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MAR 31 2020  
OSH REVIEW BOARD  
BY *K. Kennedy*

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

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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 AND  
CONVERTING, LLC,

Respondent.

DECISION OF THE BOARD UPON REMAND

This matter came before the Nevada Occupational Safety and Health Review Board in a hearing which commenced on the 13<sup>th</sup> day of December, 2018, pursuant to a notice duly posted according to law. Ms. Salli Ortiz, Esq., counsel, appeared on behalf of the complainant, Chief Administrative Officer of the Occupational Safety and Health Administration, Division of Industrial Relations (OSHA or State). Mr. Timothy Rowe, Esq., counsel appeared on behalf of the respondent, Sierra Packaging and Converting, LLC. Jurisdiction in this matter has been conferred in accordance with the Nevada Revised Statutes. *See*, NRS 618.315.

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1 The complaint filed by the State sets forth claims of a violation of the Nevada Revised  
2 Statutes as referenced in Exhibit "A" attached to the complaint. The State alleged a serious  
3 violation of Citation 1, Item 1, 29 CFR § 1910.132(f)(1)(iv), which states:

4 The employer shall provide training to each employee who is required by this  
5 section to use personal protective equipment (PPE). Each such employee shall be  
trained to know the limitations of the PPE:

6 (iv) The limitations of the PPE;

7 This case is back before the Board upon remand from the Court of Appeals of the State of  
8 Nevada, through an order of the District Court. The Nevada Court of Appeals overturned the  
9 decision of the District Court, dated August 31, 2015, wherein the District Court affirmed the  
10 decision of the Board finding that Sierra Packaging and Converting, LLC, violated 29 CFR §  
11 1910.132(f)(1)(iv) by failing to provide adequate training in personal fall protection equipment to  
12 each employee who had been provided the use of personal protective equipment (PPE).

13 Steve Ingersoll, Board Chairman, called the meeting to order on December 13, 2018. The  
14 other Board members participating at the meeting in person were Secretary of the Board Rodd  
15 Weber, and Board members James Halsey, Frank Milligan, and Sandra Roche. As at least three  
16 members of the Board were in attendance and as one member of the Board representing  
17 management and one member of the Board representing labor were in attendance, a quorum was  
18 present to hear this matter and conduct the business of the Board. The hearing was held at the  
19 Las Vegas Office of the Division of Industrial Relations (DIR), 3360 West Sahara Avenue, Suite  
20 175, Las Vegas, Nevada 89102.

21 The Court of Appeals' disposition of the case on an appeal was not an outright reversal of  
22 the Board. Rather, the Court of Appeals remanded this case back to the Board for further  
23 consideration. In a nutshell, the Court of Appeals concluded that the Board applied an incorrect  
24 legal standard, constituting reversible legal error. The Appeals Court, therefore, sent the case  
25 back to the Board for reconsideration against the correct legal standard which the Appeals Court  
26 also enunciated in its decision. The Court of Appeals stated: "[W]e reverse and remand this case  
27 to the District Court with instructions to remand this matter to the Board to re-evaluate the  
28 evidence and reconsider its decision under the standard set forth in this opinion." Decision, p. 10.

1 The Board concludes the use of the term "re-evaluate" is quite clear. It connotes an  
2 analysis of that which already exists. Thus, in the Board's opinion, the Court of Appeals did not  
3 remand the matter for a *de novo* hearing. Rather, the Board finds it was charged to re-evaluate the  
4 existing record applying the correct legal standard as enunciated by the Court of Appeals in its  
5 decision.

6 The Board elected to hear oral argument from respective counsel, where they were given  
7 the opportunity to explain to the Board why and how their respective positions should be  
8 affirmed by the Board when the correct legal standard is applied to the existing record. The  
9 parties were also given the opportunity to provide briefs on their view of the disposition of this  
10 case. The Chairman signed an order allowing for both briefing and oral argument by the parties.

11 As this case was first heard on March 12, 2014, there has been a complete turnover in the  
12 Board since the case was decided in a decision filed April 11, 2014. As a result, the current  
13 Board members were provided with a complete copy of the record that was before the Board as  
14 of March 12, 2014. This consisted of the transcript of the hearing on March 12, 2014, all of the  
15 pleadings, the briefs, the original decision of the Board, the Findings of Fact and all of the  
16 exhibits admitted into evidence, "[T]he entire record is before the Board to review in order to  
17 make its determination based upon the standard enunciated by the Court of Appeals." Transcript  
18 of 12/13/2018 (1 Tr.) 11;13-19. The current Board may convene to dispose of this case upon  
19 remand. *See*, NRS 233B.124 (majority may read the record).

20 Turning to the posture of the case before the Board on December 13, 2018, as indicated,  
21 Sierra Packaging was cited for a violation of 29 CFR § 1910.132(f)(2011). Three workers were  
22 provided protective fall equipment (PPE). However, they were not according to the State,  
23 provided any training or any worthwhile training at least in the use of the protective fall  
24 equipment. This failure to provide training in the use of PPE was sufficient, in and of itself, to  
25 constitute a serious violation of 29 CFR § 1910.132(f), according to the State. *See*, 1 Tr., pp.  
26 80;13-19, 83;9-11. The Court of Appeals quoted the State as follows: "[t]he only thing that  
27 matters is that these employees... had the fall protection equipment but they didn't know how to  
28 properly use it." Decision, p. 4.

1 Thus, when the case was first presented to the Board, the mere provision of PPE,  
2 according to the State, was sufficient in and of itself to trigger the duty to train in the use of PPE.  
3 And, since Sierra Packaging, according to the State, failed to adequately train the personnel given  
4 PPE equipment, this constituted a violation of 29 CFR § 1910.132(f), even if there were no  
5 hazardous conditions necessitating the use of PPE. 1 Tr., p. 83;1-8.

6 Sierra Packaging disagreed. It took the position that 29 CFR § 1910.132(f) was irrelevant  
7 or inapplicable to the facts of this case. Fall protection equipment was not even needed in the  
8 first place since the record, according to Sierra Packaging, was clear that there was no exposure  
9 to unsafe conditions which would require the use of PPE. Hence, Sierra Packaging should not  
10 have been cited as there was no unsafe condition warranting fall protection equipment and if fall  
11 protection equipment was not needed, there was similarly no need to train in the use of fall  
12 protection equipment even if provided. Consequently, there was no reason for Sierra Packaging  
13 to be cited. *See*, 1 Tr., pp. 9;21-25, 10;1-11.<sup>1</sup>

14 The Court of Appeals agreed, the Board finds, with Sierra Packaging to the extent that 29  
15 CFR § 1910.132(f) requires more than proof that protective fall equipment was supplied and that  
16 no training in the equipment was provided to establish a violation of 29 CFR § 1910.132(f). The  
17 Court of Appeals reached this conclusion, in part, the Board believes beginning with language of  
18 29 CFR § 1910.132, where it states in subsection (a), the following: "Application. Protective  
19 Equipment, including personal protective equipment..., shall be provided, used and maintained in  
20 a sanitary and reliable condition whenever it is necessary by reason of hazards of processes or  
21 environment." Decision, p. 6.

22 According to the Court of Appeals, this section of the regulation sets out the threshold  
23 condition that must be satisfied before the regulation relied upon by the State is even pertinent.  
24 From the plain language of this section of the regulation, personal protective equipment is not

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26 <sup>1</sup>The three employees, the object of this matter, were temporary hires, were employed as  
27 maintenance personnel whose duties included, in part, installing stabilizer plates on racks being installed  
28 in the employer's new facilities. These racks were 50 foot racks. 12/13/2018 Transcript, p. 8;5-9.  
According to the employer, these temporary employees were told not to climb on or suspend themselves  
from the rack but to install the plates from a mechanical ladder, akin to the boarding platforms which, in  
the past, were used to gain entrance to a passenger airplane.

1 even required unless there is present a hazard process or environment. In the absence of either or  
2 both, 29 CFR § 1910.132(f) is not pertinent and, therefore, affords no basis for citing an  
3 employer for a violation of the Regulation.

