 A Yes, for seismic, I believe.

3 Q Now, does Sierra Packaging have a specific rule
4 against employees being up on upper levels of the racks?

5 A We have a rule against climbing anywhere.

6 Q On the racks?

7 A Racks, anywhere else.

8 Q And how is that communicated to the employees?

9 A Through the employee safety handbook.

10 Q How are employees supposed to access materials
11 on the racks?

12 A Anything they need on the racks as far as
13 visual or to do a count, we have a ladder, which the kind of
14 ladders, we have about 10 of them. They are kind of like
15 airline to get on an airplane. And if they are going to
16 remove something from the racks, then they are to use a
17 forklift.

18 Q Let me ask you about these ladders. You say
19 they are like the ramps for getting on an airplane?

20 A Yes.

21 Q Are they on wheels?

22 A They are on wheels that when you step on them
23 they will set down on the floor and lock in place, they have
24 handrails on both sides.

25 Q And do they have a platform at the top?

1 A Yes.

2 Q How big is the platform?

3 A It is small. It is probably three by three.

4 Q And how high up -- or strike that. Let me ask

5 it this way. Is the platform, the top platform of the

6 ladder at the same level as the upper rack?

7 A I couldn't honestly answer that. I believe it

8 is slightly below the upper level.

9 Q But can employees climb the ladder to observe

10 materials on the upper racks?

11 A Yes.

12 Q It is tall enough to do that?

13 A Yes.

14 Q Are you aware of anybody ever having violated

15 the rule against being on the upper level of the racks?

16 A No, not at any time.

17 Q Have you ever had other employees attempt to

18 climb up other levels or lower levels of the racks?

19 A I have had employees attempt to climb up the

20 racks, and we have gotten after them immediately and told

21 them that was totally unacceptable.

22 Q So you have disciplined them?

23 A Uh-huh.

24 Q Given your experience in the manufacturing

25 industry and your experience with respect to safety programs

1 in that industry, how would you describe Sierra Packaging's
2 commitment to safety?

3 A Sierra Packaging is extremely committed to
4 safety. We are one of the best safety programs that I have
5 ever seen. They are very committed to training employees to
6 making sure employees are safe. One of the first things
7 Mr. Garrity told me when he hired me was that his number one
8 concern, my number one responsibility was the safety of the
9 employees.

10 MR. ROWE: I have no further questions.

11 CHAIRMAN ADAMS: Miss Ortiz.

12 MS. ORTIZ: Thank you, Mr. Chairman.

13 **CROSS-EXAMINATION**

14 BY MS. ORTIZ:

15 Q Mr. Hodges, you said that you are in charge of
16 doing the draining for your employees; is that correct?

17 A Yes, it is.

18 Q But you also said that sometimes you bring
19 outside people in if it is training for something outside of
20 your area of expertise; correct?

21 A Absolutely.

22 Q Would fall protection be outside your area of
23 expertise?

24 A Yes, I normally bring people in for the fall
25 protection for our maintenance group through TMCC. I can't

1 tell you what the instructor's name is, but Scott is the
2 main guy there.

3 Q So as far as you are concerned, you brought in
4 TMCC to do the fall protection training? Now, you said you
5 believed the gentleman's name was Scott. Do you know if
6 Scott speaks Spanish?

7 A Scott works for their maintenance crew. I
8 couldn't say. I did not say that Scott did the training.
9 He brought in an instructor to do the training. Scott is
10 the head of the safety program at TMCC.

11 Q To your knowledge, so just if you know, did the
12 person who did the training for fall protection from TMCC
13 speak Spanish?

14 A I could not say that one way or the other.

15 Q Now, you said that manufacturing would never
16 require fall protection; is that correct?

17 A That is correct.

18 Q Only maintenance employees require fall
19 protection?

20 A That is correct.

21 Q And do you have any crossover employees like
22 employees that do manufacturing and the maintenance?

23 A No.

24 Q So if there are maintenance employees, they are
25 the ones in charge of anything that might have to do with

1 fall protection; correct?

2 A Yes.

3 Q Can you tell me what you understand the
4 citation is about?

5 A No, I really can't. At the time I wasn't
6 there. I understood that we had people or there was someone
7 climbing in the racks and that that was the idea of what the
8 problem was. We addressed that immediately.

9 Q So would you be surprised if I were to tell you
10 that the citation actually doesn't mention the racks at all?

11 A Yes.

12 Q And would you be surprised if I told you that
13 the citation has nothing to do with those three gentlemen
14 being up on the rack?

15 A Yes.

16 Q Have you had an opportunity to read the
17 citation?

18 A No, I have not.

19 MS. ORTIZ: I have no further questions.

20 CHAIRMAN ADAMS: Mr. Rowe.

21 **REDIRECT EXAMINATION**

22 BY MR. ROWE:

23 Q Mr. Hodges, are you aware of any job
24 requirement that those three individuals who were up on the
25 rack would be assigned that would require fall protection?

1 A No, I'm not. Two of the individuals I know
2 were trained in fall protection for changing the light
3 bulbs, but I don't know about the third guy. I don't know.

4 Q So as far as you know, a couple of them did
5 have some fall protection training?

6 A Yes.

7 Q And two that have been through TMCC?

8 A I do believe it was through their contractor.

9 MR. ROWE: That is all the questions.

10 THE WITNESS: They had cards, OSHA.

11 BY MR. ROWE:

12 Q When you say "cards," what do you mean?

13 A The contracting cards that said they had been
14 trained in certain areas.

15 MR. ROWE: All right. That is all the
16 questions I have.

17 CHAIRMAN ADAMS: Miss Ortiz, any further?

18 **RECROSS EXAMINATION**

19 BY MS. ORTIZ:

20 Q Just one quick one. Is there anyone else at
21 Sierra Packaging that would be -- that has taught fall
22 protection to the employees?

23 A I would not be aware of it.

24 MS. ORTIZ: Thank you very much. I have
25 nothing further.

1 CHAIRMAN ADAMS: Mr. Rowe.
2 MR. ROWE: Nothing further.
3 CHAIRMAN ADAMS: Questions?
4 MEMBER BARNES: No questions.
5 MEMBER BAKER: No.
6 CHAIRMAN ADAMS: The witness is excused.
7 MR. ROWE: Mr. Chairman, would it be all right
8 for Mr. Hodges to remain in the audience now that he has
9 testified?
10 CHAIRMAN ADAMS: Any objection to that, any
11 intent to call him?
12 MS. ORTIZ: No, that is fine.
13 CHAIRMAN ADAMS: That's fine.
14 MR. ROWE: At this time I call Sean Tracy.
15 (One witness was sworn: Sean Tracy.)
16 **SEAN TRACY**
17 called as a witness on behalf of the Respondent,
18 having been duly sworn,
19 was examined and testified as follows:
20 **DIRECT EXAMINATION**
21 BY MR. ROWE:
22 Q Please state your name.
23 A Sean Tracy.
24 Q And how do you spell your last name?
25 A T-r-a-c-y.

1 Q What is your current occupation?

2 A Plant Operations Manager at Sierra Packaging.

3 Q And that is in the Stead plant?

4 A Correct.

5 Q How long have you been in that position?

6 A Approximately eight months.

7 Q And would you describe for me just generally
8 what your duties are?

9 A The oversight of the general operations,
10 manufacturing, involved, obviously intimately involved in
11 the safety compliance, environmental compliance, anything
12 that has to do with the operation.

13 Q Were you present when OSHA did the inspection
14 on August 16th, 2013?

15 A I was.

16 Q Can you explain what your involvement in that
17 inspection was?

18 A I was contacted by Mr. O'Grady on the 16th to
19 make my presence at the front office, at which time Miss Cox
20 identified herself as an OSHA enforcement officer. I was
21 informed that she was requesting access to the operation, at
22 which time we granted. She immediately proceeded to the
23 shipping area of the operation to a specific location and
24 produced a photograph.

25 Q Let me show you what's been marked, I think

1 it's OSHA Exhibit 1, page 41. This is the clearer copy. Is
2 that the picture you are talking about?

3 A It is.

4 Q So she produced that and showed it to you at
5 the time of the inspection?

6 A Correct.

7 Q And what happened after she showed you the
8 picture?

9 A She asked if we recognized and could confirm
10 that it was in fact the racking that was present at the
11 facility, at which time we said yes.

12 Q Did she ask you who the individuals were on the
13 racking?

14 A She asked if I could identify them. I could
15 not.

16 Q So what, if anything, was done to try to
17 identify those individuals?

18 A At that point we contacted the shipping
19 manager, Ian Openshaw, the maintenance manager, Steve
20 Tintinger, and asked them to make their presence to try to
21 identify the individuals.

