IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 71130

SIERRA PACKAGING & CONVERTING, LLC,

Appellants,

v.

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

Respondents.

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

APPELLANT'S OPENING BRIEF

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APPELLANT'S NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in Nevada Rule of Appellate Procedure 26.1(a) and must be disclosed:

(1) Petitioner, SIERRA PACKAGING & CONVERTING, LLC ("Sierra") states that it has no parent company and no publicly held company owns 10% or more of its stock.

(2) The law firm of McDonald Carano Wilson represented Sierra Packaging before the administrative agency.

(3) Lawyers from McDonald Carano Wilson, including Timothy Rowe, will represent Sierra Packaging in these proceedings.

This representation is made in order that the judge of this court may evaluate possible disqualification or recusal.

Dated this 14th day of December, 2016. McDONALD CARANO WILSON LLP

By: /s/Timothy E. Rowe
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I. INTRODUCTION

The Nevada Occupational Safety and Health Review Board ("the Board") determined that Petitioner Sierra Packaging and Converting, LLC ("Sierra") violated a health and safety regulation that mandates employers are to provide training for the use of fall protection devices to employees who were required to use that protection in the performance of their work duties. The Board reached this conclusion in the absence of any evidence that the employees at issue had any job assignments that actually required them to use fall protection. Indeed, the evidence presented to the Board demonstrated that the employees in question were not required to use fall protection in the performance of their work tasks. Because the Board's decision reflects an error of law and a clearly erroneous application of the law to the facts of this case, Sierra asks the Court TO REVERSE THE DECISION OF THE District Court and set aside the Board's decision sustaining the violation.

II. JURISDICTIONAL STATEMENT

The Court has jurisdiction over this timely Appeal pursuant to NRS

233B.150. The appeal seeks reversal of a final District Court Order denying a petition for judicial review. Notice of Entry of Order Denying Petition for Judicial Review was filed on July 29, 2016. The Notice of Appeal was filed on August 25, 2016.

III. ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(4) in that it is an appeal involving an administrative agency.

IV. STATEMENT OF THE ISSUES

1. Did the Board err as a matter of law when it ignored the word "required" in 29 CFR § 1910.132(f)(1) and sustained a citation against Sierra for failing to train certain employees in the use of fall protection equipment absent any proof that the employees' assigned tasks required them to use fall protection equipment?

V. STATEMENT OF THE CASE

On October 8, 2013, the Occupational Safety and Health Administration of the Division of Industrial Relations ("DIR") filed a complaint against Sierra with

the Board alleging that Sierra failed to train its employees in the use of fall protection equipment under 29 CFR § 1910.132(f). (JA at 34-35). DIR asserted that the violation was serious and proposed a fine of nearly four thousand dollars. (*Id*.). Sierra denied the allegations, and this case went to an evidentiary hearing before the Board on March 12, 2014. (*JA at 2212*).

The Board admitted exhibits and heard testimony from DIR's inspector, Sierra's safety supervisor, Sierra's plant operations manager, and Sierra's maintenance manager. *(JA at 244, 245*). Based on this evidence, DIR argued that Sierra violated 29 CFR § 1910.132(f) because the employees **had access** to fall protection equipment and had not been trained how to use it properly. (*JA at 334*). Although Sierra emphasized the difference between having access to the equipment and being required to use it, the Board concluded that having access to the equipment was sufficient to establish a violation. (JA at 338-340). The Board further rejected Sierra's defense that the employees' actions of climbing on the racks, an activity that required fall protection, was employee misconduct, violating Sierra's policy that expressly prohibited any employee from climbing on the racks.

(JA at 340-343).

After filing and serving its decision on April 11, 2014, the Board entered its Final Findings of Fact and Conclusions of Law on July 28, 2014. (*JA at 346*) expressly holding that 29 CFR 1910.123(f)(18(iv) applied to Sierra's employees because they had access to fall protection. Ultimately, the Board concluded that DIR had properly charged Sierra with a serious violation and imposed a penalty of $3,825. (*JA at 352*). Sierra now requests the Court to reverse the District Court Order and set aside the citation issued by DIR.