4 Thus, according to the Appeals Court, the State was mistaken when it took the position,  
5 affirmed by the Board and the District Court, that all that matters under 29 CFR § 1910.132(f) is  
6 that the employees were not trained in the use of personal fall equipment once provided with  
7 PPE. To the contrary, application of the regulation is not reached unless the personal protective  
8 equipment is precipitated by proof that there is present a hazard of processes or environment.

9 The Court of Appeals reasoned: “[T]he citation was proper if the employees’ work  
10 exposed them to a hazard that required the use of PPE—here, if the employees were exposed to  
11 heights that necessitated the use of fall protection equipment.” Decision pp. 6, 7. The Court of  
12 Appeals then went on to find that 29 CFR § 1910.132, “...does not however clarify what evidence  
13 NIOSH [the State] must present to show exposure to the hazard.” *Id.*, p. 7. The Court of  
14 Appeals observed further that the Nevada Courts have never addressed this issue of the quantum  
15 of proof required to show exposure to a hazard triggering the need for protective fall equipment  
16 and, therefore, the requisite training in the use of equipment.

17 The Court of Appeals solved that problem. Relying, in part, upon *Or. Occupational*  
18 *Safety & Health Div. v. Moore Excavation, Inc.*, 307 P.3d. 510 (Or. Ct. App. 2013), the Nevada  
19 Court of Appeals held that exposure to a hazard must be shown by the State to exist to trigger the  
20 application of a regulation such as 29 CFR § 1910.132 and that the burden of proof that the  
21 requisite exposure exists is met, “... by demonstrating that it is reasonably predictable that the  
22 employees were or would be exposed to the hazard.” *Id.*, pp. 8, 9. The standard, therefore, is  
23 one of reasonable predictability. According to the Court of Appeals, before a citation for the  
24 want of training in the use of protective fall equipment can be established, the State must first  
25 also show that it is reasonably predicable that the employees at issue were or would be exposed  
26 to the hazard.

27 Specifically, in this case, the standard requires pursuant to the “Rule of Access,” that the  
28 State could meet its “... burden of proof by showing that it was reasonably predictable that the

1 employees were or would be exposed to hazardous heights, necessitating the use of PPE [,...]"  
2 given that fall protection equipment was the equipment purportedly provided without training.  
3 *Id.*, at 9. Once this proof is demonstrated by a preponderance of the evidence, PPE must be  
4 provided and if it were provided and there was no adequate training in its use, the State would be  
5 able to demonstrate a violation of 29 CFR § 1910.132(f), the training requirement of the  
6 regulation. Couched alternatively, the Board concludes that the training requirement for which  
7 Sierra Packaging was cited, "... only comes into play if it was reasonably predictable that the  
8 employees were or would be exposed to hazardous heights requiring the use of PPE." *Ibid.*

9 This, then, becomes the charge for the Board on remand. The Board concludes it must  
10 review the record as a whole to determine: (1) whether it is reasonably predictable that the  
11 employees supplied the PPE were or would be exposed to hazardous heights requiring the use of  
12 the PPE, and then, if the employees were so exposed such that the PPE was required; (2) the  
13 Board must inquire into whether the employees were given adequate training in the use of PPE  
14 that was necessitated under the circumstances.

15 That is to say, for the State to prevail, here, the State must first show when establishing a  
16 violation of 29 CFR § 1910.132(f), that it was reasonably predictable that the three employees  
17 supplied PPE were or would be exposed to hazardous heights requiring the use of PPE. If, then,  
18 the State succeeds in that proof, then the State must show that the training supplied was  
19 inadequate, resulting in a serious violation of 29 CFR § 1910.132(f).

20 For Sierra Packaging, it may defend on the grounds that it is not reasonably predictable  
21 based upon the facts of this case that these three employees would be exposed to working at  
22 heights. Specifically, Sierra Packaging asserts that while, admittedly, these employees were  
23 hired to install stabilizer bars on the racks, they could do this with rolling ladders that are not  
24 unlike an airplane ramp ladder. They were told, additionally, not to climb on the racks.

25 So, if those employees weren't assigned any duties that would require them to  
26 work at heights and those employees were doing something that was expressly  
27 prohibited by the rules of the company, how can we say it was reasonably  
28 predictable with those employees would be working at heights such that they  
should be trained in the use of fall protection equipment? 1 Tr., p. 20;6-13.

This was, in essence, the defense of Sierra Packaging.

1 The question before the Board on remand, therefore, becomes, was it was reasonably  
2 predictable that Sierra Packaging employees would be working at heights such that they should  
3 be trained in the use of fall protection equipment and, if so, were they adequately trained in the  
4 use of the fall protection equipment that was supplied to them?

### 5 FINDINGS IN FACT

6 1. Nothing occurred during the hearing on remand or on appeal to the Nevada Court  
7 of Appeals to alter or amend the Board's original Findings of Fact contained in the Board's  
8 original decision, beginning at page 2;3 through page 5;19. Those Findings of Fact are  
9 incorporated herein. *See*, Exhibit "A."

### 10 SUPPLEMENTAL FINDINGS OF FACT

11 Based upon the existing record, the Board makes, however, Supplemental Findings of  
12 Fact which are highlights to the record in light of the Nevada Court of Appeal's decision in this  
13 case, as follows:

14 1. A quorum of the Board was present on December 13, 2018, to hear and decide  
15 this matter on remand.

16 2. This matter commenced upon a "...referral and a picture of three individuals  
17 standing on top of racking with two items of complaint on it." 1Tr., p. 13;10-13. One employee  
18 was actually on the racking without fall protection and CSHO Cox believes the second was there  
19 with no forklift certification. 1 Tr., p. 13;10-14. *See*, State's evidence packet, p. 41 for the  
20 picture. There are three employees in the photo. Exhibit admitted into evidence. 1 Tr., p. 8;1-3.

21 3. Two of the three employees admitted they were in the photograph. One did not  
22 say he was up on the racking. The one in the middle, who was standing on top, admitted to  
23 standing on the racking. The second individual said he was not standing on the racking, he was  
24 standing on a ladder. 1 Tr., p. 18;1-6.

25 4. In the photograph, a ladder can be seen but it was not directly beneath the  
26 employee who stated he was standing on the ladder. 1 Tr., p. 18;15-17.

27 5. These employees indicated to CHSO Cox that they were not authorized to be up  
28 there on the racking. 1Tr., p. 18;20-21.

1           6.       The employees admitted that the employer provided them with some fall  
2 protection, they should have been using it when on the racking, and that their fall protection was  
3 a 5-point body harness, 6-foot liner, 3-foot shop pack. 1 Tr., p. 19;5-8.

4           7.       When asked by CSHO Cox to show her the PPE equipment supplied them, one of  
5 the three employees retrieved the fall protection equipment consisting of the 5-point body  
6 harness, 6-foot liner, and 3-foot shop pack, 1 Tr., p. 19;13-16.

7           8.       This type of fall protection requires an anchor point capable withstanding 5,000  
8 pounds of force. If the racking was the anchor point, it was not engineered for that amount of  
9 force. One of the employees explained that the required anchorage point needed to hold 200  
10 pounds. 1 Tr., pp. 17-21.

11          9.       The 5,000 pound anchor point comes per the manufacturer, 1 Tr., p. 20;3-5. A 200  
12 pound anchor point is woefully inadequate.

13          10.      The rack was not designed to support this force. 1Tr., p. 20;19-20.

14          11.      When queried about how to use the fall protection equipment, these employees  
15 were untrained or inadequately trained in its use and did not know how to utilize this form of  
16 personal fall protection equipment. 1 Tr., p. 21;5-14.

17          12.      This is a serious circumstance in that a fall from 9 feet could result in death. 1 Tr.,  
18 pp. 6-11.

19          13.      CSHO Cox also discussed the use of personal fall equipment with representatives  
20 of management consisting of Mr. O'Grady, (sic) Mr. David Hodges, safety manager, 1 Tr., p.  
21 51;1-4, and Steve Tintinger. 1 Tr., p. 23;6-8, 51;1-4.