22 Q Were they able to do that?

23 A Yeah. Well, at that point Miss Cox asked us if
24 we could proceed to the maintenance shop or the maintenance
25 area to discuss this further, at which time we did. And

1 then Mr. Tintinger proceeded to contact the individuals or
2 the manager of the individuals that potentially -- so that
3 they potentially could be identified.

4 Q And so eventually were the three individuals
5 basically identified?

6 A Yes.

7 Q That would have been Mr. Gonzalez, Mr. Soto,
8 and -- I forget the name of the last one -- Mr. Caal?

9 A As I recall.

10 Q Did Miss Cox ever ask what the employees were
11 doing in the racks?

12 A I don't recall.

13 Q Do you happen to know what the employees were
14 doing in the racks?

15 A It was determined after the fact that they were
16 installing gusset supports or plates to stabilize the
17 racking.

18 Q And I'll represent to you that there was
19 testimony earlier that the racking was installed by an
20 independent outside contractor; is that accurate?

21 A Correct.

22 Q Do you know who that was?

23 A It was Reno Forklift, inspected by the city.

24 Q So do you know why Reno Forklift didn't install
25 these gussets or plates?

1 A I do not.

2 Q In any case, they weren't installed at the time
3 that Reno Forklift put the racks up?

4 A Correct.

5 Q So how did the issue of the plates come up? Do
6 you know how that happened?

7 A Yeah. Prior to or subsequent to the racking
8 being installed at the new facility, the question was
9 brought up by the shipping department as to the reason, if
10 there was a reason that the stabilization plates were in
11 place at the old building but not in place when the racking
12 was installed at the new building.

13 Q Were you able to determine why that was?

14 A No, we didn't. There was no investigation or
15 anything as to the cause. Basically what was determined was
16 that these plates or these stabilizers were at a position at
17 the end of the racking that would be easy enough to
18 reinstall just as a failsafe, a redundancy, regardless.

19 Q Can you explain to the Board the location where
20 these plates are supposed to go on the racks?

21 A They are vertical supports at each end of the
22 row of racking about eight-foot off the ground level, they
23 were bolted to the back of each rack support leg just as a
24 stabilization.

25 Q And that is the location they were when they

1 were on the racks in Sparks?

2 A Correct.

3 Q That is where they were supposed to go in the
4 racks at Stead; right?

5 A That is what was discussed and determined, yes.

6 Q So could you access the location for these
7 plates with a ladder?

8 A Absolutely.

9 Q Could you access these locations without
10 getting up on the racks?

11 A Absolutely.

12 Q Do you know how these individual workers got
13 assigned to do this work?

14 A I do not.

15 Q Were you involved in that process?

16 A I was not.

17 Q Do you happen to know who might have assigned
18 them to do that task?

19 A Directly?

20 Q Yes.

21 A Yes, it would have been their employer, their
22 boss, Oswaldo Gimenes.

23 MR. ROWE: That is all the questions I have.

24 CHAIRMAN ADAMS: Miss Ortiz.

25

CROSS-EXAMINATION

BY MS. ORTIZ:

Q Mr. Tracy, you said that you do the oversight of the general operations for the firm; is that correct?

A Correct.

Q Does that include the maintenance workers?

A Correct.

Q Are you a direct supervisor?

A No, I am the plant manager. Basically my subordinates are Mr. Hodges, Mr. Tintinger, and any supervisors on the production floor.

Q Are you familiar with fall protection requirements?

A Not intimately.

Q Do you provide any training on fall protection yourself?

A I do not.

Q Have you had a chance to read the citation involved here today?

A I have but it's been a while. I don't recall any details of it.

Q Maybe we can help you a little bit here. Could you turn to page 28 in the Complainant's evidence packet? Could I have you read that section where it says the actual citation, just to yourself?

1 A The 29 C part.

2 Q Where it starts with "Facility."

3 A Yes.

4 Q Could you please tell me what your
5 understanding of the citation is?

6 A In reading that, it's pretty concise that an
7 employee stated that they used a full arrest fall system.

8 Q But you don't see anything in here regarding
9 the racks; is that correct?

10 A I do not. Well, it says top tier of racking.
11 Second sentence, "access the top tier racking located 15
12 feet, 7 inches high."

13 Q Thank you very much. Do you have any
14 involvement in who is brought in to do the training for fall
15 protection?

16 A I don't make the final decision. Mr. Hodges
17 does.

18 Q Do you have any familiarity with them?

19 A I do.

20 Q This is strictly if you yourself know. Do you
21 have any idea if the person who came in from TMCC -- strike
22 that. Let me start again.

23 The previous testimony said that there was
24 someone brought in from TMCC to do the training regarding
25 fall protection; is that correct?

1 A I understand that, yes.

2 Q Do you by any chance know if that person that
3 came in to do the training was a Spanish speaking
4 individual?

5 A I do not.

6 MS. ORTIZ: I have no further questions.

7 CHAIRMAN ADAMS: Mr. Rowe.

8 MR. ROWE: I have nothing further.

9 CHAIRMAN ADAMS: Board members.

10 MEMBER BARNES: No questions.

11 CHAIRMAN ADAMS: The witness is excused. Thank
12 you.

13 (The witness was excused.)

14 MR. ROWE: At this time I'd call Steve
15 Tintinger.

16 CHAIRMAN ADAMS: I think we will take a
17 five-minute break here at this point, Mr. Rowe. We will go
18 off the record.

19 (Recess taken at 3:13 p.m.)

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1 RENO, NEVADA, WEDNESDAY, MARCH 12, 2014, 3:20 P.M.

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3
4 CHAIRMAN ADAMS: If everybody is back, we will
5 go back on the record. Has the witness been sworn?

6 MR. ROWE: Not yet.

7 (One witness was sworn: Steve Tintinger.)

8 STEVE TINTINGER

9 called as a witness on behalf of the Respondent,

10 having been duly sworn,

11 was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. ROWE:

14 Q Would you please state your full name and spell
15 your last name?

16 A Steve Tintinger, T-i-n-t-i-n-g-e-r.

17 Q And what is your current occupation?

18 A Maintenance manager.

19 Q Where are you employed?

20 A Sierra Packaging and Converting.

21 Q How long have you been employed in that
22 position?

23 A Since June 3rd.

24 Q Of this year?

25 A 2013.

1 Q Just give the Board a general description of
2 your duties.

3 A I'm in charge of making sure all the equipment
4 stays running, in charge of the building facilities in
5 general, and that's pretty much it. The building and the
6 machinery I'm in charge of, and of course, the outside of
7 the building, everything that is related to keeping the
8 facility running.

9 Q Now, at some point -- or strike that. In early
10 August of 2013, did the plant move or begin the process of
11 moving from Sparks to Stead?

12 A Yes.

13 Q Do you recall how long you had been in the
14 plant at Stead at the time the inspection from OSHA was
15 done, just roughly?

16 A Like two weeks or something. Not very long.

17 Q Do you recall at some point after this moving
18 process had started the issue of stabilization plates for
19 the racks came up?

20 A Yes.

21 Q Do you remember how that came up?

22 A The shipping manager approached me and said
23 these need to be installed.

24 Q And who is the shipping manager?

25 A Ian is his first name. I don't remember his

1 last name.

2 Q Did you instruct somebody to go do that work?

3 A Yes.

4 Q And who did you instruct?

5 A I normally go to Oswaldo, but I can't remember
6 whether it was Oswaldo or one of his employees.

7 Q Is Oswaldo in this group of employees part of
8 your regular maintenance crew?

9 A No.

10 Q Were they brought in to help with the move?

11 A Yes.

12 Q And did they do various functions around the
13 plant as part of the moving process?

14 A Yes.

15 Q Do you remember what you told that individual,
16 Oswaldo, or the other person to do?

17 A I told them that these brackets need to be
18 installed at the end of the rack about three-quarters of the
19 way up.

20 Q Could the location of the brackets be accessed
21 with ladders?

22 A Yes.

23 Q Was there anything about doing this work that
24 would have required these individuals to get up and walk on
25 the racks?

1 A No.

2 Q Did you tell Oswald, or whoever this person
3 was you talked to, to use fall protection while doing this
4 work?

5 A No.

6 MR. ROWE: That is all the questions I have.

7 CHAIRMAN ADAMS: Miss Ortiz.

8 MS. ORTIZ: Thank you.

9 CROSS-EXAMINATION

10 BY MS. ORTIZ:

11 Q Mr. Tintinger, you just said that Oswald
12 Gimenes and the employees involved in this investigation
13 were not your regular maintenance people; is that correct?

14 A That is correct.

15 Q Where are they from?

16 A They are just temporary employees. I don't
17 know where they are from.

18 Q Did SGS hire them directly, or did they go
19 through a temp firm?

20 A I don't know.

21 Q Are you normally the one that does training for
22 your employees?

23 A No.

24 Q Do you have any knowledge of fall protection
25 yourself?

1 A Yes.

2 Q So you do know the standard, for instance, for
3 general industry on -- excuse me just a moment. You know
4 what the height is for fall protection that is required by
5 general industry?

