

1 **IN THE COURT OF APPEALS OF THE STATE OF NEVADA**

2 **Case No. 71130**

3 **SIERRA PACKAGING & CONVERTING, LLC,** **FILED**

4 Appellant,

5 JUL 28 2017

6 vs.

7 ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *J. Hendrix*
DEPUTY CLERK

8 THE CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL
9 SAFETY AND HEALTH ADMINISTRATION OF THE DIVISION OF
10 INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS
11 AND INDUSTRY, STATE OF NEVADA; and THE OCCUPATIONAL
12 SAFETY AND HEALTH REVIEW BOARD,

13 Respondents.

14 Appeal from an Order Denying Petition for Judicial Review
15 First Judicial District Court of Nevada
16 District Court Case No. 14-OC-00195-1B

17 **RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF**

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29 **RECEIVED**

30 JUL 28 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
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17-901544

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REGULATIONS

29 CFR 1910.132(f)(1)(iv)	3
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I. STATEMENT OF THE ISSUE

The Court of Appeals has ordered supplemental briefing exclusively addressing the applicability of the “rule of access” standard to the specific facts of the case at hand. The Court specified such additional briefing needs to include consideration of Oregon Occupational Safety and Health Division v. Moore Excavation, Inc., 307 P.3d 510(OR. Ct. App. 2013).

II. RULE OF ACCESS

In order for the Occupational Safety & Health Administration (OSHA) to establish a violation of an OSHA standard, it must prove, by a preponderance of the evidence, four (4) factors, which include showing “employee exposure” to the hazardous or violative condition.

The “rule of access” rationale was originally summarized and analyzed by the 4th Circuit in 1974. *See Brennan v. Gilles & Cotting, Inc.*, 504 F2d 1255 (4th Cir. 1974). The Gilles & Cotting Court found that, for OSHA to establish a violation, *actual* employee exposure to a hazard or violative condition was **not** necessary to prove “employee exposure” to that hazard or violative condition. *Id.* at 1263-1266. Instead, the Court adopted a “rule of access” standard based on reasonable predictability, i.e., whether it was reasonably predictable that the employee(s) was exposed or had access to the hazard or violative condition. *Id.* Subsequently on remand, the federal

Occupational Safety and Health Review Commission (OSHRC) expressly renounced proof of "actual" exposure as a requirement, given OSHA's preventative purpose, and developed the "rule of access":

We have given careful consideration to the question presented. On balance we conclude that a rule of access based on reasonable predicability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure.

Gilles & Cotting, 3 BNA OSHC at 2002, 1975-76 CCH OSHD at p. 24,425 (OSAHRC 1976).

In more recent analysis, Courts have explained that an agency must show that:

[I]t is reasonably predictable that employees, by 'operational necessity' or otherwise (including inadvertence) in the course of their work or associated activities (e.g., going to rest rooms) will be in the zone of danger created by the cited condition.

Moore Excavation, 307 P.3d at 516-517. Further, "access" in this context is no different from "exposure". *Id.* at 517.

As noted in the Moore Excavation case, the "rule of access" standard is the prevailing federal standard that has been adopted by most states. Moore Excavation, 307 P.3d at 517; *see R. Williams Constr. Co. v. OSHRC*, 464 F.3d 1060 (9th Cir. 2006).

However, "Reasonable predictability requires more than a hypothetical possibility of exposure, *though less than a certainty.*" Department of Labor v.