22          14.      These representatives of management and supervisors were untrained in and did  
23 not know how to use the personal fall equipment deployed by or given to the three employees in  
24 the photograph of them on the rack. 1 Tr., p. 23;19-25.

25          15.      The three employees in the photograph on or about the rack were maintenance  
26 personnel. 1 Tr., p. 40;22-23. As they were also maintenance personnel, Mr. Tintinger was their  
27 supervisor.

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1           16.     Management personnel were unable to display the minimum requirement of  
2 knowledge about personal fall protection equipment. 1 Tr., p. 30;1-3.

3           17.     Management personnel also were unaware that their employees were not properly  
4 trained. 1 Tr., p. 30;20-23. Management personnel displayed that they were, themselves,  
5 confused about any restrictions or limitations on personnel protective equipment. 1 Tr., pp.  
6 30;20-25, 31;1.

7           18.     One of the employees in the photograph said he had been given safety training. 1  
8 Tr., p. 38;2-4. Nonetheless, none of the three employees demonstrated that if they were given  
9 training in personal fall protection, the training took. 1 Tr., pp. 19-21.

10          19.     One of the employees also admitted that they "were not supposed to be on the  
11 racks." 1Tr., p. 38;8-12.

12          20.     The three employees were photographed on the rack because they were instructed  
13 to install the stabilization bars on the racks which had been left off by the company that had been  
14 retained to install the racks in the first place. 1 Tr., p. 39;18-20.

15          21.     In reality, only one of the three employees showed CSHO Cox fall protection.  
16 None of the other witnesses said that they used fall protection. 1 Tr., p. 43;2-8.

17          22.     The photograph of the three employees shows that they were not using fall  
18 protection and management did not tell CSHO Cox they were not supposed to be wearing fall  
19 protection. 1 Tr., p. 6;12.

20          23.     According to CSHO Cox, while the company had a policy that employees were  
21 not to be on the racking and that they had company rules against that, it could not be established  
22 whether the employees were told. "And I could not establish whether they were told or not, it  
23 wasn't that clear due to the language barrier." 1 Tr., pp. 47;21-25, 48;1.

24          24.     The actual training in fall protection was not provided directly by the employer.  
25 Rather, the employer retained TMCC [Truckee Meadows Community College] to come in and  
26 do the training. 1 Tr., pp. 53;22-25, 54;1.

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1           25.     The site of the incident was a manufacturing plant. In the manufacturing process,  
2 there are no duties which require fall protection. The maintenance function in the plant,  
3 however, is an area that requires fall protection. 1 Tr., p. 54;15-22.

4           26.     The training in personal fall protection is only given to employees who perform  
5 the type of work with duties at heights such as the maintenance department. 1 Tr., p. 55;11-12.  
6 Maintenance personnel may well be expected to work at heights requiring the use of PPE. 1 Tr.,  
7 pp. 55;1-6, 62;20-25, 63;1-3.

8           27.     According to Sierra Packaging, the company has no functions which would  
9 require somebody to be on the upper levels of the racks. Similarly, according to Sierra  
10 Packaging, there are no circumstances where an employee would be required to use fall  
11 protection while being on the racks because "they shouldn't be on the racks." 1 Tr., p. 55;11-20.

12           28.     As Sierra Packaging was new to the plant site, it had not completed a hazard  
13 assessment of the facility. 1 Tr., p. 56;17-20.

14           29.     The rule against climbing anywhere, particularly the racks, is communicated to  
15 employees through the Employee Safety Handbook. 1 Tr., p. 59;5-9.

16           30.     According to Mr. Hodges, the company normally brings people in for the fall  
17 protection of our maintenance group through TMCC. When asked, however, Mr. Hodges did not  
18 know if the person providing the training for fall protection from TMCC spoke Spanish. He  
19 could not say one way or the other. 1 Tr., p. 62;11-14.

20           31.     Mr. Hodges admits that "we had people or there was someone climbing in the  
21 racks and that was the idea of what the problem was." 1 Tr., p. 63;5-8.

22           32.     Mr. Hodges admits that the three employees in the photograph would work at  
23 heights, as they were trained in fall protection for changing light bulbs. He knew of two of the  
24 individuals, but not about the third guy. 1 Tr., p. 64;1-3.

25           33.     According to Sean Tracy, 1 Tr., p. 66;1-3, the Plant Manager, the three individuals  
26 on the rack were Mr. Gonzalez, Mr. Soto, and Mr. Caal. 1 Tr., p. 68;7-9.

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1           34.     According to Mr. Tracy, the three individuals were on the racks or in the vicinity  
2 of the racks because they were installing gusset supports or plates to stabilize the racking. 1 Tr.,  
3 p. 68;15-17.

4           35.     Mr. Tracy admits that he is not intimately familiar with fall protection  
5 requirements. He does, however, provide oversight of the general operations for the firm. 1 Tr.,  
6 p. 71;3-14.

7           36.     According to Mr. Tracy, the top tier of the racking was located 15 feet, 7 inches  
8 high above the floor. 1 Tr., p. 72;10-12. Mr. Tracy also does not know whether the person  
9 providing training in personal fall protection is a Spanish speaking individual. 1 Tr., p. 73;2-5.

10          37.     Steve Tintinger is the maintenance manager at Sierra Packaging and Converting. 1  
11 Tr., pp. 24;21, 74;16-20.

12          38.     Mr. Tintinger is in charge of making sure that all equipment stays running. He is  
13 also in charge of the building facilities in general, the building and machinery and everything that  
14 is related to keeping the facility running. 1 Tr., p. 75;3-8.

15          39.     Mr. Tintinger states that he is the one who told these three individuals that they  
16 needed to install brackets at the end of the rack about three-quarters of the way up. 1 Tr., p.  
17 76;15-19.

18          40.     Mr. Tintinger testified that there was nothing about this work which would require  
19 the individuals to get up and walk on the racks. 1 Tr., pp. 76;23-25, 77;1.

20          41.     According to Mr. Tintinger, he did not issue fall protection equipment to the three  
21 employees in the photograph and on the rack. 1 Tr., p. 78;15-16.

22          42.     According to Mr. Tintinger, the three employees told him that they had fall  
23 protection equipment and that Mr. Tintinger said that he had seen them with fall protection  
24 previously to this incident. 1 Tr., p. 78;17-25.

25          43.     Despite assigning the employees to install the stabilizer plates on the racks, he had  
26 no idea who trained the three employees in the use of personal fall protection. 1 Tr., p. 79;1.

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1           44.     When he told these workers to put the stabilizers on the racks he did not go with  
2 them and Mr. Tintinger did not supervise them while they were performing this work. 1 Tr., p.  
3 79;2-8.

4           45.     While installing the stabilizer plates on the rack, the three employees were  
5 without supervision by anyone who had any training or knowledge in the use of personal fall  
6 protection equipment.

7           46.     While Sierra Packaging professes to have a progressive discipline policy for  
8 employees who violate company rules, 1 Tr., p. 56;8-10, there is not a scintilla of evidence the  
9 three employees on or about the rack without PPE were disciplined for violating multiple  
10 company rules.

#### 11                               **ANALYSIS AND CONCLUSIONS OF LAW**

12           As elucidated above, the first question to be answered, according to the Court of Appeals,  
13 is whether it is reasonably predictable that employees at Sierra Packaging were or would be  
14 exposed to hazardous heights requiring the use of PPE? Decision, pp. 8, 9. The Board finds and  
15 concludes that the answer to this question is, yes.

16           The racks to which the stabilization bars were to be installed or were being installed were  
17 at height at the upper level. The photograph reveals that three employees were actually on the  
18 rack at height. These employees, as a part of maintenance, were trained to change light bulbs  
19 while wearing personal fall protection equipment. At least some of the employees were issued  
20 personal fall protection equipment. All three employees had been seen wearing personal fall  
21 protection equipment, suggesting its use was due to the exposure to working at altitude. 1 Tr., p.  
22 78;22-23. Here, not only were the employees likely to be exposed to employment at altitude. In  
23 fact, they were, as the picture reveals. And, as Sierra Packaging admits, they were trained to  
24 work installing or replacing lights while wearing personal fall protection equipment.