VI. STATEMENT OF FACTS

In July and August of 2013, Sierra was shifting its operations from a location in Sparks to a new location in Stead. (JA at 8). As a manufacturing business, Sierra uses large racking systems to store products and materials. (*JA at 42-47*). Sierra had their racking system disassembled at the Sparks location and then reassembled in the Stead location by Reno Forklift. (JA at 299). When operations were beginning in the new location, the shipping department noticed that stabilization plates for the racking system, which had been in place in the

Sparks location, were not installed in the Stead location. (JA at 310). Viewing the stabilization plates as a redundant safety system and determining that they could be easily installed using ladders that Sierra normally used to access product in the racks[1], Sierra decided its maintenance employees could reinstall the plates. (JA at 310-311).

While Sierra was installing the plates, DIR received an anonymous report, accompanied by a blurry picture, of employees climbing in metal racks above the plant floor without fall protection. (JA 8, 254). Compliance Safety and Health Officer Jennifer Cox went to the Stead location to investigate the report. (JA at 8, 9). Cox investigated the report[2], identified the location of the racks, and attempted

[1] It is important to note that the ladders used at Sierra's facility resemble a set of steps used to access an airplane, not an extension ladder that might be pictured. (JA at 323, 324). The ladder systems are on wheels so that they can be rolled into place. (*Id.).* When stepped on, the system locks into place, and an employee climbs the steps, guarded by handrails, to a small flat platform. (*Id.).* The platform can extend almost to the height of the uppermost level of the racks, such that work could be done or materials retrieved from that level. (*Id*.). The use of ladders unequivocally does not require the use of fall protection equipment.

[2] The Board noted that Cox "observed employees standing on the racking without fall protection as confirmed in photographic exhibits (JA at 331). This finding reflects the Board's confusion, since Cox testified that she did not take the photographs, but that the photographs had been provided with an anonymous

to identify the employees in the picture. (*Id*.). One of Sierra's managers was able to identify the employees in the pictures as maintenance employees and contacted the maintenance manager, Steve Tintinger, to join the meeting with Cox. (*Id*.) Tintinger recognized one of the employees in the picture and accompanied Cox to interview that employee. (*Id*.)

Cox testified about the interviews, noting that each of the three employees told her that they were not authorized to be up on the racking (JA at 258). Upon cross-examination, she testified: "[t]he whole inspection was very difficult. There was a language barrier, it was difficult trying to get the individuals identified in the picture. I got conflicting statements from everyone." (JA at 280, 281). Cox only interviewed three people, each of whom needed a Spanish-English translator. (JA at 277). The translation was performed by a fourth Sierra employee, not a trained translator. (JA at 9). Cox, who did not speak Spanish, testified that she did not know if her questions or the employees' responses were translated accurately. (JA at 282, 283). Nonetheless, she wrote out statements for the

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report. (JA at 18, 254). Cox never testified that she personally observed employees standing in the racking.

employees to sign. (JA at 276, 277).

The statement of the first employee indicated that he had been instructed by a person named Oswaldo Gimenes to install pieces of metal in the racking. (JA at 14). The statement did not indicate that the employee had been instructed to use or provided with fall protection equipment to perform this task. *(Id*.) Despite admitting that she could not remember all of the details of her investigation and the absence of any note to this effect in the employee's statement, Cox testified that this employee brought her a five-point harness and she quizzed him on its usage. (JA at 260, 283). Without any statement from the employee in writing to this effect, Cox testified that the employee "informed Ms. Cox [the five-point harness] was provided by [Sierra]." (JA at 260; see also JA at 277, 278). The testimony established, however, that Cox did not know if the translator had asked the employee to retrieve fall protection equipment provided to the employee or general fall protection equipment that happened to be on site. (JA at 283, 284). Cox could not testify as to where the employee obtained the equipment or whether the employee actually claimed it belonged to him. (*Id*.). At most, Cox established

that the employee knew how to identify fall protection equipment and where some such equipment was located. (*Id*.)