1 Morel Constr. Co., 359 S.W.3d 438, 449 (Ky. Ct. App. 2011)(emphasis
2 added; internal Citation omitted).

3
4 **III. APPLICATION OF THE “RULE OF ACCESS” TO THE FACTS**

5 On September 10, 2013, Nevada OSHA issued its Citation for
6 Inspection Number 317224608, for lack of training. JA 20-31. This is the only
7 citation item contested by Sierra Packaging:

- 8
- 9 • **Citation 1, Item 1: SERIOUS**
10 29 CFR 1910.132(f)(1)(iv): The employer shall provide training
11 to each employee who is required by this section to use personal
12 protective equipment (PPE). Each such employee shall be trained
13 to know the limitations of the PPE:

14 JA 29; JA 32.

15 The inspection was triggered by an August 9, 2013, anonymous
16 complaint received by Nevada OSHA, which included a photograph, alleging
17 various safety and/or health violations by Sierra Packaging. JA 4. The
18 photograph provided showed three employees working/climbing on racking
19 without fall protection. JA 42-44; *see also* Supplemental Appendix (“SA”) 1.
20 The racking in question was more than 15 feet high. *See* JA 29.

21 During Compliance Safety and Health Officer (“CSHO”) Jennifer
22 Cox’s inspection, the location and authenticity of the complaint photograph
23 was verified as being taken inside the Sierra Packaging Reno-Stead
24 warehouse. JA 42-46, SA 1-3. The three people pictured therein were
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1 identified by Maintenance Manager Steve Tintinger ("Maint. Mgr. Tintinger")
2 as temporary maintenance Employees Caal, Gonzalez, and Soto. JA 8-9.

3
4 None of these facts were refuted.

5 During the interview with CSHO Cox, Maintenance Employee
6 Gonzalez produced the five point harness, six foot lanyard and a three foot
7 shock plate, to which he clearly had access. JA 9.

8
9 Maintenance Employee Gonzalez also admitted that: 1) he was
10 climbing on the racks; 2) he was assigned by a supervisor to put the stabilizers
11 on the racks; 3) he was not aware he was not supposed to climb the racks;
12 4) he had not been provided any safety training; and 5) he was not aware of
13 any safety program. JA 14.

14
15 Maintenance Employee Caal's statement said he was working on a
16 ladder while the other two employees were climbing on the racking. JA 15.
17 He stated he is aware of the harness the company provides. *Id.* Employee
18 Caal's statement asserts Maint. Mgr. Tintinger assigned the employees to the
19 task of securing metal between the racks, further stating that Maint. Mgr.
20 Tintinger told him to use "fall protection (5 point harness and ladder)." *Id.*

21
22
23 Maintenance Employee Soto stated that he was trained on fall
24 protection or other PPE, and is aware of company safety policies. JA 16.

25
26 During her testimony, CSHO Cox remarked that neither employees nor
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1 management could answer the basic questions regarding fall protection or the
2 proper use of the harness she was provided with. JA 260:5 through 264:24.

3
4 During the inspection, none of the employees, including Maint. Mgr.
5 Tintinger, demonstrated basic knowledge, training, or understanding of its use
6 or limitations. *Id.* as a result of her inspection, CSHO Cox determined that it
7 was apparent that Sierra Packaging provided employee *access* to fall
8 protection, however did not provide any training or limitations to its access
9 whatsoever. *Id.*

11 David Hodges, Sierra Packaging's Safety Manager ("Safety Mgr.
12 Hodges"), admitted his own lack of experience in fall protection training. JA
13 302:22-25. **He testified that the only area where the company would**
14 **require the use of fall protection would be maintenance functions. JA**
15 **295:8-22.** He also testified that he was aware that two of the individuals
16 identified in the photographs on top of the racks were trained in fall protection
17 "for changing the lightbulbs". JA 304:23 through 305:3.