25           The question then becomes were these three individuals, employees of Sierra Packaging,  
26 adequately trained in the use of personal fall protection equipment? The Board here finds and  
27 concludes that the answer to this question is, no.

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1       The simple fact of the matter is Steve Tintinger, the individual that assigned these three  
2 employees to install the stabilizing plates on the racks, testified they were not trained by him to  
3 perform this work. If the employees were trained, it was training that did not take as they  
4 demonstrated an unacceptable level of knowledge about personal fall protection equipment.  
5 Management, such as Mr. Hodges and Mr. Tracy, were themselves unknowledgeable or confused  
6 about the use of personal fall protection equipment. They were no source of training in the  
7 proper use of personal fall protection equipment.

8       Sierra Packaging claims that the training was provided, however, in personal fall  
9 protection equipment, by TMCC. The three employees at issue were obviously Spanish-  
10 speaking, Hispanics. No one in management knew whether the person from TMCC who  
11 provided training was Spanish-speaking. There is no proof in the record, therefore, that the  
12 training that was provided, if it was provided, was administered in a language which the  
13 employees could understand.

14       This suggested, moreover, the belief that the training was administered in English by  
15 TMCC given that the training was ineffectual. The three employees displayed, as indicated, an  
16 unacceptable level of knowledge about personal fall protection equipment.

17       Sierra Packaging counters on the grounds that no one should have been on the rack and,  
18 therefore, there is no violation because no training should have been necessary in the first place.  
19 If no training should have been necessary in the first place, there could, therefore, be no violation  
20 of 29 CFR § 1910.132(f). These employees should not have been climbing on the rack, period,  
21 and therefore, Sierra Packaging should not be penalized for conduct that Sierra Packaging had  
22 prohibited.

23       Sierra Packaging's defense is a variation on the "unpreventable employee misconduct" or  
24 "rogue employee" affirmative defense. The elements of unpreventable employee misconduct are  
25 well-established. To prove this affirmative defense, Sierra Packaging must show: (1) it has  
26 established work rules designed to prevent the violation; (2) it has adequately communicated  
27 those rules to its employees; (3) it has taken steps to discover violations; and, (4) it has

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1 effectively enforced the rules when violations have been discovered. *See, e.g., Sanderson Farms*  
2 *Inc., v. OSHRC*, 348 F.App'x. 53, 57 (5<sup>th</sup> Cir., 2009).

3 Here, Sierra Packaging claims it has established work rules, namely that no one is to  
4 climb on the racks to prevent a violation. Sierra Packaging has met the first element of their  
5 defense. Secondly, it must adequately communicate rules to its employees. The three employees  
6 at issue seemed to be aware that they were not to climb the racks. The adequacy of the  
7 communication is questionable, however, because knowledge of the rules did not keep them off  
8 the racks.

9 Turning then to items (3) and (4), had Sierra Packaging taken steps to discover the  
10 violations and had Sierra Packaging effectively enforced the rules when violations were  
11 discovered? Here, Sierra Packaging fails. The testimony of Mr. Tintinger was that he sent off  
12 the employees to work on the racks by installing the stabilization plates without following up and  
13 supervising their work. No one else testified, either, to supervising their work. There was no  
14 testimony also, that, following the incident, these employees were disciplined when violations  
15 were discovered, if they were discovered by Sierra Packaging. Worse, they were sent off to work  
16 at height, by persons who displayed a lack of knowledge about the use and requirements of  
17 personal fall protection equipment.

18 The three employees were left to their own devices to undertake the job. There was no  
19 supervision to prevent them from violating the company's rule to stay off the racks and the  
20 persons that would have been supervising them would have had inadequate knowledge, in any  
21 event, about the deployment of personal fall protection equipment.

22 "Employers are not liable under the Act for an individual single act of an employee which  
23 an employer cannot prevent." *Secretary of Labor v. Leone Const. Co.*, 3 O.S.H.C. 1979, 1982  
24 (1976). Nonetheless, the OSHRC has repeatedly held that, "employers... have an affirmative  
25 duty to protect against preventable hazards and preventable hazardous conduct by employees."  
26 *Id. See also, Brock v. L.E. Meyers Co.*, 818 F.2d. 1270 (6<sup>th</sup> Cir.) *cert. denied*, 848 U.S. 989  
27 (1987).

28 ///

1       The work by these employees on the rack installing the stabilizer plates was in plain sight.  
2       The presence of a supervisor, knowledgeable about the company's rule that no one climbs on the  
3       racks, would readily have prevented the hazardous situation from occurring. It was an easily  
4       remedial or preventable situation. Instead, the employers sent the employees off to their own  
5       devices, unsupervised and without any specific instruction or even a reminder to stay off the  
6       racks.

7       The Board, therefore, finds and concludes that Sierra Packaging failed as a matter of law  
8       and fact, to prove the affirmative defense of unpreventable employee misconduct. The work was  
9       performed inside the plant. How difficult could it have been, then, for someone to have seen and  
10      prevented what occurred? The Board cannot countenance the defense of unpreventable  
11      employee misconduct under these circumstances.

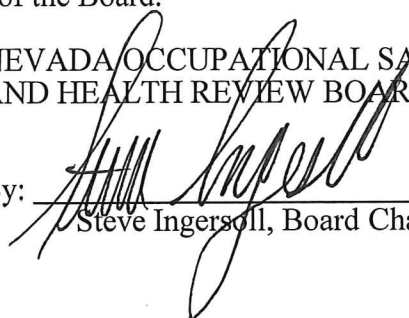
12      The *prima facie* case has, therefore, not been rebutted. The employees at Sierra  
13      Packaging were exposed to working at heights, and by virtue of their training and assignments, it  
14      was reasonably predictable that they would be exposed to working at heights. The threshold for  
15      requiring training in personal fall protection was, therefore, triggered. The evidence is clear.  
16      Adequate training was not provided in accordance with 29 CFR § 1910.132(f). It is the decision  
17      of the Nevada Occupational Safety and Health Review Board that a violation of Nevada Revised  
18      Statutes did occur as Citation 1, Item 1, 29 CFR § 1910.132(f). The violation was also shown to  
19      be serious 1 Tr., pp. 21, 22, with a proposed penalty in the amount of Three Thousand Eight  
20      Hundred Twenty-five Dollars (\$3,825). The Citation with a proposed penalty of \$3,825 is  
21      confirmed and approved.

22      Accordingly, it was moved Rodd Weber, seconded by Frank Milligan, to affirm the  
23      original decision of the Board in accordance to the standard enunciated by the Court of Appeals  
24      for the application of 29 CFR § 1910.132(f). The motion was adopted upon a vote of 3, in favor  
25      of the motion, 0, against the motion and 1, abstention. The Board, by this motion, authorizes the  
26      Chairman, Steve Ingersoll, after any grammatical or typographical errors are corrected in the  
27      Decision, to execute, without further Board review, this Decision on behalf of the Board of  
28      Review.

1 The Board accordingly directs counsel for the complainant to submit proposed findings of  
2 fact and conclusions of law to the Nevada Safety and Health Review Board and serve copies on  
3 opposing counsel within 20 days from the date of this decision. After 5 days time for filing any  
4 objections, the final findings of fact and conclusions of law shall be submitted to the Nevada  
5 Occupational Safety and Health Review Board by prevailing counsel. Service of the findings of  
6 fact and conclusions of law signed by the Chairman of the Nevada Occupational Safety and  
7 Health Review Board shall constitute the Final Order of the Board.

