

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD

3  
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,

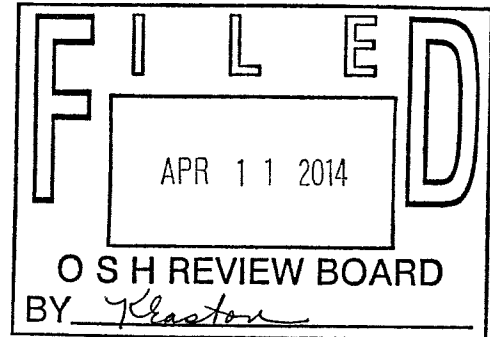
Docket No. RNO 14-1684

Complainant,

vs.

10 SIERRA PACKAGING AND CONVERTING, LLC,

Respondent.



11  
12  
13 **DECISION**

14 This matter came before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH**  
15 **REVIEW BOARD** at a hearing commenced on the 12<sup>th</sup> 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

1 (1973).

2 To prove a violation of a standard, the Secretary  
3 must establish (1) the **applicability** of the  
4 standard, (2) the existence of **noncomplying**  
5 **conditions**, (3) **employee exposure or access**, and  
6 (4) that the **employer knew** or with the exercise of  
7 **reasonable diligence** could have known of the  
8 violative condition. (emphasis added) See *Belger*  
9 *Cartage Service, Inc.*, 79 OSAHRC 16/B4, 7 BNA OSHC  
10 1233, 1235, 1979 CCH OSHD ¶23,400, p.28,373 (No.  
11 76-1948, 1979); *Harvey Workover, Inc.*, 79 OSAHRC  
12 72/D5, 7 BNA OSHC 1687, 1688-90, 1979 CCH OSHD  
13 23,830, pp. 28,908-10 (No. 76-1408, 1979); *American*  
14 *Wrecking Corp. v. Secretary of Labor*, 351 F.3d  
15 1254, 1261 (D.C. Cir. 2003). (emphasis added)

9 A respondent may rebut allegations by showing:

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

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

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

22 29 CFR 1910.132(f)(1)(iv): The employer shall  
23 provide training to each employee who is required  
24 by this section to use personal protective  
25 equipment (PPE). Each such employee shall be  
26 trained to know the limitations of the PPE.

26 The testimony of CSHO Cox and exhibits in evidence established the  
27 elements to prove violation of the cited standard. The evidence  
28 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 un rebutted **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 (9<sup>th</sup> 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 (6<sup>th</sup> 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  
(10<sup>th</sup> Cir. 1981). (emphasis added)

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

While the employer demonstrated to the CSHO that respondent  
maintained general work rules and a safety program designed to prevent  
violative conduct, it offered insufficient proof of **effective**  
**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 (1<sup>st</sup> 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  
4 added)

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

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

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

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

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