The second employee's statement provided that safety training on all equipment had been provided in Spanish, that Sierra prohibits employees from climbing in the racking, and that Tintinger had directed the three to install the plates between the racks using a five-point harness and a ladder. (JA at 15). This employee maintained that he had used the ladder instead of the body harness to accomplish the task. (*Id*.) The third statement is from an employee who denied being in the picture. (JA at 281, 282). He also stated that training had been provided and that employees were expressly prohibited from climbing in the racking. *(*JA at 16, 281). After completion of Cox's investigation Nevada OSHA issued a citation for a serious violation of 29 CFR 1910.1321(f)(1) and assessed a fine of $3,825.00. (JA at 20-31)

At the hearing Cox testified why she felt the regulation applied in this case. (JT at 270). Cox stated she issued the citation because fall protection equipment had been provided by the employer (JT at 270, 271) Cox also stated she did not

issue the citation for the employees being in the racking system and did not need any information about why they were on the racking system or what they were doing. (JT at 287, 288).

Sierra's evidence at the hearing consisted of both documentary evidence and the testimony of three witnesses. First, as documentary evidence, Sierra presented a hazard assessment completed by DIR's Safety Consultation and Training Section ("SCATS"). (JA at 226-241). This hazard assessment involved the evaluation of the full Sparks facility, including the racking system that was later installed at the Stead facility. (JA at 230). The SCATS assessment identified several potential hazards, all of which were corrected, but it made no mention of requiring fall protection training for employees working in the racks. (JA at 230, 231, 233-241). Although both the Sparks and Stead facilities had identical racking systems, the previous hazard assessment had not listed or required fall protection training for any employees performing maintenance on those systems. (*Id*.)

Sean Tracy, Sierra's plant operations manager, testified that the task assigned to the employees was able to be performed using the rack ladders, a

method that would not require the employees to walk on the racks. (JA at 310, 311). Steve Tintinger, Sierra's maintenance manager, testified similarly, that there was nothing about the work that had been assigned that would have required the employees to climb on the racks. (JA at 317, 318). He additionally testified that no one at Sierra had provided any of the three employees with fall protection equipment for any purpose, or directed them to use fall protection equipment to do the assigned task. (*Id.*).

On April 11, 2014, the Board entered its decision upholding the citation issued by Nevada OSHA. (JA at 330). On July 28, 2014, the Board entered its Findings of Fact and Conclusions of Law expressly holding Sierra violated 29 CFR 1910.123(f)(1)(iv) because Sierra had provided its employees with access to fall protection equipment (JA at 346, 351).

VII. SUMMARY OF THE ARGUMENT

The Board disregarded the plain language of 29 CFR § 1910.132(f)(1) by ignoring the regulation's use of the word "required" and concluding that Sierra was liable for not providing training on fall protection equipment to specific

employees despite the absence of any evidence that any of the employees' assigned tasks required the use of fall protection equipment. (See JA at 346-352). 29 CFR § 1910.132(f)(1) only requires employers to train employees on the use of protective equipment the employees are "required" to use. "Required," in this context, means doing work tasks for which protective equipment is mandated. Because the undisputed evidence presented to the Board demonstrated that none of the three employees interviewed by Ms. Cox were assigned tasks that mandated the use of fall protection, the Board erred as a matter of law in sustaining this violation.

The absence of any finding or conclusion by the Board that Sierra's employees were required to use fall protection in the performance of their assigned work tasks demonstrates the Board upheld the citation simply because Sierra employees had access to fall protection, not because they were required to use it to perform their assigned work tasks.