8 Dated this 31<sup>st</sup> day of March, 2020.

NEVADA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

By:   
Steve Ingersoll, Board Chairman



**FILED**  
OCT 27 2023  
OSH REVIEW BOARD  
BY *K Kennedy*

**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,**

**Docket No. RNO 14-1684**

**Inspection No. 317224608**

**Complainant,**

**vs.**

**SIERRA PACKAGING AND  
CONVERTING, LLC,**

**Respondent.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER**

The above captioned matter came on for hearing before the Nevada Occupational Safety and Health Review Board on October 11, 2023, for the Board to consider whether the proposed Findings of Fact, Conclusions of Law and Final Order prepared by the State of Nevada were consistent with the Board's decision in this matter dated April 11, 2014. No challenge to the proposed Findings of Fact, Conclusions of Law and Final Order, was levied by either party to this matter. The parties were duly noticed for this hearing.


GOOD CAUSE APPEARING, the Board HEREBY FINDS that the proposed Findings of Fact, Conclusions of Law and Final Order, attached hereto as Exhibit A, are consistent with the Board's Decision in this case dated April 11, 2014, and HEREBY ORDERS that said Findings of Fact, Conclusions of Law and Final Order are the Findings of Fact, Conclusions of Law and Final Order of the Board, effective this date.

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IT IS SO ORDERED

Dated this 27<sup>th</sup> day of October, 2023.

NEVADA OCCUPATIONAL SAFETY AND  
HEALTH REVIEW BOARD

By:   
/s/ Rodd Weber  
Rodd Weber, Chairman

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## CERTIFICATE OF SERVICE


Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Law Offices of Charles R. Zeh, Esq., and that on this date I served the attached document, *Order Filing Findings of Fact, Conclusions of Law and Final Order*, on those parties identified below by placing an original or true copy thereof in a sealed envelope, certified mail, return receipt requested, postage prepaid, placed for collection and mailing in the United States Mail, at Reno, Nevada to the following addresses:

Salli Ortiz, Esq.  
State of Nevada  
Division of Industrial Relations  
Division of Counsel's Office  
400 West King Street, Suite 201  
Carson City, Nevada 89703

Lisa Wiltshire Alstead, Esq.,  
McDonald Carano Wilson LLP,  
100 West Liberty Street, 10<sup>th</sup> Floor,  
P.O. Box 2670,  
Reno, NV 89505 and

Aaron Shipley, Esq.  
McDonald Carano LLP  
2300 West Sahara Avenue, Suite 1200  
Las Vegas, NV 89102

Dated this 27<sup>th</sup> day of October, 2023.

  
\_\_\_\_\_  
Employee of  
The Law Offices of Charles R. Zeh, Esq.

S:\Clients\OSHA\RNO 14-1684, Sierra Packaging\Order 002.wpd

# Exhibit A

NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD

FILED  
OCT 27 2023

QSH REVIEW BOARD  
BY Kennedy

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,

DOCKET NO: RNO 14-1684

Inspection No: 317224608

vs.

SIERRA PACKAGING AND CONVERTING,  
LLC,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF LAW**

**AND FINAL ORDER**

This matter came before the NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD ("Review Board") for oral arguments on December 13, 2018. The Review Board has jurisdiction to hear such matters pursuant to Nevada Revised Statutes §618.315. The hearing was conducted pursuant to Chapter 618 and 233B of the Nevada Revised Statutes.

Complainant, the Chief Administrative Officer of the Nevada Occupational Safety and Health Administration, Division of Industrial Relations ("NV OSHA"), was represented by Salli Ortiz, Esq., Division Counsel, Division of Industrial Relations of the Nevada Department of Business and Industry. Respondent, SIERRA PACKAGING AND CONVERTING, LLC ("Respondent" or "SIERRA PACKAGING") was represented by Timothy E. Rowe, Esq., of McDonald Carano.

The matter was back before the Review Board upon remand from the Court of Appeals, on the grounds that an incorrect legal standard was applied to decide the case. Specifically, the Court determined the Review Board needed to first consider whether it was

1 reasonably predictable that employees at issue were or would be exposed to a hazard, in this  
2 particular case height, requiring the possible use of personal protection equipment ("PPE").  
3 Only once that determination was made, should the Review Board consider whether or not  
4 the training provided was adequate,

5 The Compliance Safety and Health Officer ("CSHO") that conducted the inspection  
6 was Jennifer Cox ("CSHO Cox"). At the original hearing, the parties stipulated to admit  
7 Complainant's Exhibit 1 and Respondent's Exhibits A through D.

8 The Review Board, after having heard additional oral argument on this matter,  
9 along with the previously heard testimony and previously admitted documentary  
10 evidence, considered the parties' respective position statements, and being fully advised  
11 regarding the underlying subject matter, renders the following Findings of Fact,  
12 Conclusions of Law, and Final Order:

### 13 **PRELIMINARY FINDINGS**

14 1. At all times mentioned, the Complainant served as the Chief Administrative  
15 Officer of the Occupational Safety and Health Administration, Division of Industrial  
16 Relations, Department of Business and Industry, which is the agency of the State of Nevada  
17 responsible for the administration of Occupational Safety and Health.

18 2. Respondent is a Nevada limited liability company with business and mailing  
19 address at 11005 Stead Blvd, Reno, NV 89506. On August 16-19, 2013, Respondent was  
20 conducting business and maintaining a place of employment at 11005 Stead Blvd., Reno,  
21 NV, as defined by NRS 618.155.

22 3. Pursuant to NRS 618.315, jurisdiction has been conferred upon NV OSHA over  
23 the working conditions at Respondent's job site.

24 4. CSHO Cox, conducted a safety inspection at Respondent's manufacturing site in  
25 Stead, Nevada, based on photographs received showing employees standing on "racking"  
26 without fall protection.

27 5. NV OSHA issued Citation and Notification of Penalty, Inspection No. 317224608  
28 on September 10, 2013, as a result of alleged code violations discovered at the worksite. A

1 copy of the Citation was attached to the Summons and Complaint as Exhibit "A" served  
2 upon the Respondent and is incorporated herein by reference.

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

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

9 8. CSHO Cox conducted a safety inspection based on photographs received showing  
10 employees standing on "racking", described as shelving-type assemblies upon which  
11 products were placed and stored. The employees were not utilizing any fall protection  
12 devices, as confirmed by interviews and in photographic exhibits at pgs. 41 (A-C) and 42A.  
13 The employees were identified by Maintenance Manager Steve Tintinger ("Maintenance  
14 Mgr. Tintinger") as those of Respondent.

15 9. CSHO Cox testified that she interviewed and obtained witness statements from  
16 employees Caal, Soto, and Gonzalez with the assistance of an interpreter employee of  
17 Respondent. Each employee's statement provided the information each had in regards to  
18 the racking: Employee Caal's statement said that Maintenance Mgr. Tintinger had told him  
19 to use fall protection; Employee Soto stated he was instructed not to climb on the racks;  
20 and, Employee Gonzalez stated he was not aware he should not climb on the racks. All three  
21 employees demonstrated very little basic knowledge, training, or understanding of the use  
22 or limitations of PPE, even when one employee retrieved a five-point harness available at  
23 the facility.

24 10. CSHO Cox testified that when she met with the five respondent management  
25 representatives, including Maintenance Mgr. Tintinger, they also failed to demonstrate  
26 knowledge of PPE use or limitations, including the fall distances required for a lanyard.  
27 They were also unable to confirm or document any employee knowledge or training in the  
28 use of the five-point harness.

1 11. CSHO Cox testified to the difficulties caused by the language barrier and limited  
2 translation resources available in interviewing the three employees.

3 12. CSHO Cox testified that the cited standard was applicable under the facts in  
4 evidence, as the Respondent had furnished to the employees the five-point harness fall  
5 arrest PPE, without the mandatory training in its use. CSHO Cox also referenced her  
6 findings to support the classification of the violation as "Serious" in accordance with the  
7 operations manual and enforcement guidelines.

8 13. Respondent called as a witness its Safety Manager David Hodges, who testified  
9 that he conducts employee training and works in conjunction with Truckee Meadows  
10 Community College ("TMCC") when additional expertise for specialized training is needed.

