THE LAW OFFICES OF CHARLES R. ZEH, ESQ.
50 West Liberty St., Suite 950
Reno, Nevada 89501
(775) 323-5700 FAX: (775) 786-8183

FILED
MAR 31 2020
O.S.H. 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, **Complainant,** **vs.** **SIERRA PACKAGING AND CONVERTING, LLC,** **Respondent.**	**Docket No. RNO 14-1684**

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 13th 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.

///

///

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[1]The three employees, the object of this matter, were temporary hires, were employed as maintenance personnel whose duties included, in part, installing stabilizer plates on racks being installed 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.

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

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

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

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

Specifically, in this case, the standard requires pursuant to the "Rule of Access," that the State could meets its "... burden of proof by showing that it was reasonably predictable that the

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

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

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

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

> So, if those employees weren't assigned any duties that would require them to work at heights and those employees were doing something that was expressly prohibited by the rules of the company, how can we say it was reasonably 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.

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

FINDINGS IN FACT

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

SUPPLEMENTAL FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

///

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

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

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

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

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

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

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

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

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

///

///

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

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

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

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

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

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

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

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

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

///

///

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

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

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

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

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

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

40. 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.

41. 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.

42. 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.

43. 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.

///

///

44. 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.

45. 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.

46. 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.

ANALYSIS AND CONCLUSIONS OF LAW

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

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. These employees, as a part of maintenance, were trained to change light bulbs while wearing personal fall protection equipment. 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. Here, not only were the employees likely to be exposed to employment at altitude. In fact, they were, as the picture reveals. And, as Sierra Packaging admits, they were trained to work installing or replacing lights while wearing personal fall protection equipment.

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

///

The simple fact of the matter is 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.

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

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

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

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

///

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

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

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

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

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

///

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

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

The *prima facie* case has, therefore, not been rebutted. 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. Adequate training was not provided in accordance with 29 CFR § 1910.132(f). It is the decision of the Nevada Occupational Safety and Health 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 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 with a proposed penalty of $3,825 is confirmed and approved.

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

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

Dated this 31st day of March, 2020.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: _____
Steve Ingersoll, Board Chairman