18
19 **Maint. Mgr. Tintinger testified that he knew those employees**
20 **pictured had fall protection personal protective equipment (PPE), and**
21 **had seen them use it before. JA 319:17-23.** Maint. Mgr. Tintinger also
22 admitted that he was trained on some fall protection equipment himself, and
23 that he sometimes worked with it when required. JA 318:24 through 319:10.
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1 In order for the “rule of access” to apply, OSHA must show it is
2 reasonably predictable that an employee would be exposed to a particular
3 hazard, in this case, a fall hazard.
4

5 While Sierra Packaging argues that the Review Board relied solely on
6 simple access to the fall protection equipment to establish the violation, that
7 contention is not supported by the submitted evidence. *See* Appellant’s
8 Supplemental Opening Brief, pg. 3.
9

10 In this case, it was undisputed that the three employees at the heart of
11 this matter were maintenance workers.
12

13 Through a walk around inspection, observation, and several interviews,
14 CSHO Cox determined that at least these three employees had access to fall
15 protection equipment, without the attendant training. This included
16 Maintenance Employee Caal’s statement that Maint. Mgr. Titingier told him to
17 use “fall protection (5 point harness and ladder)”, when he assigned him to
18 work on the racking system. JA 15. Additionally, when speaking to the
19 employees and management, CHSO Cox found that none knew even the basic
20 requirements or limitations of the company-provided equipment. *See* JA 260:5
21 through 264:24.
22
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24 In its April 11, 2014, Decision, the Review Board specifically found the
25 testimony and evidence presented by and through CSHO Cox credible. JA
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27
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1 338:22-24, 350:16-17.

2 Safety Mgr. Hodges confirmed his own lack of experience in fall
3 protection training, and testified that "maintenance" was the only department
4 whose employees would require the use of fall protection. JA 295:8-22;
5 302:22-25. Safety Mgr. Hodges even provided a specific maintenance task for
6 which fall protection would be required, i.e., changing lightbulbs. JA 304:23
7 through 305:3.
8

9 Maint. Mgr. Tintinger testified that he knew those employees pictured
10 had fall protection equipment, *and that he had seen them use it before*. JA
11 319:17-23. Maint. Mgr. Tintinger also admitted that he was trained on some
12 fall protection equipment himself, and that he sometimes worked with it when
13 required. JA 318:24 through 319:10. Additionally, Maint. Mgr. Tintinger did
14 not refute Maintenance Employee Caal's statement that Maint. Mgr. Tintinger
15 told him to use fall protection equipment when he was assigned to work on
16 the racking system. JA 15.
17

18 The Review Board determined that Maint. Mgr. Tintinger's testimony
19 was unsupported and "did not rebut that of CSHO Cox, the employee witness
20 statements and the facts in evidence." JA 339:22-23.
21

22 All of the information gained through management testimony,
23 consistent as it is with CSHO Cox's credible testimony, findings, and the
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1 submitted evidence, unequivocally establish that employee exposure to a fall
2 hazard was reasonably predictable.

3
4 The Safety Manager specified maintenance employees are the only
5 ones who have any duties requiring fall protection. In order to fulfill any such
6 duties, fall protection equipment would be needed. As such, training should
7 have been provided.
8

9 The Maintenance Manager admitted that he not only knew these
10 employees had access to the company-provided fall protection equipment, but
11 that he had previously observed these employees using that equipment. This
12 does not even require "reasonable predictability", as Maint. Mgr. Tintinger's
13 admissions show he had actual knowledge of these employees access to the
14 fall hazard.
15

16
17 Thus, while Sierra Packaging asks this Court to "suppose" and
18 "assume" a proposed scenario to show how the rule of access would not apply
19 in its hypothetical situation, Nevada OSHA has shown employee exposure to
20 fall hazards in the case at hand. *See* Appellant's Supplemental Opening Brief,
21 pgs. 3-4. It did this through largely uncontested facts, many established
22 through Sierra Packaging's management's testimony.
23

24
25 It cannot be stressed enough that the Maintenance Manager himself, the
26 person in charge of the maintenance department, testified he knew these
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1 employees had access to this equipment, and that he had seen them using it.
2 JA 319:17-23. This admission establishes that these employees must have
3 some duties requiring fall protection, because Maint. Mgr. Tintinger saw them
4 using it. Maintenance Employee Caal's statement even says that Maint. Mgr.
5 Tintinger told him to use fall protection equipment when he was assigned to
6 work with the racking. JA 15.
7
8