11 14. Safety Manager Hodges testified that, because Respondent is in the  
12 manufacturing business, fall protection is not regularly an issue since their limited  
13 maintenance work generally requires only the use of a ladder. Because of that, Respondent  
14 does not provide any fall protection, PPE, or training. He stated that no employees required  
15 fall protection for the racks, because they were not permitted to work or stand on the racks  
16 pursuant to the company safety program.

17 15. Safety Manager Hodges explained that the company safety program consisted of  
18 a three-part disciplinary action plan: for a first violation a verbal reprimand, a second  
19 violation a written reprimand and, on a third, termination.

20 16. Safety Manager Hodges also testified that because Respondent had only occupied  
21 the Stead worksite for two weeks, there had been no time for a hazard assessment.

22 17. Safety Manager Hodges testified that company safety rules prohibit employees  
23 climbing on racks and such conduct is specifically addressed in the Respondent's safety  
24 handbook. For any work above ground level, employees are instructed to use ladders or  
25 forklifts, depending on the work.

26 18. Safety Manager Hodges admitted that he lacks expertise in fall protection and  
27 instead relies on TMCC for any training when required. He stated that only maintenance  
28 employees are required to have fall protection training, because they are the only ones  
sometimes required to work at heights.



1 19. Respondent's Stead Maintenance Manager, Steve Tintinger, testified that  
2 employees observed on the racks were only temporary employees, there to attach stabilizers  
3 to the racks that were inadvertently left out when reassembled at the new plant facility  
4 during the move. He made it clear that he had no involvement in their hiring, nor had he  
5 trained them in fall protection.

6 20. On September 10, 2013, NV OSHA issued a Citation and Notification of Penalty  
7 ("Citation"), Inspection Number 317224608. SIERRA PACKAGING contested the NV  
8 OSHA Citation 1, Item 1, on September 26, 2013. NV OSHA in turn filed a Complaint with  
9 the Review Board on October 8, 2013.

10 21. The only contested item was the following "Serious" Citation:

11 **Citation 1, Item 1: SERIOUS**

12 29 CFR 1910.132(f)(1)(iv): The employer shall provide training to each  
13 employee who is required by this section to use personal protective  
14 equipment (PPE). Each such employee shall be trained to know the  
15 limitations of the PPE:

16 Facility; employees used a fall arrest system consisting of a five point  
17 body harness, six foot lanyard with a three foot shock pack to access the  
18 top tier racking located 15 feet, 7 inches high. The lack of knowledge of  
19 the minimum required distance from a suitable anchorage point to  
20 ground exposed user to an unarrested fall of 15 feet, 7 inches.

21 The Serious citation item had a proposed penalty of \$3,825.

22 22. The Review Board heard the matter at an evidentiary hearing held on  
23 March 12, 2014.

24 23. On April 11, 2014, the Review Board issued its Decision affirming the Citation  
25 and proposed penalty. The Review Board filed its Findings of Fact, Conclusions of Law,  
26 and Final Order on July 28, 2014.

27 24. SIERRA PACKAGING filed a Petition for Judicial Review on August 22, 2014.

28 25. The First Judicial District Court denied SIERRA PACKAGING's petition in an  
Order dated August 31, 2015, the Notice of Entry of Order was filed on August 1, 2016.

1 26. SIERRA PACKAGING filed its notice of appeal to the Supreme Court on August  
2 26, 2016. The matter was presumptively assigned to the Court of Appeals pursuant to  
3 NRAP 17(b)(4) being that it was an appeal involving an administrative agency.

4 27. On November 16, 2017, the Court of Appeals reversed and remanded the matter.  
5 On November 28, 2017, the First Judicial District Court issued an Order remanding the  
6 matter back to the Review Board for further proceedings in accordance with the Court of  
7 Appeals' Decision.

8 28. On December 13, 2018, the Review Board heard oral argument from respective  
9 counsel, where they were given the opportunity to explain to the Review Board why and  
10 how their respective positions should be affirmed by the Review Board when the correct  
11 legal standard is applied to the existing record. The parties were also given the opportunity  
12 to provide briefs on their view of the disposition of this case.

13 29. On March 31, 2020, after analysis of the submitted evidence under the correct  
14 legal standard, the Review Board issued its Decision of the Board Upon Remand upholding  
15 the Citation and penalty.  
16

### 17 **FINDINGS OF FACT**

18  
19 1. Nothing occurred during the hearing on remand or on appeal to the Nevada Court  
20 of Appeals to alter or amend the Review Board's original Findings of Fact contained in the  
21 Review Board's original Decision, beginning at page 2:3 through page 5:19. Those  
22 Findings of Fact are incorporated herein. See, Exhibit "A."

23 2. Based upon the existing record, the Review Board makes Supplemental Findings of  
24 Fact which are highlights to the record in light of the Nevada Court of Appeal's Decision in  
25 this case.

26 3. A quorum of the Review Board was present on December 13, 2018, to hear and  
27 decide this matter on remand. Tr. 2:13-16.

28 4. This matter commenced upon a "...referral and a picture of three individuals  
standing on top of racking with two items of complaint on it." 1 Tr., p. 13;10-13. One

1 employee was actually on the racking without fall protection and CSHO Jennifer Cox  
2 believes the second was there with no forklift certification. 1 Tr., p. 13;10-14. See, State's  
3 evidence packet, p. 41 for the picture. There are three employees in the photo. Exhibit  
4 admitted into evidence. 1 Tr., p. 8;1-3.

5 5. Two of the three employees admitted they were in the photograph. One did not say  
6 he was up on the racking. The one in the middle, who was standing on top, admitted to  
7 standing on the racking. The second individual said he was not standing on the racking, he  
8 was standing on a ladder. 1 Tr., p. 18:1-6.

9 6. In the photograph, a ladder can be seen but it was not directly beneath the  
10 employee who stated he was standing on the ladder. 1 Tr., p. 18:15-17.

11 7. These employees indicated to CHSO Cox that they were not authorized to be up  
12 there on the racking. 1 Tr., p. 18:20-21.

13 8. The employees admitted that the employer provided them with some fall  
14 protection, they should have been using it when on the racking, and that their fall  
15 protection was a 5-point body harness, 6-foot liner, 3-foot shop pack. 1 Tr., p. 19:5-8.

16 9. When asked by CSHO Cox to show her the PPE equipment supplied them, one of  
17 the three employees retrieved the fall protection equipment consisting of the 5-point body  
18 harness, 6-foot liner, and 3-foot shop pack. 1 Tr., p. 19:13-16.

19 10. This type of fall protection requires an anchor point capable withstanding 5,000  
20 pounds of force. If the racking was the anchor point, it was not engineered for that amount  
21 of force. One of the employees explained that the required anchorage point needed to hold  
22 200 pounds. 1 Tr., pp. 17-21.

23 11. The 5,000 pound anchor point comes per the manufacturer, 1 Tr., p. 20:3-5. A 200  
24 pound anchor point is woefully inadequate.

25 12. The rack was not designed to support this force. 1 Tr., p. 20:19-20.

26 13. When queried about how to use the fall protection equipment, these employees  
27 were untrained or inadequately trained in its use and did not know how to utilize this form  
28 of personal fall protection equipment. 1 Tr., p. 21:5-14.

1 14. This is a serious circumstance in that a fall from 9 feet could result in death. 1 Tr.,  
2 pp. 6-11.

3 15. CSHO Cox also discussed the use of personal fall equipment with representatives of  
4 management consisting of Mr. O'Grady, (sic) Mr. David Hodges, safety manager, 1 Tr., p.  
5 21 51; 1-4, and Steve Tintinger. 1 Tr., p. 23:6-8; 51:1-4.

6 16. These representatives of management and supervisors were untrained in the, and  
7 did not know how to, use the personal fall equipment deployed by or given to the three  
8 employees in the photograph of them on the rack. 1 Tr., p. 23:19-25.

9 17. The three employees in the photograph on or about the rack were maintenance  
10 personnel. 1 Tr., p. 40:22-23. As they were also maintenance personnel, Mr. Tintinger was  
11 their supervisor.