6 A I think it is 16. Well, it is above four feet
7 as far as requiring it.

8 Q Do you yourself work with fall protection
9 equipment?

10 A Sometimes when it is required.

11 Q So you didn't have anything to do with the
12 hiring of these people that you are talking about, Oswaldo
13 Gimenes and the employees involved in this?

14 A No.

15 Q Did you issue them fall protection?

16 A No.

17 Q Do you know if they had fall protection
18 equipment?

19 A I know they did. They told me they did.

20 Q Did you ever see them with their fall
21 protection?

22 A I have seen, yeah, I have seen them with fall
23 protection before, yes.

24 Q But you don't have any idea who trained them to
25 use that; is that correct?

1 A That is correct.

2 Q So when you told these workers to go put the
3 stabilizers on the rack, you didn't go with them; correct?

4 A No.

5 Q And you didn't supervise them doing that;
6 correct?

7 A No.

8 Q You didn't tell them how to do it?

9 A No.

10 MS. ORTIZ: I have no further questions.

11 CHAIRMAN ADAMS: Mr. Rowe.

12 MR. ROWE: No further questions.

13 CHAIRMAN ADAMS: Board members.

14 MEMBER BAKER: No.

15 MEMBER BARNES: No questions.

16 CHAIRMAN ADAMS: No further questions. Thank
17 you.

18 (The witness was excused.)

19 MR. ROWE: That is all the witnesses I have,
20 Mr. Chairman.

21 CHAIRMAN ADAMS: Miss Ortiz, are you ready to
22 proceed with closing?

23 CLOSING STATEMENTS

24 MS. ORTIZ: I am. In this case it is really
25 important to remember what the issue is. Unfortunately,

1 this whole racking issue, the thing that has to do with the
2 picture at page 41 of Exhibit 1, all of that they keep going
3 back to the employees on the rack, the employees on the
4 rack, were they supposed to be, not supposed to be. There
5 is nothing here saying that we are claiming the employer
6 knew they were up on the rack. There is nothing here saying
7 that they were following company policy when they were on
8 the rack.

9 There is nothing here at all about that rack as
10 far as fall protection goes because fall protection isn't
11 what is cited here. We are not saying anything related to
12 this specific incident is the only reason for the citation.

13 The actual citation here is they need proper
14 training on how to use fall protection equipment that they
15 are given. If they don't have proper training, it is almost
16 worse than having nothing at all because they may have a
17 false sense of confidence that they know how to use this
18 equipment to save their own lives if necessary, and yet they
19 don't really have that information.

20 This also is not a case about the hazard
21 assessment. So it doesn't matter whether the hazard
22 assessment was done for the purpose of this hearing because
23 they weren't cited, that is not one of the citations before
24 you. That wasn't contested, it's gone, it's done. That is
25 not something you have to worry about today.

1 So the only thing you have to worry about is
2 based on the evidence you saw in our evidence packet,
3 including the diagram, the drawing, the testimony you heard
4 today, you heard Ms. Cox talk about how she explained what
5 the proper distances were, what the minimum requirements
6 were on the fall protection. You heard the testimony of the
7 three employer representatives. For the most part
8 Mr. Hodges testified, as did Mr. Tracy, that they didn't
9 know anything about fall protection. So they themselves are
10 not people who are going to be training. And Mr. Tintinger
11 does have a working knowledge of fall protection, but he
12 made it very clear he doesn't train anybody with these.

13 You know that these employees were issued fall
14 protection. Not only is that statement included on page 16
15 in the safety narrative, you heard it as part of the
16 testimony, and in fact, Mr. Tintinger testified that he saw
17 that fall protection. So when you were told in the opening
18 statements that the company had no reason to train these
19 employees on fall protection, that is clearly not the case
20 here.

21 You have been told by Mr. Hodges that the only
22 people that do work that might require fall protection are
23 the maintenance workers. These people, they may have been
24 temporary workers. It is unclear to us how everything
25 happened. We don't have those records, we don't know if

1 they were from a firm, we don't know if they were privately
2 hired. We don't really know much about them other than they
3 were there, they were issued fall protection, they are part
4 of the maintenance staff who are the only ones that have to
5 do any kind of duties that might involve fall protection,
6 and they did not know what the safe use of that equipment
7 was.

8 And based on the testimony you have got today
9 from Mr. Tracy, Mr. Hodges and Mr. Tintinger, what Ms. Cox
10 said that they were not familiar with the actual
11 requirements is true. They supported her testimony that
12 they were not familiar, they did not know. If those people
13 aren't aware of what the safety requirements are, they
14 couldn't be in charge of training them.

15 You were told that somebody came in from TMCC
16 to train them, and presumably that person was experienced in
17 how to train for safety, fall protection safety. However,
18 as was made very clear in this case based on the employees's
19 statements, there is a language barrier here.

20 You have got no information, we have been given
21 no information to contradict that they actually did not know
22 what they were supposed to do. We don't have any training
23 manuals to contradict the findings of Ms. Cox and the
24 testimony that we heard regarding the fact that they didn't
25 know the minimum safe distances.

1 So at this point you have nothing to contradict
2 the findings of the CSHO in this case that they were not
3 trained on how to properly use this equipment, that they had
4 this equipment given, so the training should have been done,
5 and because it wasn't done in this case, that was the
6 violation. Not the picture with the three people in the
7 rack, not the one was standing on a ladder, the other one
8 isn't identified. None of that matters here.

9 The only thing that matters is that these
10 employees, they had the fall protection equipment but they
11 didn't know how to properly use it. For that reason we are
12 asking the Board to affirm the citation, the classification
13 of citation as serious and the proposed penalty of \$3,825.

14 CHAIRMAN ADAMS: Thank you.

15 Mr. Rowe.

16 MR. ROWE: Thank you, Your Honor. I think the
17 contention that the citation in this case didn't have
18 anything to do with the racking system is disingenuous. If
19 you look at the evidence that you have in front of you, not
20 only the citation but most of the narrative and most of the
21 testimony from Miss Cox indicated that was all based on the
22 fact that three individuals were up on the racking without
23 fall protection.

24 Now if you look at the actual regulation that
25 they have been cited with, what it says is the employer

1 shall provide training to each employee who is required by
2 this section to use personal protective equipment.

3 If you go back and look at the Regulation
4 1910.132(d)(1), which is part of the same regulatory
5 provision, what it says is that the employer shall assess
6 the workplace to determine if hazards are present or likely
7 to be present which necessitate the use of personal
8 protective equipment. If such hazards are present or likely
9 to be present, the employer shall, and then one of the
10 requirements down below is the actual training provision
11 they were cited for.

12 So what the employer is obligated to do in this
13 circumstance is to provide training when there are functions
14 that the employer recognizes are a hazard, and they are
15 required to train with respect to the personal protective
16 equipment. The problem in this case is that these
17 individuals were up on the racks without fall protection,
18 and there was nothing -- there is no evidence to indicate
19 that that is a regular part of their manufacturing process
20 or that the employer and management would have any reason to
21 believe that fall protection was necessary for those folks.

22 The evidence you have in front of you is that
23 the plates or the stabilizers for the racking could have
24 been put in using ladders. There was no requirement for
25 anybody to get up on the racking or to have fall protection.

1 There is a specific -- if you think about it,
2 this employer has a specific policy that says people aren't
3 supposed to be up on the racks. What basically is being
4 argued here is that the employer should train people to use
5 fall protection when they get on the racks, even though they
6 have a policy that no one is supposed to be up on the racks.
7 It makes no sense.

8 The thing to me that is interesting here is
9 that there is absolutely no evidence indicating that any of
10 these individuals in that picture who were up on the racks
11 were supposed to be doing any work anywhere that would have
12 required fall protection. So without evidence demonstrating
13 that these folks were supposed to be doing work that would
14 require fall protection, there can't be, in my opinion,
15 based on the language of the regulation, any requirement
16 that they be trained to use fall protection when they are
17 not doing functions that would require it. And the evidence
18 that you heard from Mr. Tintinger and Mr. Tracy and
19 Mr. Hodges is that these individuals wouldn't be doing
20 anything on the racks or around the racks that would require
21 fall protection.

22 When you look at the statements basically that
23 OSHA is relying on in this case, there are three statements.
24 Only one of those statements indicates that this employer
25 provided fall protection.

1 And I'll submit to you that the evidence in
2 this case indicates that the employer probably did not
3 require fall protection or provide fall protection in this
4 case. You have Mr. Tintinger testifying under oath here
5 that he did not provide fall protection for these people to
6 do this work. You don't have any evidence indicating
7 anybody that instructed these people to do the work issued
8 fall protection.