VIII. ARGUMENT

A. Standard of Review

When the decision of an administrative body is contested, the function of the court is to review the evidence presented to the administrative body and to ascertain whether that body acted arbitrarily or capriciously, thus abusing its discretion. *Langham v. Nevada Administrators, Inc.*, 114 Nev. 203, 206-207, 955 P.2d 188, 190 (1998); *Gandy v. State el rel. Div. Investigation*, 96 Nev. 281, 607 P.2d 581, 582 (1980). "'[T]he court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact'"; however, "[a]n agency ruling without substantial evidentiary support is arbitrary or capricious and therefore unsustainable." *State Indus. Ins. Sys. v. Christensen*, 106 Nev. 85, 787 P.2d 408 (1990) (quoting *Gandy*, 96 Nev. at 282-83, 607 P.2d at 582-83); see also *Tighe v. Las Vegas Metro. Police Dept.*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994) ("A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal."). Evidence is only substantial if "'a reasonable mind might accept [it] as adequate to

support a conclusion.'" *Tighe*, 110 Nev. at 634, 877 P.2d at 1034 (quoting *State Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)). Additionally, Nevada courts review an administrative body's statutory interpretation independently. *Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety & Health Section*, 122 Nev. 584, 588, 137 P.3d 1155, 1158 (2006) ("Construction of a statute, including its meaning and scope, is a question of law, which this court reviews de novo. We may undertake an independent review of an administrative construction of a statute."). Courts give no deference to an agency's interpretation of a statute, issuing a decision regarding statutory construction de novo. *Elizondo v. Hood Machine, Inc.*, 129 Nev. ___, ___, 312 P.3d 479, 482 (2013).

B. The Board Erred As a Matter of Law Because Sierra's Employees Were Not "Required" to Use Fall Protection

Before the Board could sustain the violation against Sierra, it had to conclude that the standard DIR had charged Sierra with violating applied to the conduct or work conditions at issue. See *Am. Wrecking Corp. v. Secretary Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003). Specifically, the Board had to conclude

that 29 CFR § 1910.132(f)(1) applied to the employees identified in DIR's charge. See *id*. The plain language of 29 CFR § 1910.132(f)(1) provides that it only applies to employees who are **required** to use protective equipment in their assigned work tasks. Without addressing the meaning or use of the word "required" in 29 CFR § 1910.132(f)(1), the Board determined that the regulation applied to these Sierra employees because the employees had access to fall protection equipment. (JA at 338-340). The plain language of the regulation and decisions of the Occupational Safety Health Review Commission ("OSHC") indicate that the use of the term "required" does not include situations like this one in which the evidence reflected that not only were employees supposed to perform the assigned task in a manner that would not require the use of protective equipment, but that they were specifically prohibited by company policy from engaging in the behavior that would require protective equipment.

The relevant text of 29 CFR § 1910.132(f)(1) reads: "The employer shall provide training to each employee who is **required** by this section to use PPE." (emphasis added). "Required" is not separately defined in the standard. When a

word is not defined in a statute or regulation, Courts turn to the common-meaning or dictionary definition to determine the plain meaning of a statute. See, e.g., *Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. ___, ___, 331 P.3d 850, 854 (2014) (using Black's Law Dictionary to define "furnish"); accord *Employers Ins. Co. v. Chandler*, 117 Nev. 421, 23 P.3d 255 (2001) (using Random House Webster's College Dictionary to define "payable"). If the plain language of a statute can only reasonably mean one thing, courts go no further and enforce the statute as it is written. *See Simmons Self-Storage*, 130 Nev. at ___, 331 P.3d at 854-55.

"Require" is commonly defined as "cause to be necessary . . . specify as compulsory . . . ." The New Oxford American Dictionary (2d Ed. 2005). In other words, "required" means that there is no other option for compliance. Under the plain language of 29 CFR § 1910.132, therefore, an employer violates the standard only if the employees work duties mandate that he or she use protective equipment and the employee is not trained to use that equipment. If the employee's work duties do not require the use of protective equipment, then the employee does not

need to be trained on the use of that equipment.

While DIR presented evidence that some Sierra employees were climbing in the racks without using fall protection, there was no evidence presented that these employees were assigned tasks requiring the use of fall protection. (JA at 296, 298, 299, 311, 317). Indeed, even Cox testified that Sierra prohibited employees from climbing in racks. Definitively, the task assigned to these employees could have been safely performed without the use of protective equipment. (*Id*.).

