

IN THE SUPREME COURT OF THE STATE OF NEVADA

TONY CALABRESE,
Appellant,
vs.
M.J. DEAN CONSTRUCTION, A
NEVADA CORPORATION; AND HMA
SALES, LLC, A NEVADA LIMITED
LIABILITY COMPANY,
Respondents.

No. 59407

FILED

DEC 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *A. Malm*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a final district court order entering judgment on a jury verdict in a tort action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Appellant Tony Calabrese was crossing a temporary walkway constructed to access the delivery entrance to his restaurant at the Royal Resort Casino when the handrails on the walkway failed, causing him to fall and sustain injuries. The purpose of the walkway was to temporarily cover some cooling pipes that had become exposed during a construction project. Calabrese brought a negligence action against Respondents M.J. Dean Construction, Inc. (M.J. Dean) and HMA Sales, LLC (HMA), who constructed the walkway and owned the property, respectively. During the proceedings, the district court granted Respondents' motion for partial

summary judgment, determining that Occupational Safety and Health Administration (OSHA) standards did not apply. As a result, the district court disallowed all evidence regarding OSHA regulations. The district court also granted a motion in limine excluding all evidence of subsequent remedial measures. Following a six-day trial, the jury returned a verdict for Respondents, who were also awarded costs and attorney fees by the district court based on the fact that they prevailed at trial.

Appellant's challenge raises the following issues: (1) whether OSHA standards should have applied; (2) whether evidence of OSHA standards was properly disallowed; (3) whether the exclusion of all evidence of subsequent remedial measures was proper; and, (4) whether the district court erred in awarding costs and attorney fees to Respondents.

"Congress intended to subject employers and employees to only one set of regulations, be it federal or state, and the only way a State may regulate an OSHA-regulated occupation safety and health issue is pursuant to an approved state plan that displaces the federal standards." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992). Nevada has such an approved state OSHA plan. See NRS 618.005-990; NAC 618.001-9927.¹ In its plan, Nevada adopted federal OSHA standards contained within 29 CFR §1926, which among other things, sets standards for safety systems. OSHA NEVADA STATE PLAN, available at <https://www.osha.gov/dcsp/osp/stateprogs/nevada.html> (last visited Nov. 13, 2013). This section contains particular standards for guardrail

¹See also OSHA, <https://www.osha.gov/dcsp/osp/> (last visited Nov. 13, 2013).

systems. 29 CFR § 1926.502(b). We also note that Nevada has defined a “safety device” or “safeguard,” such as the walkway covering the pipes here, as “any practicable method of mitigating or preventing a specific danger.” NRS 618.165. Further, an employer cannot “fail to furnish, provide and use safety devices and safeguards . . . reasonably adequate to render such employment and place of employment safe and healthful.” NRS 618.385(2). In his appeal, Calabrese argues that the district court erred in determining that OSHA standards did not apply and excluding all evidence related to those standards. We agree.

This court reviews a district court’s interpretation of a statute de novo. *Madera v. State Indus. Ins. Sys.*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998). When interpreting a statute, we will first look to the plain language of the statute. *A.F. Const. Co. v. Virgin River Casino Corp.*, 118 Nev. 699, 703, 56 P.3d 887, 890 (2002). The Nevada Occupational Safety and Health Act (NOSHA) establishes regulations to provide safe working conditions for employees. NRS 618.005, 618.015. The Act provides that “[t]he Division [of Industrial Relations of the Department of Business and Industry] has authority over working conditions in all places of employment except as limited by subsection 2.”² NRS 618.315. “‘Place of employment’ means any place, whether indoors or out or elsewhere, and the premises appurtenant thereto, where, either temporarily or permanently, any industry, trade, work or business is carried on, including all construction work, and where any person is directly or indirectly employed by another for direct or indirect gain or

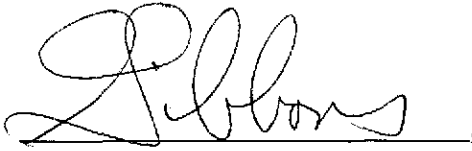
²The exceptions in subsection 2 are not applicable here. See NRS 618.315(2).

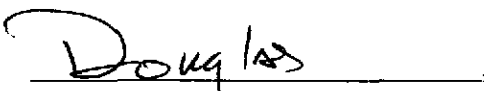
profit.” NRS 618.155. While NOSHA does not specifically define “appurtenant,” this term is defined by Black’s Law Dictionary as “[a]nnexed to a more important thing.” (9th ed. 2009). Moreover, other chapters of the Nevada Revised Statutes have described “appurtenant” as something that benefits a property even though it is not a part of it. *See, e.g.,* NRS 40.605; NRS 118B.0111.


In this case, Calabrese was injured while crossing a walkway that M.J. Dean had constructed at the request of Royal Resort while Royal Resort was under renovation and construction. This walkway was intended to facilitate rear entry access to Calabrese’s restaurant during the construction and to protect him and others from contact with the cooling pipes. Based on the plain language of NRS 618.155 and 618.385(2), we conclude that this walkway constitutes a place of employment where adequate safeguards must be provided. Accordingly, the district court committed reversible error in determining that OSHA standards, to the extent they have been adopted by Nevada, were not applicable or admissible.³

³We also conclude that the district court did not abuse its discretion in excluding evidence of subsequent remedial measures because defendants did not put feasibility at issue in the district court. *See Jacobson v. Manfredi by Manfredi*, 100 Nev. 226, 231-32, 679 P.2d 251, 254-55 (1984). Furthermore, because we are remanding the case for a new trial consistent with this order, the issues of costs and attorney fees are moot.

We ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Valerie Adair, District Judge
Janet Trost, Settlement Judge
Callister & Associates
Hall Jaffe & Clayton, LLP
Eighth District Court Clerk