9 It is inexplicable why Sierra Packaging keeps insisting training on fall
10 protection equipment was not necessary, when its Safety Manager says
11 "Maintenance" employees are the only ones with any job duties requiring fall
12 protection, and its Maintenance Manager has *seen* these particular employees
13 using that equipment.
14

15 Sierra Packaging's claim that "the Board applied an overly broad
16 interpretation of the rule of access by assuming that simply having access to
17 the fall protection equipment necessarily means that the employee would use
18 the fall protection equipment" is against the submitted evidence. *See*
19 Appellant's Supplemental Opening Brief, pg. 4.
20
21

22 Here not only was access to, and use of, the fall protection equipment
23 established, but access to fall hazards was established by CSHO Cox's
24 testimony and inspection findings, as well as by "reasonable predictability"
25 through the Safety Manager and by actual knowledge through the
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1 Maintenance Manager.

2 Sierra Packaging made the harness available to these three maintenance
3 employees, at least one of these employees stated that Maint. Mgr. Tintinger
4 told him to use the harness, both Maint. Mgr. Tintinger and Safety Mgr.
5 Hodges testified that maintenance employees are the only ones that work at
6 heights, and Maint. Mgr. Tintinger admitted he had seen these employees
7 using the fall protection equipment, yet no training was ever provided to the
8 employees for the provided harness. JA 295:8-22.

9 All of these established and submitted facts support the Review Board's
10 findings that these employees had access to both fall protection equipment and
11 fall hazards.

12 By contrast, Sierra Packaging was unable to establish its various
13 contradictory claims, including the one that "None of the three employees
14 were assigned job duties that would require the use of fall protection." *See*
15 Appellant's Supplemental Opening Brief, pg. 4. This unsubstantiated
16 statement not only contradicts CSHO Cox's findings, it contradicts the
17 testimony of both its Safety and Maintenance Managers. Sierra Packaging was
18 and is unable to support its conclusory and contradictory claims, as evidenced
19 by the lack of references to the record behind those various statements.


20 ///

1 IV. CONCLUSION

2 The Review Board has taken the reasonable, logical, and legal stance
3 that when an employer provides fall protection equipment to its employees, it
4 must also provide the training on the safe use of such equipment. Given the
5 credible testimony and evidence submitted by and through CSHO Cox, and
6 the admissions made by both the Safety and Maintenance Managers consistent
7 with that, the "rule of access" was properly applied through not only
8 "reasonable predictability", but through actual knowledge.

9 Conversely, none of Sierra Packaging's arguments provide a basis for
10 rebutting the applicability of the rule of access to the facts at hand. In order to
11 accept Sierra Packaging's position, this Court would have to reverse the
12 Review Board's credibility determinations, re-weigh the documentary
13 evidence, and ignore the sworn testimony. There is no legal justification for
14 any of those steps.

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19 NEVADA OCCUPATIONAL SAFETY
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22
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CERTIFICATE OF COMPLIANCE

1. 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 2013 in Times New Roman 14 or

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is either:


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3. Finally, I hereby certify that I have read this appellate 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28 day of July, 2017.


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AFFIRMATION

PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding Respondent's
Supplemental Answering Brief filed in or submitted for Supreme Court Case
71130

☒ Does not contain the social security number of any person

or

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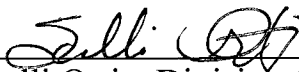
or

B. For the Administration of a public program or for an

application

for a federal or state grant.

Dated this 28 day of July, 2017.



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CERTIFICATE OF SERVICE

Pursuant to NRAP 16, I hereby certify that I am an employee of the State of Nevada, Department of Business and Industry, Division of Industrial Relations, and that on this date, I caused to be served the true and original document described herein by the method indicated below, and addressed to the following:

Document Served: Respondent's Supplemental Answering Brief

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DATED this 28th day of July, 2017.



State of Nevada Employee