12 18. Management personnel were unable to display the minimum requirement of  
13 knowledge about personal fall protection equipment. 1 Tr., p. 30:1-3.

14 19. Management personnel also were unaware that their employees were not properly  
15 trained. 1 Tr., p. 30:20-23. Management personnel displayed that they were, themselves,  
16 confused about any restrictions or limitations on personnel protective equipment. 1 Tr.,  
17 pp. 30:20-25; 31:1.

18 20. One of the employees in the photograph said he had been given safety training. 1  
19 Tr., p. 38:2-4. Nonetheless, none of the three employees demonstrated that if they were  
20 given training in personal fall protection, the training took. 1 Tr., pp. 19-21.

21 21. One of the employees also admitted that they "were not supposed to be on the  
22 racks." 1 Tr., p. 38:8-12.

23 22. The three employees were photographed on the rack because they were instructed  
24 to install the stabilization bars on the racks which had been left off by the company that  
25 had been retained to install the racks in the first place. 1 Tr., p. 39:18-20.

26 23. In reality, only one of the three employees showed CSHO Cox fall protection. None  
27 of the other witnesses said that they used fall protection. 1 Tr., p. 43:2-8.  
28

1 24. The photograph of the three employees shows that they were not using fall  
2 protection and management did not tell CSHO Cox they were not supposed to be wearing  
3 fall protection. 1 Tr., p. 6:12.

4 25. According to CSHO Cox, while the company had a policy that employees were not  
5 to be on the racking and that they had company rules against that, it could not be  
6 established whether the employees were told. "And I could not establish whether they  
7 were told or not, it wasn't that clear due to the language barrier." 1 Tr., pp. 47:21-25; 48:1.

8 26. The actual training in fall protection was not provided directly by SIERRA  
9 PACKAGING. Rather, SIERRA PACKAGING retained TMCC [Truckee Meadows  
10 Community College] to come in and do the training. 1 Tr., pp. 53:22-25; 54:1.

11 27. The site of the incident was a manufacturing plant. In the manufacturing process,  
12 there are no duties which require fall protection. The maintenance function in the plant,  
13 however, is an area that requires fall protection. 1 Tr., p. 54:15-22.

14 28. The training in personal fall protection is only given to employees who perform the  
15 type of work with duties at heights such as the maintenance department. 1 Tr., p. 55:11-12.  
16 Maintenance personnel may well be expected to work at heights requiring the use of PPE.  
17 1 Tr., pp. 55:1-6; 62:20-25; 63:1-3.

18 29. According to SIERRA PACKAGING, the company has no functions which would  
19 require somebody to be on the upper levels of the racks. Similarly, according to SIERRA  
20 PACKAGING, there are no circumstances where an employee would be required to use fall  
21 protection while being on the racks because "they shouldn't be on the racks." 1 Tr., p.  
22 55:11-20.

23 30. As SIERRA PACKAGING was new to the plant site, it had not completed a hazard  
24 assessment of the facility. 1 Tr., p. 56:17-20.

25 31. The rule against climbing anywhere, particularly the racks, is communicated to  
26 employees through the Employee Safety Handbook. 1 Tr., p. 59:5-9.

27 32. According to Mr. Hodges, the company normally brings people in for the fall  
28 protection of their maintenance group through TMCC. When asked, however, Mr. Hodges

1 did not know if the person providing the training for fall protection from TMCC spoke  
2 Spanish. He could not say one way or the other. 1 Tr., p. 62:11-14.

3 33. Mr. Hodges admits that "we had people or there was someone climbing in the racks  
4 and that was the idea of what the problem was." 1 Tr., p. 63:5-8.

5 34. Mr. Hodges admits that the three employees in the photograph would work at  
6 heights, as they were trained in fall protection for changing light bulbs. He knew of two of  
7 the individuals, but not about the third guy. 1 Tr., p. 64:1-3.

8 35. According to Sean Tracy, 1 Tr., p. 66:1-3, the Plant Manager, the three individuals  
9 on the rack were Mr. Gonzalez, Mr. Soto, and Mr. Caal. 1 Tr., p. 68:7-9.

10 36. According to Mr. Tracy, the three individuals were on the racks or in the vicinity of  
11 the racks because they were installing gusset supports or plates to stabilize the racking. 1  
12 Tr., p. 68:15-17.

13 37. Mr. Tracy admits that he is not intimately familiar with fall protection  
14 requirements. He does, however, provide oversight of the general operations for the firm.  
15 1 Tr., 6 p. 71:3-14.

16 38. According to Mr. Tracy, the top tier of the racking was located 15 feet, 7 inches high  
17 above the floor. 1 Tr., p. 72:10-12. Mr. Tracy also does not know whether the person  
18 providing training in personal fall protection is a Spanish speaking individual. 1 Tr., p.  
19 73:2-5.

20 39. Steve Tintinger is the maintenance manager at SIERRA PACKAGING. 1 Tr., pp.  
21 24:21; 74:16-20.

22 40. Mr. Tintinger is in charge of making sure that all equipment stays running. He is  
23 also in charge of the building facilities in general, the building and machinery and  
24 everything that is related to keeping the facility running. 1 Tr., p. 75:3-8.

25 41. Mr. Tintinger states that he is the one who told these three individuals that they  
26 needed to install brackets at the end of the rack about three-quarters of the way up. 1 Tr.,  
27 p. 76:15-19.

28 42. Mr. Tintinger testified that there was nothing about this work which would require  
the individuals to get up and walk on the racks. 1 Tr., pp. 76:23-25; 77:1.

43. According to Mr. Tintinger, he did not issue fall protection equipment to the three employees in the photograph and on the rack. 1 Tr., p. 78:15-16.

44. According to Mr. Tintinger, the three employees told him that they had fall protection equipment and that Mr. Tintinger said that he had seen them with fall protection previously to this incident. 1 Tr., p. 78:17-25.

45. Despite assigning the employees to install the stabilizer plates on the racks, he had no idea who trained the three employees in the use of personal fall protection. 1 Tr., p. 79:1.

46. When he told these workers to put the stabilizers on the racks he did not go with them and Mr. Tintinger did not supervise them while they were performing this work. 1 Tr., p. 79:2-8.

47. While installing the stabilizer plates on the rack, the three employees were without supervision by anyone who had any training or knowledge in the use of personal fall protection equipment.

48. While SIERRA PACKAGING professes to have a progressive discipline policy for employees who violate company rules, 1 Tr., p. 56:8-10, there is not a scintilla of evidence the three employees on or about the rack without PPE were disciplined for violating multiple company rules.

### CONCLUSIONS OF LAW

1. Nevada Administrative Code 618.788 places the burden of proof on NV OSHA. NV OSHA must prove by a preponderance of the evidence that: (i) the cited standard applied to the condition; (ii) the existence of noncomplying conditions; (iii); employee exposure or access, and and (iv) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition." See Belger Cartage Service, Inc., 7 9 OSAHRC 16/B4, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶123,400, 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); Am. Wrecking Corp. v. Sec'y of Labor, 351 F.3d. 1254, 1261 (D.C. Cir. 2003).

2. All facts forming the basis of a Complaint must be proved by a preponderance of the evidence. See *Armor Elevator Co.*, 1 OSHC 1409, 1973-1974 OSHD ¶16, 958 (1973).

3. The Review Board finds and concludes that it is reasonably predictable that employees at Sierra Packaging were or would be exposed to hazardous heights requiring the use of PPE.

4. The racks to which the stabilization bars were to be installed, or were being installed, were at height at the upper level. The photograph reveals that three employees were actually on the rack at height.

5. These employees, as a part of maintenance, were trained to change light bulbs while wearing personal fall protection equipment.

6. At least some of the employees were issued personal fall protection equipment. All three employees had been seen wearing personal fall protection equipment, suggesting its use was due to the exposure to working at altitude. 1 Tr., p. 78:22-23.