9 You have the statement supposedly of Mr. Caal
10 that indicated Steve told you and Andres to use fall
11 protection, five-point body harness and ladder. Well, Mr.
12 Tintinger said otherwise and he was under oath.

13 I want to talk for just a minute about the
14 circumstances under which these interviews were done.
15 Number one, they were done through a translator, and as Miss
16 Cox indicated, they were difficult because of the language
17 barrier.

18 Number two, these individuals were extremely
19 nervous. Miss Cox indicated that that is basically the
20 reason she asked if they wanted to use a translator.

21 It's not clear and it wasn't clear from Miss
22 Cox's testimony whether when that individual went to get the
23 fall protection device, whether that just happened to be the
24 fall protection device that is in the plant or whether or
25 not he went and got fall protection that was used supposedly

1 to do this work in the rack.

2 I'd submit to you probably what happened here
3 is this individual went out and just grabbed the fall
4 protection that the employer had at the plant because he
5 thought he was in trouble. And again, it's interesting to
6 me that Miss Cox did not interview Oswaldo Gimenes or Mr.
7 Tintinger about the actual facts that led to these people
8 being up on the racks. I don't know why she didn't do that.

9 But the evidence that we have in this
10 particular case doesn't indicate that these people were
11 supposed to be up on the racks or that they were supposed to
12 be using fall protection, and given those circumstances,
13 there is absolutely no reason under the language of this
14 regulation that this employer should have or was required to
15 train for fall protection for the particular function that
16 these employees were performing. Thank you.

17 CHAIRMAN ADAMS: Thank you. We will compile
18 the evidence, take a look and listen and relook at the
19 testimony and make a decision, and the decision will be
20 communicated to the parties in approximately 60 days after
21 the decision is drawn up, reviewed, approved and then
22 redrawn.

23 With that, we will go off the record.

24 (Hearing concluded at 3:39 p.m.)
25

1 STATE OF NEVADA,)
2) ss.
3 COUNTY OF WASHOE.)
4

5 I, ERIC V. NELSON, Certified Court Reporter and
6 a notary public in and for the County of Washoe, State of
7 Nevada, do hereby certify:

8 That I was present at the hearing of the NEVADA
9 OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD on Wednesday,
10 March 12, 2014, and thereafter took stenotype notes of the
11 proceedings, and thereafter transcribed the same into
12 typewriting as herein appears;

13 That the foregoing transcript is a full, true
14 and correct transcription of my stenotype notes of said
15 proceedings.

16 Dated at Reno, Nevada, this 17th day of March
17 2014.
18
19
20

21 _____
22 ERIC V. NELSON, CCR #57
23
24
25

1 RECEIVED NEVADA OCCUPATIONAL SAFETY AND HEALTH
2 APR 16 2014 REVIEW BOARD

3 McDonald Carano Wilson LLP

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,

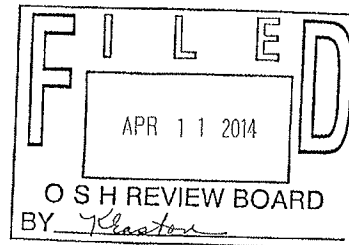
Docket No. RNO 14-1684

Complainant,

vs.

10 SIERRA PACKAGING AND CONVERTING, LLC,

Respondent.



12
13 DECISION

14 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
15 **REVIEW BOARD** at a hearing commenced on the 12th day of March, 2014, in
16 furtherance of notice duly provided according to law. MS. SALLI ORTIZ,
17 ESQ., counsel appearing on behalf of the Complainant, Chief
18 Administrative Officer of the Occupational Safety and Health
19 Administration, Division of Industrial Relations (OSHA). MR. TIMOTHY
20 ROWE, ESQ., counsel appearing on behalf of Respondent, **Sierra Packaging**
21 **and Converting, LLC.**

22 Jurisdiction in this matter has been conferred in accordance with
23 Nevada Revised Statute 618.315.

24 The complaint filed by the OSHA sets forth allegations of violation
25 of Nevada Revised Statutes as referenced in Exhibit "A", attached
26 thereto. The alleged violation in Citation 1, Item 1, referenced 29 CFR
27 1910.132(f)(1)(iv).

28 The respondent employer was charged with a failure to provide

1 training to each employee required by the standard to use personal
2 protective equipment (PPE).

3 Counsel for complainant presented testimony and evidence from
4 Compliance Safety and Health Officer (CSHO) Jennifer Cox. The witness
5 identified exhibits admitted in evidence by stipulation of counsel. Ms.
6 Cox referenced her narrative report and described her investigation and
7 findings at the respondent manufacturing site located in Stead, Nevada.
8 On August 16, 2013 CSHO Cox and respondent personnel, Messrs. O'Grady
9 and Tracy conducted "walk around inspection". During the inspection CSHO
10 Cox observed employees standing on "racking" described as shelving-type
11 assemblies upon which products were placed and stored. She observed
12 employees standing on the racking without fall protection as confirmed
13 in photographic exhibits at pages 41-A, B, C, and supplemented at
14 photograph 42-A. The employees were identified by maintenance
15 supervisor Tintinger as those of respondent.

16 CSHO Cox obtained witness statements from employees Gonzalez, Caal
17 and Soto, respectively identified at complainant Exhibit 1, pp. 13, 14
18 and 15. Ms. Cox questioned the employees through the assistance of an
19 interpreter employee of respondent. The three individuals admitted they
20 were employees of the respondent.

21 Employee Caal signed a witness statement providing ". . . Steve
22 (Tintinger) told . . . him . . . and employee Gonzalez to use fall
23 protection (five point body harness and ladder). . ." to perform the
24 work. See complainant Exhibit 1, p. 14. Mr. Soto informed CSHO Cox
25 through an interpreter that he was trained in fall protection and
26 instructed not to climb on the racks. Employee Gonzalez statement
27 reflected he was not aware he could not climb on the racks.

28 Ms. Cox tested the subject employees' knowledge on training and the

1 use and limitations of a five point harness. The employees were unable
2 to demonstrate basic knowledge, training, or understanding in the use
3 and limitations of a five point harness. None of the subject employees
4 knew the 5,000 lb anchor point limit; one advised he understood the
5 weight limit to be 200 lbs. The subject employees could not demonstrate
6 knowledge of the accepted fall distance of a lanyard to reflect
7 understanding and training in the necessity of length adjustment to
8 avoid hitting the ground. During continued inquiry, one employee
9 briefly left and retrieved a five point harness. He informed Ms. Cox
10 it was provided by the employer respondent. He demonstrated his limited
11 understanding on use.

12 Ms. Cox met with five respondent management representatives to
13 explain her findings as referenced in the report at Exhibit 1. She
14 inquired if they had any knowledge of the fall distances required for
15 a lanyard; none could respond. The employer representatives could not
16 confirm or document employee knowledge or training in use of the five
17 point harness.

18 CSHO Cox testified the cited standard was **applicable** under the
19 facts in evidence. The employer **furnished** five point harness fall
20 arrest PPE for employee use, but **without the required training**.
21 Employees interviewed with **access** to the harnesses **could not demonstrate**
22 **basic knowledge in the use or limitations** of the PPE or **verify any**
23 **training** as required by the standard.

24 Ms. Cox found the employer management personnel could not
25 demonstrate knowledge of harness use or limitations, including Mr.
26 Tintinger, the maintenance supervisor in charge of the interviewed
27 employees. No respondent representatives provided any evidence of
28 employee fall arrest training in the harness PPE.

1 Ms. Cox testified employee interviews were difficult due to the
2 language barrier and limited translation resources. She confirmed the
3 witness statements were signed, but for that of Mr. Soto which was due
4 to an oversight. She testified Mr. Soto informed her he had received
5 training in the company safety policy, which included instructions that
6 he was not supposed to stand on the racks.

7 Ms. Cox concluded her direct testimony referencing her findings to
8 support the classification of the violation as "Serious" in accordance
9 with the operations manual and enforcement guidelines. She referenced
10 her narrative report at Exhibit 1 accordingly.

11 Respondent presented witness testimony and referenced Exhibits A
12 through D stipulated in evidence. Mr. David Hodges, the respondent
13 safety manager, conducts employee training and works in conjunction with
14 TMCC when additional expertise for specialized training is required. He
15 testified respondent is in the manufacturing business and does not
16 regularly experience fall protection issues, except for some limited
17 maintenance work that generally requires only a ladder for access to
18 points of employee work. The company does not provide any fall
19 protection, PPE, or training. He testified that no employees require
20 fall protection from racks because they are not permitted to work or
21 stand on the racks in accordance with the company safety program. He
22 explained the discipline policy under the company safety program as
23 consisting of a three point system: first verbal, second written and
24 third termination. The company had only occupied the plant subject of
25 the inspection at Stead approximately two weeks before the actual
26 citations were issued; accordingly there was no time for a **hazard**
27 **assessment** as done in their Sparks facility referenced at Exhibits C and
28 D in evidence. The company safety rules prohibit employees climbing on

1 the racks or anywhere; and such conduct is specifically addressed in the
2 employer safety handbook at Exhibit A. He testified that if employees
3 are required to work above ground level, they use ladders on wheels
4 similar to the type seen at airports. Employees also utilize forklifts
5 if materials are beyond floor height reach.