Case law from the OSHC demonstrates that OSHC interprets the word as used in 29 CFR § 1910.132(f)(1) to mean work tasks that actually mandate the use of PPE. This conclusion is supported by OSHC decisions specifically addressing 29 CFR § 1910.132(f)(1). In *Union Oil Co. of California, Chicago Refinery*, 13 OSHC 1673 at 14-16 (1988), the OSHC addressed whether oil refinery employees were "required" to use fire protective equipment in their jobs. In that case, the job description for all operating personnel required them "to extinguish or contain minor fires located in their work areas as part of their regular duties." *Id*. at 14.

Two groups of employees were specially trained to perform firefighting duties: the Day Fire Crew and the Shift Fire Crew. *Id*. The Shift Fire Crew was trained as a stop-gap measure in case a fire grew beyond the capability of regular employees so that there was a group of employees with additional training to hold the fire in check until the Day Fire Crew could be called in from their homes. *Id*. Regular employees were neither provided with nor trained in using fire protective gear. *Id*. The Shift Fire Crew was provided with and trained in the use of fire protective gear, but its use was not enforced. *Id.* In the accident that was the basis for the action, some Shift Fire Crew responded to the scene of a gas leak without wearing protective equipment and died in a gas explosion. *Id*. Despite this obvious exposure to a dangerous condition, another regulation specified that employees like those on the Shift Fire Crew were not required to use protective clothing. *Id*. at 15-16. Therefore, the OSHC was forced to conclude that the employer did not violate 29 CFR § 1910.132. *Id*. at 15-16.

The OSHC applied a similar interpretation of "required" in *St. Lawrence Food Corp.*, 22 OSHC 1145 at 23-24 (2007), to find a violation of 29 CFR §

1910.132. In that case, the OSHC determined that because the employer required employees to climb on top of tank trailers to clean them, the height of the tank trailers mandated the use of fall protection equipment, and no alternative to the use of that equipment was provided, the employer violated 29 CFR § 1910.132(f)(1) by failing to provide training to use the fall protection equipment. *Id*. at 23-24. From the plain language of the regulation and the method in which the OSHC has applied 29 CFR § 1910.132(f)(1), it is clear that an employer only needs to offer training on protective equipment if the employee's assigned task cannot be accomplished without using that protective equipment.

In this case, there can be no question that the employees installing the stabilization plates were not **required** to use fall protection equipment since they could safely accomplish the task using ladders. (JA at 279, 296, 298, 311, 317, 15). Indeed, one of the employees interviewed specifically stated that he was using a ladder to complete the task. (JA at 15). The evidence submitted also demonstrated that employees were expressly prohibited from climbing in the racks. (JA at 300). Not only was protective equipment not required to accomplish

the task to which the employees were assigned, they had been expressly forbidden from using a method of accomplishing the task for which protective equipment would be required. Thus, the Board clearly erred when it ignored the plain language of 29 CFR § 1910.132 and held that having access to use equipment is the same as being required to use that equipment.

C. The Board's Upheld the Citation Because Sierra Employees Had Access to Fall Protection Equipment, Not Because They Were Required to Use It.

The plain meaning of CFR § 1910.132(f)(1) requires an employer to train employees in the use of PPE only when their job tasks require the use of PPE. Thus, Nevada OSHA was required to prove the three Sierra employees involved in this incident were required to use fall protection equipment in the performance of their assigned tasks. More importantly, a Board finding that the evidence proved the involved employees were required to use fall protection equipment in the performance of their assigned tasks was an essential premise to upholding the Nevada OSHA citation for violating this regulation. Despite the importance of this finding, careful review of the Board's Findings of Fact and Conclusions of Law

fail to disclose any finding that the Sierra employees were assigned tasks requiring the use of fall protection equipment.