7. Not only were the employees likely to be exposed to employment at altitude, they were exposed, as the picture reveals. As SIERRA PACKAGING admits, they were trained to work installing or replacing lights while wearing personal fall protection equipment.

8. The Review Board here next finds and concludes that these three individuals, employees of SIERRA PACKAGING, were not adequately trained in the use of personal fall protection equipment.

9. Steve Tintinger, the individual that assigned these three employees to install the stabilizing plates on the racks, testified they were not trained by him to perform this work. If the employees were trained, it was training that did not take as they demonstrated an unacceptable level of knowledge about personal fall protection equipment. Management, such as Mr. Hodges and Mr. Tracy, were themselves unknowledgeable or confused about the use of personal fall protection equipment. They were no source of training in the proper use of personal fall protection equipment.

10. SIERRA PACKAGING claims that the training was provided, however, in personal fall protection equipment, by TMCC. The three employees at issue were obviously Spanish speaking, Hispanics. No one in management knew whether the person from TMCC who



1 provided training was Spanish-speaking. There is no proof in the record, therefore, that  
2 the training that was provided, if it was provided, was administered in a language which  
3 the employees could understand.

4 11. This suggests that the training was administered in English by TMCC, given that  
5 the training was ineffectual. The three employees displayed, as indicated, an unacceptable  
6 level of knowledge about personal fall protection equipment.

7 12. SIERRA PACKAGING's defense is a variation on the "unpreventable employee  
8 misconduct" or "rogue employee" affirmative defense. Specifically, it argues that no one  
9 should have been on the rack, therefore there is no violation because no training should  
10 have been necessary in the first place. If no training should have been necessary in the  
11 first place, there could be no violation of 29 CFR § 1910.132(f). These employees should  
12 not have been climbing on the rack, period, therefore SIERRA PACKAGING should not be  
13 penalized for conduct that it had prohibited.

14 13. The elements of unpreventable employee misconduct are well-established. To  
15 prove this affirmative defense, SIERRA PACKAGING must show: (1) it has established  
16 work rules designed to prevent the violation; (2) it has adequately communicated those  
17 rules to its employees; (3) it has taken steps to discover violations; and, (4) it has  
18 effectively enforced the rules when violations have been discovered. *See, e.g., Sanderson*  
19 *Farms Inc., v. OSHRC*, 348 F.App'x. 53, 57 (5<sup>th</sup> Cir., 2009).

20 14. Here, SIERRA PACKAGING claims it has established work rules, namely that no  
21 one is to climb on the racks to prevent a violation. The Review Board finds and concludes  
22 that SIERRA PACKAGING has met the first element of their defense.

23 15. Secondly, it must adequately communicate rules to its employees. The three  
24 employees at issue seemed to be aware that they were not to climb the racks. The  
25 adequacy of the communication is *questionable* however, because knowledge of the rules  
26 did not keep them off the racks.

27 16. Turning then to items (3) and (4), had SIERRA PACKAGING taken steps to  
28 discover the violations, and had SIERRA PACKAGING effectively enforced the rules when

1 violations were discovered? The Review Board finds and concludes that SIERRA  
2 PACKAGING fails here.

3 17. The testimony of Mr. Tintinger was that he sent off the employees to work on the  
4 racks by installing the stabilization plates without following up and supervising their  
5 work. No one else testified, either, to supervising their work. There was no testimony that,  
6 following the incident, these employees were disciplined when violations were discovered,  
7 if they were discovered by SIERRA PACKAGING. Worse, they were sent off to work at  
8 height, by persons who displayed a lack of knowledge about the use and requirements of  
9 personal fall protection equipment.

10 18. The three employees were left to their own devices to undertake the job. There was  
11 no supervision to prevent them from violating the company's rule to stay off the racks and  
12 the persons that would have been supervising them would have had inadequate  
13 knowledge, in any event, about the deployment of personal fall protection equipment.

14 19. "Employers are not liable under the Act for an individual single act of an employee  
15 which an employer cannot prevent." Secretary of Labor v. Leone Const. Co., 3 O.S.H.C.  
16 1979, 1982 (1976). Nonetheless, the OSHRC has repeatedly held that, "employers., have  
17 an affirmative duty to protect against preventable hazards and preventable hazardous  
18 conduct by employees." *Id.*; see also, Brock v. L.E. Meyers Co., 818 F.2d. 1270 (6th Cir.)  
19 cert. denied, 848 U.S. 989 (1987).

20 20. The work by these employees on the rack installing the stabilizer plates was in plain  
21 sight.

22 21. The presence of a supervisor, knowledgeable about the company's rule that no one  
23 climbs on the racks, would readily have prevented the hazardous situation from occurring.  
24 It was an easily remedial or preventable situation. Instead, SIERRA PACKAGING sent the  
25 employees off to their own devices, unsupervised and without any specific instruction or  
26 even a reminder to stay off the racks.

27 22. The Review Board finds and concludes that SIERRA PACKAGING failed as a  
28 matter of law and fact to prove the affirmative defense of unpreventable employee  
misconduct.

23. The prima facie case has not been rebutted.

24. The employees at SIERRA PACKAGING were exposed to working at heights, and by virtue of their training and assignments, it was reasonably predictable that they would be exposed to working at heights. The threshold for requiring training in personal fall protection was, therefore, triggered. The evidence is clear.

25. Adequate training was not provided in accordance with 29 CFR §1910.132(f).

26. It is the Decision of the Review Board that a violation of Nevada Revised Statutes did occur as Citation 1, Item 1, 29 CFR §1910.132(f). The violation was also shown to be properly classified as Serious 1 Tr., pp. 21, 22, with a proposed penalty in the amount of Three Thousand Eight Hundred Twenty-five Dollars (\$3,825). The Citation, classified as Serious with a penalty of \$3,825, is confirmed and approved.

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**FINAL ORDER**

1. Citation 1, Item 1, is AFFIRMED as a SERIOUS violation of the cited standard, 29 CFR §1910.132(f);
2. The penalty amount for Citation 1, Item 1, of Three Thousand Eight Hundred Twenty-Five Dollars (\$3,825), is APPROVED;
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.

**DATED** this 27<sup>th</sup> day of October, 2023.

NEVADA OCCUPATIONAL SAFETY AND  
HEALTH REVIEW BOARD



RODD WEBER, Chairman

Submitted by:



Salli Ortiz, Division Counsel  
Division of Industrial Relations  
400 West King Street, Suite 201  
Carson City, Nevada 89703

# **CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I hereby 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 the **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER, OSHA Docket RNO 14-1684**, by the method indicated below, and addressed to the following:

|   |  |
|---|--|
| <p>McDonald Carano Wilson LLP<br/>           ATTN: LISA WILTSHIRE<br/>           ALSTEAD, ESQ.<br/>           100 West Liberty Street, 10<sup>th</sup> Floor<br/>           Reno, NV 89505</p>                                      | <p><b>U.S. Mail</b><br/> <input type="checkbox"/> Via State Mail room<br/> <input checked="" type="checkbox"/> Certified Mail:7022 2410 0001 5083 9176<br/> <input type="checkbox"/> Electronic Mail<br/> <input type="checkbox"/> Deposited directly with U.S. Mail Service<br/> <input type="checkbox"/> Overnight Mail<br/> <input type="checkbox"/> Interdepartmental Mail</p> |
| <p>Rodd Weber, Chairman<br/>           Nevada Occupational Safety &amp;<br/>           Health Review Board<br/>           c/o CHARLES R. ZEH, ESQ.<br/>           50 W. Liberty Street, Suite 950<br/>           Reno, NV 89501</p> | <p><input type="checkbox"/> Via State Mail room<br/> <input checked="" type="checkbox"/> Certified Mail:7022 2410 0001 5083 9107<br/> <input type="checkbox"/> Electronic Mail<br/> <input type="checkbox"/> Overnight Mail<br/> <input type="checkbox"/> Interdepartmental Mail<br/> <input type="checkbox"/> Messenger Service</p>   |

DATED this 30<sup>th</sup> day of June, 2023.

  
 Christy Bateman  
 State of Nevada Employee