6 On cross-examination Mr. Hodges testified fall protection is
7 outside of his area of expertise and uses TMCC for any training when
8 required. He further testified that only maintenance employees are
9 required to have fall protection training because they are the only ones
10 in the manufacturing facility who are required to sometimes work at
11 heights.

12 Mr. Steve Tintinger identified himself as the respondent
13 maintenance manager at the Stead plant facility. He testified the
14 individuals observed and photographed on the racks were not permanent,
15 but rather temporary employees; he had no involvement in their hiring.
16 He never trained the subject employees in fall protection. The
17 employees were on the premises only to attach stabilizers to the racks
18 that were inadvertently left out when reassembled at the new plant
19 facility during the move in.

20 At the conclusion of evidence and testimony, both counsel presented
21 closing argument.

22 Complainant argued the focal point of the citation and contested
23 hearing is not necessarily that employees were standing or climbing on
24 the racks; but based upon identified employees with access to safety
25 harnesses having no fall protection training. Counsel asserted the
26 evidence in Exhibit 1 and CSHO Cox testimony showed that an employee of
27 respondent had a fall arrest harness provided by the employer but
28 demonstrated no knowledge or training in use or limitations. The

1 respondent employees interviewed were furnished five point body harness
2 and lanyard fall protection identified at Exhibit 1, page 16. Respondent
3 maintenance supervisor Tintinger who was in charge of the subject
4 employees testified he observed them on the plant premises at times with
5 the harness fall protection equipment (PPE). Counsel argued the
6 testimony and evidence proved the violation and confirmed the
7 applicability of the cited standard, employee exposure through access,
8 lack of training compliance, and employer knowledge. Counsel argued
9 that regardless of any claims the employees were temporaries, they were
10 in fact employed and issued fall protection by respondent without
11 training on how to use it. Counsel asserted the entire case to be very
12 simple based upon employees being furnished fall protection by the
13 respondent employer without sufficient training or understanding on how
14 to use the available PPE all in violation of the cited standard.

15 Respondent presented closing argument. Counsel argued it is
16 disingenuous for complainant to take the position that the citation has
17 nothing to do with the three employees standing on the racking without
18 fall protection. He argued that by referencing the verbiage in the
19 standard at 132(d)(1) it requires the employer assess the workplace and
20 if there are hazards for fall protection then the employer shall train
21 its employees in accordance with the standard. The respondent was only
22 required to train employees when assigned work requires use of a
23 harness. He asserted that was not the case presented by the facts in
24 evidence. The employees on the racks were violating the company policy
25 and engaged in misconduct. They were not allowed to climb onto the
26 racking under company policy. The stabilizer repairs could have been
27 done from ladders. There was no evidence the employees were assigned
28 work that required fall protection and therefore no requirement for

1 training as charged by the standard.

2 Counsel argued there was no reliable proof of violation from the
3 evidence contained in the translated statements. He asserted only one
4 employee claimed he was issued the five point fall protection harness,
5 but there was no witness testimony under oath, just an unverified
6 translated statement.

7 Mr. Tintinger testified no employees were issued or instructed to
8 use harnesses. He asserted the CSHO questions to the witnesses were
9 confusing; and when one employee left and retrieved a harness he thought
10 he was simply doing what he was supposed to do without understanding the
11 implications.

12 Counsel argued the employer is in the manufacturing business where
13 fall protection is rarely required. The employer had no knowledge nor
14 any reason to know the three individuals subject of the photographs and
15 observations of CSHO Cox were working without fall protection while
16 standing on the racks. The individuals were on the racking without fall
17 protection but there was no evidence to indicate it was a regular part
18 of the manufacturing business. The employer and management personnel
19 had no reason to be aware or know that fall protection was necessary for
20 the individuals.

21 The board in reviewing the facts, documents and testimony in
22 evidence must measure same against the established law developed under
23 the Occupational Safety & Health Act, Code of Federal Regulations (CFR)
24 and Nevada Revised Statutes (NRS).

25 In all proceedings commenced by the filing of a
26 notice of contest, the burden of proof rests with
the Administrator. N.A.C. 618.788(1).

27 All facts forming the basis of a complaint must be
28 proved by a preponderance of the evidence. *Armor
Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16,958

(1973).

To prove a violation of a standard, the Secretary must establish (1) the applicability of the standard, (2) the existence of noncomplying conditions, (3) employee exposure or access, and (4) that the employer knew or with the exercise of reasonable diligence could have known of the violative condition. (emphasis added) See *Belger Cartage Service, Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No. 76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD 23,830, pp. 28,908-10 (No. 76-1408, 1979); *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003). (emphasis added)

A respondent may rebut allegations by showing:

1. The standard was inapplicable to the situation at issue;
2. The situation was in compliance; or **lack of access** to a hazard. See *Anning-Johnson Co.*, 4 OSHC 1193, 1975-1976 OSHD ¶ 20,690 (1976). (emphasis added)

A "serious" violation is established upon a preponderance of evidence in accordance with NRS 618.625(2) which provides in pertinent part:

... a serious violation exists in a place of employment if there is a **substantial probability that death or serious physical harm could result** from a condition which exists or from one or more practices, means, methods, operations or processes which have been adopted or **are in use at that place of employment** unless the employer did not and could not, with the exercise of **reasonable diligence**, know the presence of the violation. (emphasis added)

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.

The testimony of CSHO Cox and exhibits in evidence established the elements to prove violation of the cited standard. The evidence demonstrated **applicability** to the standard, **non-complying conditions**,

1 employee exposure under the rule of access, and constructive employer
2 knowledge through supervisory personnel.

3 In addition to the unrebutted non-compliant conditions of employees
4 standing on the racks in plain view without fall protection, the weight
5 of credible evidence, direct and by inference, also established that at
6 least three employees of respondent had access to the five point safety
7 harness and were constructively exposed to potential fall hazards from
8 untrained use. The subject employees simply could not demonstrate
9 understanding and limitations of use, nor verify any training. The
10 respondent maintenance supervisor responsible for the three interviewed
11 employees could not demonstrate understanding in the use of the five
12 point harness. How could he manage and assure the employees under his
13 control, performing non-manufacturing maintenance work with access to
14 the harnesses, and whom he previously observed wearing them, were
15 compliant with OSHA standards and company safety policies?

16 Respondent asserts the defense of lack of applicability of the
17 standard to the facts in evidence because there was no proof the
18 employees were specifically instructed to engage in tasks requiring the
19 harnesses. Counsel also asserts a defense of unforeseeable employee
20 misconduct. However there was insufficient proof to support the
21 defenses.

22 The board finds the testimonial and documentary evidence presented
23 by and through CSHO Cox was credible and established the violation cited
24 at Citation 1, Item 1. The testimony of respondent maintenance
25 supervisor Tintinger and safety manager Hodges, and the witness
26 statements supported the evidence of violation.

27 APPLICABILITY

28 The standard was applicable because the identified employees were

1 provided with five point fall protection harnesses by the respondent
2 employer without training on use. The preponderance of evidence
3 established that three employees of respondent, Messrs. Gonzalez, Caal
4 and Soto were assigned a **non-manufacturing work task** by their supervisor
5 Steven Tintinger to attach stabilizers to racking fixtures which
6 extended to approximately 15 feet in height. They were not wearing any
7 fall protection when observed and photographed by CSHO Cox. Mr.
8 Tintinger, the maintenance supervisor, did not supervise the employees
9 performing the maintenance type work. There was no evidence anyone
10 supervised the work of the identified employees. The assigned tasks for
11 racking work required some height exposure controlled by the standards
12 governing use of a fall protection system. The employees had **access** to
13 "five point fall protection harnesses" **furnished** by the respondent.
14 There was **no evidence of training in the harness PPE**.

15 Mr. Tintinger testified he observed the identified employees on the
16 plant premises at times with fall protection equipment (PPE). He did
17 not train the employees nor could he verify or document their training
18 on use or limitations of the fall protection harnesses. Mr. Tintinger
19 had **knowledge** of use of the fall protection harness by employees under
20 his supervision yet never provided, reviewed nor confirmed their
21 training.

22 The unsupported testimony of Mr. Tintinger did not rebut that of
23 CSHO Cox, the employee witness statements and the facts in evidence.
24 The employees had access to safety harnesses made available to them by
25 the respondent without any respondent training on use, limitations or
26 understanding of the system.