There is a reason for this. The reason is reflected in the Board's Conclusion No. 2 and demonstrates the Board upheld the citation issued by Nevada OSHA simply because the Sierra employees had access to fall protection equipment, not because they were required to use it in the performance of assigned job tasks.

> Conclusion Number 2 states:
>
> "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.**" (Emphasis Added)(JA at 351)

The Board's Conclusion makes it clear the Board was not concerned about the specific requirements of the regulation at issue but only that the three Sierra employees had access to fall protection equipment. Apparently the Board has taken the stance that access to fall protection equipment invokes the requirement to train employees in the use of that equipment:

> "The Review Board has taken the reasonable stance that when an employer provides fall protection equipment, it must also provide the training on the safe use of such equipment. Similarly, it is reasonable to presume that an employer only provides this type of pricey, specialized equipment if its employees are required to use it as part of their assigned job tasks." Respondent's Answering Brief in the Petition for Judicial Review Proceeding, page 14, lines 16 through 20." (JT at 401.)

The problem here is that is not what the regulation says, and the Board stance is not codified in any adopted and published statute, regulation or rule.

Interestingly, Nevada OSHA did not even prove the Sierra employees actually had access to the fall protection equipment. The only thing the Nevada OSHA investigator could establish was that she asked to see fall protection equipment and one of the Sierra Packaging employees retrieved fall protection equipment for her to inspect. She could not identify where the fall protection equipment came from, what its purpose was or that it was intended for use by any of the three Sierra employees. (JT at 283, 284)

Nevada OSHA's disregard of what the regulation actually requires is even reflected in the citation issued by Nevada OSHA. Careful review of the citation and the explanation of the violation on the citation fails to reveal any allegation that the three involved Sierra employees were required to use fall protection

equipment in their assigned work duties. (JT at 29.)

The citation itself, the absence of any finding by the Board that the Sierra employees were assigned tasks requiring the use of fall protection equipment and the Board's conclusion that the regulation applied simply because the employees had access to fall protection equipment all demonstrate neither Nevada OSHA nor the Board were concerned about the specific requirements of the applicable regulation. The citation was issued and upheld by the Board simply because Sierra employees allegedly had access to fall protection equipment, not because they were required to use it in the performance of their duties.

The fact that Sierra employees may have had access to fall protection equipment does not make 29 CFR § 1910.132(f)(1) applicable to the circumstances giving rise to the citation in this case. Unless the Sierra employees were required to use fall protection equipment in the performance of their assigned employment tasks, this regulation has no application to this case. Nevada OSHA failed to prove, and the Board failed to find that any of the involved Sierra Packaging employees were required to use fall protection equipment in the performance of

their assigned job tasks. Thus, the Board's conclusion that 29 CFR § 1910.132(f)(1) was violated in this case constitutes clear error and requires reversal under NRS 233B.135.

IX. CONCLUSION

Without addressing the specific language of 29 CFR § 1910.132(f)(1), the Board erroneously concluded the regulation was applicable to Sierra employees simply because they allegedly had access to fall protection equipment. (ER 22). Upon independent review of the meaning of "required" in 29 CFR § 1910.132(f)(1), the Court should conclude that the standard requires training for employees whose assigned tasks cannot be accomplished without the use of protective equipment, not because they might have access to protective equipment. Because the undisputed evidence establishes that the task assigned to these employees could be and in fact should have been accomplished using a process that did not require protective equipment, the Court should reverse the District Court's Order Denying Petition for Judicial Review and set aside the Board's erroneous decision.

AFFIRMATION

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

Dated this 14th day of December, 2016.

McDONALD CARANO WILSON LLP

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point font, Times New Roman style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 5,454 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that this brief is not in

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

DATED this 14th day of December, 2016.

McDONALD CARANO WILSON LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP, and that on this 14th day of December, 2016, a copy of the foregoing **APPELLANTS OPENING BRIEF** was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex). Participants in the case who are registered with Eflex as users will be served by the Eflex system and others not registered will be served via U.S. mail as follows:

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