27 Mr. Hodges testified that **maintenance employees** require fall
28 protection training. Mr. Tintinger was the **maintenance employee**

1 supervisor and in charge of the three subject employees furnished fall
2 arrest PPE without training. The employees were not performing
3 manufacturing tasks but rather maintenance type work to correct the
4 racking fixtures. The respondent did not complete a hazard assessment
5 because it only moved into the facility two weeks prior to the
6 inspection.

7 EMPLOYEE EXPOSURE

8 Employee exposure can be based on preponderant evidence of direct
9 exposure to a hazard or through the rule of access.

10 Recognized Occupational Safety and Health Law
11 provides there need be no showing of actual
12 exposure in favor of a rule of access based upon
13 reasonable predictability. *Gilles & Cotting, Inc.*,
14 3 OSHC 2002, 1975-1976 OSHD ¶ 20,448 (1976);
15 *Cornell & Company, Inc.*, 5 OSHC 1736, 1977-1978
16 OSHD ¶ 22,095 (1977); *Brennan v. OSAHRC and Alesea*
17 *Lumber Co.*, 511 F.2d 1139 (9th Cir. 1975); *General*
18 *Electric Company v. OSAHRC and Usery*, 540 F.2d 67,
19 69 (2d Cir. 1976). (emphasis added)

20 Actual knowledge (of employee exposure to violative
21 conditions) is not required for a finding of a
22 serious violation. Foreseeability and
23 preventability render a violation serious provided
24 that a reasonably prudent employer, i.e., one who
25 is safety conscious and possesses the technical
26 expertise normally expected in the industry
27 concerned, would know of the danger. *Candler-*
28 *Rusche, Inc.*, 4 OSHC 1232, 1976-1977 OSHD ¶ 20,723
(1976), appeal filed, No. 76-1645 (D.C. Cir. July
16, 1976); *Rockwell International*, 2 OSHC 1710,
1973-1974 OSHD ¶ 16,960 (1973), aff'd, 540 F.2d
1283 (6th Cir. 1976); *Mountain States Telephone &*
Telegraph Co., 1 OSHC 1077, 1971-1973 OSHD ¶ 15,365
(1973).

24 UNPREVENTABLE/UNFORESEEABLE EMPLOYEE MISCONDUCT

25 Respondent did not meet the burden of proof for the recognized
26 defense of unpreventable or unforeseeable employee misconduct.

27 During interviews, the employees demonstrated no knowledge or
28 training on the safe and/or appropriate use and limitations of the five

1 point harness system. The employees had access to harnesses made
2 available to them by respondent and were exposed to the serious
3 potential fall hazards of utilizing a five point harness without
4 training. The employer knew by imputation through supervisory employees
5 Tintinger and Hodges, or with the exercise of reasonable diligence could
6 have known, of the violative conditions. Mr. Tintinger assigned the
7 employees a work task but did not supervise them. He was aware they had
8 access to harnesses. He did not provide any training or oversight to
9 assure the employees would perform the assigned worktask in a safe
10 manner according to company policy; or that the employees might
11 undertake any tasks where the accessible furnished harnesses could be
12 utilized.

13 Respondent maintenance manager Tintinger testified at page 78, line
14 16 through page 79, line 8 that he knew the employees identified in the
15 photographs had PPE fall protection. He had seen them with the fall
16 protection harness. He did not train them in fall protection, nor have
17 any idea who had done so. He instructed the employees to perform the
18 maintenance work task to attach stabilizers to the racks, but did not
19 supervise how they would perform the work.

20 Respondent safety manager, Mr. David Hodges, testified ". . .
21 maintenance employees require fall protection."

22 The complainant met the burden of proof to establish the cited
23 violation, however the employer did not satisfy the legal burden to
24 prove the necessary elements of the unpreventable, or unforeseeable
25 employee misconduct defense by a preponderance of evidence. This board
26 relies upon long established Federal and OSHRC case law providing that
27 for an employer to prevail on the defense of unpreventable or
28 unforeseeable employee misconduct, it must meet its burden of proof by

1 a preponderance of evidence that despite established safety policies in
2 a safety program which is **effectively communicated and enforced**, the
3 conduct of its employees in violating the policy was **unforeseeable**,
4 **unpreventable or an isolated event**.

5 An employer has the affirmative duty to anticipate
6 and protect against **preventable** hazardous conduct
7 by employees. *Leon Construction Co.*, 3 OSHC 1979,
8 1975-1976 OSHD ¶ 20,387 (1976). **Employee**
9 **misbehavior, standing alone, does not relieve an**
10 **employer.** Where the Secretary shows the existence
11 of violative conditions, an employer may defend by
12 showing that the employee's behavior was a
13 deviation from a uniformly and **effectively enforced**
14 **work rule**, of which deviation the employer had
15 neither actual **nor constructive** knowledge. *A. J.*
16 *McNulty & Co., Inc.*, 4 OSHC 1097, 1975-1976 OSHD ¶
17 20,600 (1976). (emphasis added)

18 "... (A) **supervisor's knowledge** of deviations
19 from standards . . . is properly **imputed to the**
20 **respondent employer.**..." *Division of Occupational*
21 *Safety and Health vs. Pabco Gypsum*, 105 Nev. 371,
22 775 P.2d 701 (1989). (emphasis added)

23 Evidence that the employer effectively communicated
24 and enforced safety policies to protect against the
25 hazard permits an inference that the employer
26 justifiably relied on its employees to comply with
27 the applicable safety rules and that violations of
28 these safety policies were not **foreseeable or**
preventable. *Austin Bldg. Co. v. Occupational*
Safety & Health Review Comm., 647 F.2d 1063, 1068
(10th Cir. 1981). (emphasis added)

29 When an employer proves that it has effectively
30 communicated and enforced its safety policies,
31 serious citations are dismissed. See *Secretary of*
32 *Labor v. Consolidated Edison Co.*, 13 O.S.H. Cas.
33 (BNA) 2107 (OSHRC Jan. 11, 1989); *Secretary of*
34 *Labor v. General Crane Inc.*, 13 O.S.H. Cas. (BNA)
35 1608 (OSHRC Jan. 19, 1988); *Secretary of Labor v.*
36 *Greer Architectural Prods. Inc.*, 14 O.S.H. Cas.
37 (BNA) 1200 (OSHRC July 3, 1989).

38 While the employer demonstrated to the CSHO that respondent
39 maintained general work rules and a safety program designed to prevent
40 violative conduct, it offered insufficient proof of **effective**
41 **enforcement** of fall arrest safety or training to avoid violation.

1 Respondent provided no evidence that it **adequately communicated** safety
2 policies and rules to employees in its work practice for safely carrying
3 out a job that may reasonably require use of a fall arrest system.
4 Respondent did not demonstrate that it took **meaningful steps to discover**
5 violations involving fall arrest protection which should have been
6 observable by supervisory employees at the plant facility. The defense
7 of unpreventable employee misconduct must fail because violative
8 conditions were **foreseeable, in plain view and reasonably preventable**.
9 Adequate communication and **meaningfully enforced** work rules would have
10 prevented the violative conditions and the citations. See *Jensen*
11 *Construction Co.*, 7 OSHC 1477, 1979 OSHD ¶23,664 (1979). Accord, *Marson*
12 *Corp.*, 10 OSHC 2128, 1980 OSHC 1045 ¶24,174 (1980).

13 . . . cases make clear the existence of an
14 employer's defense for the unforeseeable
15 disobedience of an employee who violates the
16 specific duty clause. However, the disobedience
17 defense will fail if the employer does not
18 **effectively communicate and conscientiously enforce**
19 **the safety program at all times. Even when a**
20 **safety program is thorough and properly conceived,**
21 **lax administration renders it ineffective.** *P.*
22 *Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 110-
23 111 (1st Cir. 1997). Although the mere occurrence
24 of a safety violation does not establish
25 ineffective enforcement, *Secretary of Labor v.*
26 *Raytheon Constructors Inc.*, 19 O.S.H.C. 1311, 1314
27 (2000) the employer must show that it took **adequate**
28 **steps to discover violations of its work rules and**
an effective system to detect unsafe conditions for
control. *Secretary of Labor v. Fishel Co.*, 18
O.S.H.C. 1530, 1531 (1998). Failure to follow
through and to require employees to abide by safety
standards should be evidence that disciplinary
action against disobedient employees progressed to
levels of punishment designed to provide
deterrence. *Id.* See also, *Secretary of Labor v.*
A&W Construction Services, Inc., 19 O.S.H.C. 1659,
1664 (2001); *Secretary of Labor v. Raytheon*
Constructors Inc., 19 O.S.H.C. 1311, 1314 (2000).
A disciplinary program consisting solely of verbal
warnings is insufficient. *Secretary of Labor v.*
Reynolds Inc., 19 O.S.H.C. 1653, 1657 (2001);
Secretary of Labor v. Dayton Hudson Corp., 19

1 O.S.H.C. 1045, 1046 (2000). Similarly, disciplinary
2 action that occurs long after the violation was
3 committed may be found ineffective. (emphasis
added)

4 Complainant met the statutory burden of proof and established the
5 **serious** classification of the violation at Citation 1, Item 1, by a
6 preponderance of evidence.

7 A potential unarrested fall involving **lack of PPE or employee**
8 **training in PPE use** creates exposure to a substantial probability for
9 death or serious injury.

10 When an employer furnishes or makes fall arrest PPE available for
11 employee use, it bears the burden of training under the OSHA standards.
12 There was no evidence employees subject of the inspection were protected
13 or trained in the use and limitations of the furnished five point
14 harness system to which they had access.

15 It is the decision of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**
16 **REVIEW BOARD** that a violation of Nevada Revised Statute did occur as to
17 Citation 1, Item 1, 29 CFR 1910.132(f)(1)(iv). The violation, Serious
18 classification and proposed penalty in the amount of THREE THOUSAND
19 EIGHT HUNDRED TWENTY-FIVE DOLLARS (\$3,825.00) are confirmed and
20 approved.

21 The Board directs counsel for the complainant, **CHIEF ADMINISTRATIVE**
22 **OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, DIVISION**
23 **OF INDUSTRIAL RELATIONS**, to submit proposed Findings of Fact and
24 Conclusions of Law to the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW**
25 **BOARD** and serve copies on opposing counsel within twenty (20) days from
26 date of decision. After five (5) days time for filing any objection,
27 the final Findings of Fact and Conclusions of Law shall be submitted to
28 the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** by prevailing

1 counsel. Service of the Findings of Fact and Conclusions of Law signed
2 by the Chairman of the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW
3 BOARD shall constitute the Final Order of the BOARD.

4 DATED: This 11th day of April, 2014.

5 NEVADA OCCUPATIONAL SAFETY AND HEALTH
6 REVIEW BOARD

7 By /s/
8 JOE ADAMS, Chairman

STATE OF NEVADA
Division of Industrial Relations - Division Counsel's Office
400 West King Street, Suite 201, Carson City, Nevada 89703
Telephone: (775) 684-7286 Fax: (775) 687-1621

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JUL-29-2014

McDonald Carano Wilson LLP
Donald Carano Wilson LLP

NEVADA OCCUPATIONAL SAFETY AND HEALTH

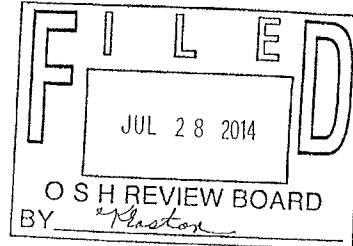
REVIEW BOARD

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 VIOLATION¹

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
¹ 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.

2. 29 CFR 1910.132(f)(1)(iv) states: "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." This standard was applicable because the identified employees were provided access to the five-point fall protection harnesses by Respondent.

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

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

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

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

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

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

9. The defense of unpreventable employee misconduct must fail because violative 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.

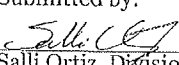
4. Any party who is aggrieved by this order may file a petition for judicial review in accordance with NRS Chapter 233B.

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

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Nevada Bar No. 1000
2 MCDONALD CARANO WILSON LLP
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3 P. O. Box 2670
Reno, Nevada 89505-2670
4 Telephone: 775-788-2000
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5 trowe@mcwlaw.com
Attorneys for Appellant and Petitioner
6 *Sierra Packaging & Converting, LLC*

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ALAN GLOYER
BY J. [Signature] CLERK
DEPUTY

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

9 * * * * *

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
INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA

19 Respondents.
20

Case No.: 14DC00195 IB
Dept. No.: I

21 **PETITION FOR JUDICIAL REVIEW**

22
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:

100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

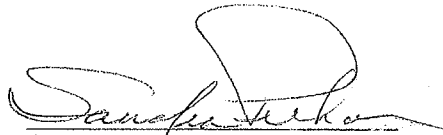
MC DONALD-CARANO-WILSON
100 WEST LIBERTY STREET, 1ST FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89502-2670
PHONE 775-788-2000 • FAX 775-788-2020

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 2nd 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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PHONE 775-788-2000 • FAX 775-788-2020

INDEX OF EXHIBITS

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

EXHIBIT 1

EXHIBIT 1

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JUL 29 2014

NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

McDonald Carano Wilson LLP
McDonald Carano Wilson LLP

FILED			
JUL 28 2014			
O S H REVIEW BOARD			
BY <u>Koston</u>			

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.

///

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

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

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

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

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

ALLEGED VIOLATION¹

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

EVIDENCE

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

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

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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 ///

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

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

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

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

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

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

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

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

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

20 CONCLUSIONS OF LAW

21 1. Nevada Administrative Code 618.788(1) places the burden of proof, to establish a
22 violation occurred, on NV OSHA. NV OSHA must "prove by a preponderance of the
23 evidence that: (1) the cited standard applied to the condition; (2) the terms of the standard
24 were violated; (3) one or more employees had access to the cited condition; and (4) the
25 employer knew, or with the exercise of reasonable diligence could have known, of the
26 violative condition." *Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 1981 CCH OSHD
27 P25, 578 (No. 78-6247, 1981). Nevada OSHA has met its burden of proving these elements
28 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

NEVADA OCCUPATIONAL SAFETY AND HEALTH
REVIEW BOARD

Docket No. RNO 14-1684

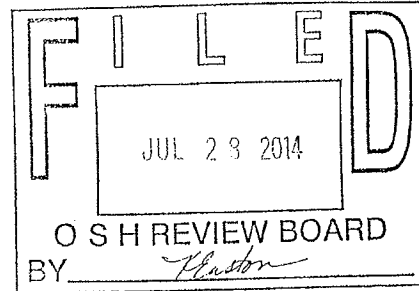
CHIEF ADMINISTRATIVE OFFICER
OF THE OCCUPATIONAL SAFETY AND
HEALTH ADMINISTRATION, DIVISION
OF INDUSTRIAL RELATIONS OF THE
DEPARTMENT OF BUSINESS AND
INDUSTRY, STATE OF NEVADA

Complainant,

vs.

SIERRA PACKAGING & CONVERTING, LLC,

Respondent.



CERTIFICATE OF MAILING

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

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

Timothy E. Rowe, Esq.
McDonald Carano Wilson LLP
100 W. Liberty Street, 10th Floor
P. O. Box 2670
Reno, NV 89505

DATED: July 28, 2014

KAREN A. EASTON

CIVIL COVER SHEET

Carson City

Case No. _____

(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone):

Sierra Packaging & Converting, LLC

Attorney (name/address/phone):

Timothy E. Rowe, Esq.

McDonald Carano Wilson LLP, P.O. Box 2670

Reno, NV 89501 - phone: (775) 788-2000

Defendant(s) (name/address/phone):

Nevada Occupational Safety & Health Review Board and the Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business & Industry, State of Nevada

Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

Civil Cases

Real Property	Negligence	Torts
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence – Auto <input type="checkbox"/> Negligence – Medical/Dental <input type="checkbox"/> Negligence – Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence – Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition

Probate

Other Civil Filing Types

<input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Civil Petition for Judicial Review <input checked="" type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters
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III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- | | | |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88 | <input type="checkbox"/> Investments (NRS 104 Art. 8) | <input type="checkbox"/> Enhanced Case Mgmt/Business |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90) | <input type="checkbox"/> Trademarks (NRS 600A) | |

August 21, 2014

Date

T.E. Rowe
Signature of initiating party or representative

McDONALD CARANO WILSON LLP

89862

Invoice Date	08-21-14	Invoice Number	SP/082114	Date	Aug 21, 2014	Amount \$	\$265.00
			#16542-1	Invoice Description		Amount Paid	\$265.00



McDONALD-CARANO-WILSON
100 WEST LIBERTY STREET, 10th FLOOR • P.O. BOX 2670
RENO, NEVADA 89505 • TELEPHONE 775-788-2000

NEVADA STATE BANK
111 West Liberty Street
Reno, Nevada 89501
94-7771224

89862

TWO HUNDRED SIXTY-FIVE AND 00/100 Dollars

PAY TO THE ORDER OF

First Judicial District Court Clerk

DATE	Aug 21, 2014	AMOUNT	\$*****265.00
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2 SIGNATURES REQUIRED IF OVER \$2500.00



J.E. Jones
JUL 20 10 10 AM '14
2010 AFTER 120 DAYS

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

⑈089862⑈ ⑆22400779⑆0542004190⑈

ORIGINAL

REC'D & FILED

2015 AUG 31 PM 1:04

SUSAN MERRIWETHER
CLERK
BY: *[Signature]*
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 Penalty¹, containing safety citations and proposed penalties, issued by Respondent Chief Administrative Officer of

¹ 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 177².

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.

21 EOR 115.

22 The anonymous source provided with this referral complaint photographs of three
23 employees working/climbing on racking without any fall protection. EOR 153-155.

24 Based on this referral complaint, Jennifer Cox, a Compliance Safety and Health
25 Officer ("CSHO") with NV OSHA, conducted an inspection, number 317224608, on
26 August 16, 2013. EOR 116.

27 ///

28 ² 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
required distance from a suitable anchorage point to ground exposed user to an
17 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."³
26

27
28 ³ See also, Construction Indus. v. Chaluc, 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. 4 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. 5 Substantial evidence is "evidence that a reasonable
7 person could accept as adequately supporting a conclusion," 6 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."7 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 DISCUSSION

13
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 o 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 o 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 ⁴ See Apeceche v. White Pine Co., 96 Nev. 723, 616 P.2d 975 (1980).

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

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

⁷ 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 possible⁸. 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 ⁸ 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 (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.

24 ///

25 ///

26 ///

27 ///

28 ///

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:

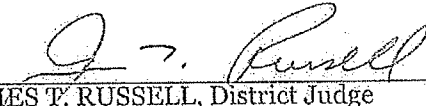
4 The Review Board's finding that the identified employees were maintenance
5 employees given access to fall protection equipment by Sierra Packaging, triggering the
6 requirements of 29 CFR 1910.132(f)(1)(iv), is supported by substantial evidence.

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

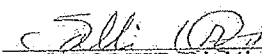
9 Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Review
10 Board's Decision is affirmed and Sierra Packaging & Converting, LLC's Petition for Judicial
11 Review is DENIED.

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 21st 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
27
28

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SUSAN MERRITT
CLERK
BY  DEPUTY

1 Salli Ortiz, Division Counsel
Nevada Bar No. 9140
2 DIVISION OF INDUSTRIAL RELATIONS (DIR)
400 West King Street, Suite 201
3 Carson City, Nevada 89703
Telephone: (775) 684-7286
4 Facsimile: (775) 687-1621
Attorney for Respondent DIR
5

6
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,

Respondents.

Case No: 14-OC-00195-1B

Dept. No: 1

17
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: 

27 Salli Ortiz, Division Counsel
Division of Industrial Relations
400 W. King Street, Ste. #201
Carson City, NV 89703
28 ATTORNEY FOR RESPONDENT DIR

STATE OF NEVADA
Division of Industrial Relations - Division Counsel's Office
400 West King Street, Suite 201, Carson City, Nevada 89703
Telephone: (775) 684-7286 Fax: (775) 687-1621

STATE OF NEVADA
Division of Industrial Relations - Division Counsel's Office
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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: _____

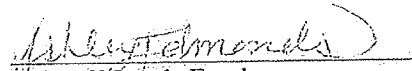
Person(s) Served:

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 MERRIWETHER
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 Penalty¹, containing safety citations and proposed penalties, issued by Respondent Chief Administrative Officer of

¹ 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 177².

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.

20 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 ² 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
required distance from a suitable anchorage point to ground exposed user to an
17 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." ³

26
27
28 ³ 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. ⁴ 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. ⁵ Substantial evidence is "evidence that a reasonable
7 person could accept as adequately supporting a conclusion," ⁶ 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."⁷ 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 ⁴ See Apeceche v. White Pine Co., 96 Nev. 723, 616 P.2d 975 (1980).

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

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

⁷ 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 possible⁸. 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 ⁸ 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 (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.

24 ///

25 ///

26 ///

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28 ///

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:

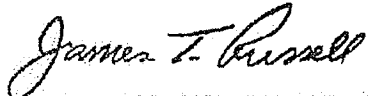
4 The Review Board's finding that the identified employees were maintenance
5 employees given access to fall protection equipment by Sierra Packaging, triggering the
6 requirements of 29 CFR 1910.132(f)(1)(iv), is supported by substantial evidence.

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

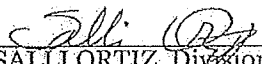
9 Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Review
10 Board's Decision is affirmed and Sierra Packaging & Converting, LLC's Petition for Judicial
11 Review is DENIED.

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 31st day of August, 2015.

16
17 
18 JAMES T. RUSSELL, District Judge

19 Submitted by:

20
21 
22 SALLI ORTIZ, Division Counsel
23 Nevada State Bar No. 9140
24 Nevada Division of Industrial Relations

25
26
27
28 R:\Legal\FY2015\District Court\Sierra Packaging\FINAL Order Denying PJR (1st Judicial) - Sierra Packaging.docx

FIRST JUDICIAL DISTRICT COURT MINUTES

CASE NO. 14 OC 00195 1B

TITLE: SIERRA PACKAGING & CONVERTING
VS NEVADA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD and 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

07/13/15 – DEPT. I – HONORABLE JAMES T. RUSSELL
J. Harkleroad, Clerk – Not Reported

ORAL ARGUMENT

Present: Timothy Rowe, counsel for Pltf.; Salli Ortiz, counsel for Deft.

Arguments were made by counsel.

Court made its findings of fact, conclusions of law for the record,

COURT ORDERED: It will deny the petition for judicial review and Ortiz will prepare the Order for the Court.

The Court minutes as stated above are a summary of the proceeding and are not a verbatim record. The hearing held on the above date was recorded on the Court's recording system.

CIVIL COVER SHEET

Carson City

Case No. 14000195 IB

(Assigned by Clerk's Office)

REC'D & FILED

2014 AUG 22 PM 3:34

I. Party Information

Plaintiff(s) (name/address/phone):

Sierra Packaging & Converting, LLC

Attorney (name/address/phone):

Timothy E. Rowe, Esq.

McDonald Carano Wilson LLP, P.O. Box 2670

Reno, NV 89501 - phone: (775) 788-2000

Defendant(s) (name/address/phone):

Nevada Occupational Safety & Health Review Board and the Chief
Administrative Officer of the Occupational Safety and Health
Administration of the Division of Industrial Relations of the Department
of Business & Industry, State of Nevada

Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)☐ Arbitration Requested**Civil Cases**

Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence <input type="checkbox"/> Negligence – Auto <input type="checkbox"/> Negligence – Medical/Dental <input type="checkbox"/> Negligence – Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence – Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
<input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input checked="" type="checkbox"/> Civil Petition for Judicial Review <input checked="" type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input type="checkbox"/> Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- | | | |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88 | <input type="checkbox"/> Investments (NRS 104 Art. 8) | <input type="checkbox"/> Enhanced Case Mgmt/Business |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90) | <input type="checkbox"/> Trademarks (NRS 600A) | |

August 21, 2014

Date

Signature of initiating party or representative

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9 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
10
11 IN AND FOR CARSON CITY

12 SIERRA PACKAGING & CONVERTING, LLC,
13 Complainant,

14 vs.

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

23 Respondent.

Case No: 14-OC-00195-1B

Dept. No: 1

24 RESPONDENT DIVISION OF INDUSTRIAL RELATIONS'S ANSWERING BRIEF

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ATTORNEY DISCLOSURE STATEMENT (NRAP 26.1 does not apply to governmental attorneys)

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1 employees stated that Maint. Mgr. Tintinger told them to use the harness and the ladder,
2 both Maint. Mgr. Tintinger and Safety Mgr. Hodges testified that maintenance employees
3 are the ones that work at heights, and no training was ever provided. As such, the Review
4 Board's Decision is not negated by the rationale of this case.

5 Even though Sierra Packaging claims "Definitively, the task assigned to these
6 employees could have been safely performed without the use of protective equipment",
7 this was not "definitively" shown. Opening Brief 8:1-2. While one employee was able to
8 perform his task with the use of the ladder, the other two employees pictured were in
9 other areas of the racking. No evidence was presented that all three could have
10 accomplished their tasks from ladders, just as there was no evidence presented that there
11 were multiple ladders available for their use. Sierra Packaging further claims that:

12 While there was some evidence that the employees had access to fall
13 protection equipment, there was no evidence from which a reasonable
14 person could conclude that they were required to use it for any of their job
tasks.

15 Opening Brief 12:2-5.

16 The Review Board has taken the reasonable stance that when an employer provides
17 fall protection equipment, it must also provide the training on the safe use of such
18 equipment. Similarly, it is reasonable to presume that an employer only provides this type
19 of pricey, specialized equipment if its employees are required to use it as part of their
20 assigned job tasks.

21 Sierra Packaging's continued insistence that the task could have been accomplished
22 without fall protection does not change the fact that at least one employee stated they were
23 told to use fall protection. It does not change the fact both Maint. Mgr. Tintinger and
24 Safety Mgr. Hodges admitted maintenance workers do require fall protection for some of
25 their tasks. Due to that, it does not change the fact that these employees needed to be
26 trained on fall protection issues, so they could at the very least identify the limitations of
27 the PPE they were provided. There is no error of law.

28 / / /