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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. LV 23-2227

Inspection No. 1638859

Complainant,

vs.

CREATIVE PRINTING, INC. dba
CREATIVE DIGITAL PRINTING

Respondent.

FILED
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O.S.H. REVIEW BOARD
BY *H. Kennedy*

DECISION AND ORDER OF THE BOARD
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND FINAL ORDER

This case arose out of an inspection of the Respondent's business and operations facilities located in Las Vegas, Nevada, which occurred on December 7, 2022. *See*, State's Exhibit 1, pp. C8-C11. During the inspection, an Original Heidelberg Cylinder was witnessed without a guard at the rotating belt pulley, which exposed the Respondent's employees to an ingoing nip point. *See*, State's Exhibit 1, pp. C12, C48-C51. The Respondent's employees utilized printing presses to print various materials and conduct equipment maintenance on the windmill letterpress. *See*, State's Exhibit 1, p. C12. The inspection resulted in the issuance of two citations for violations of 29 CFR 1910.212(a)(1) and 29 CFR 1910.1200(c)(1). *See*, State's Exhibit 1, pp. C35, C36.

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1 The matter came before the Nevada Occupational Safety and Health Review Board (the
2 Board) for a hearing conducted on August 14, 2024. *See, Tr.*, p. 1.¹ The hearing was convened
3 pursuant to a duly provided notice. *See, Notice of Hearing* dated July 13, 2024. In attendance to
4 hear the matter on August 14, 2024, were Board Chairman Jorge Macias, Board Secretary William
5 Spielberg, Board Member Gled Bautista, Board Member Scott Fullerton and Board Member Tyson
6 Hollis. *See, Tr.*, p. 1;3-13. As there were, at all relevant times, five members of the Board present
7 to decide the case, with at least one member representing management and one member
8 representing labor in attendance, a quorum was present to conduct the business of the Board.

9 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety
10 and Health Administration of the Division of Industrial Relations of the Department of Business
11 and Industry (hereinafter, the State or Nevada OSHA), appeared at the hearing on behalf of the
12 Complainant (the State). Creative Printing, Inc., dba Creative Digital Printing (hereinafter, Creative
13 Printing or the Respondent) was represented by the Respondent's owner, Jeff Casey a non-attorney.
14 *See, Tr.*, pp. 1;16-21, 2;1-3, 6;19-21. Board legal counsel, Charles R. Zeh, Esq., The Law Offices of
15 Charles R. Zeh, Esq., was also in attendance for the Board.

16 The State issued its Citation and Notification of Penalty (Citation) on June 1, 2023, alleging
17 violations of 29 CFR 1910.212(a)(1) and 29 CFR 1910.1200(c)(1)². *See, State's Exhibit 1.* pp. C26,
18 C37. The citation alleged that the Respondent did not provide machine guarding exposing its
19 employees to ingoing nip points.

20 The State alleged in Citation 1, Item 1, a serious violation of 29 CFR 1910.212(a)(1), as
21 stated below:

22 29 CFR 1910.212(a)(1): Machine guarding. Types of guarding. One or more
23 methods of machine guarding shall be provided to protect the operator and other
24 employees in the machine area from hazards such as those created by point of
25 operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of
26 guarding methods are-barrier guards, two-hand tripping devices, electronic safety
27 devices, etc.

28 ¹"Tr." stands for the transcript of the hearings conducted on August 14, 2024, followed by the page
and line number where the matter cited can be found.

²The Respondent did not contest the alleged violation of 29 CFR 1910.1200(c)(1). *See, State's*
Exhibit 1. p. C38.

1 Creative Digital Printing did not ensure that machine guarding was provided to
2 protect the machine operators in the machine area from hazards created by
3 ingoing nip points and rotating parts. Three employees utilized the Original
4 Heidelberg Cylinder windmill letterpress to print various materials. The unguarded
5 belt pulley is positioned directly across from the point of operation and by the
6 passageway other employees access. The ingoing nip points exposed employees to
7 serious injuries, such as caught-in hazards during inadvertent contact with moving
8 parts. *See*, State's Exhibit 1, p C26.

9 On June 5, 2023, the Respondent sent its Contest Letter. *See*, State's Exhibit 1, p. C38. On
10 June 23, 2023, the State filed and served the Complaint. On June 30, 2023, Mr. Casey answered the
11 Complaint on behalf of the Respondent. *See*, State's Exhibit 1, p. C44. Therein, the Respondent
12 alleged that there were two Heidelberg cylinder windmill letter presses at the time of the inspection,
13 *See, Id.*, one of which lacked a guard over the rotating belt pulley. That Cylinder Press was, "under
14 repair, not in service, turned off and unplugged" at the time of the inspection. *See, Id.*

15 At the hearing on the matter, the State offered for admission its Exhibits 1 and 2, consisting
16 of pages C1 through and including C60. *See*, Tr., p. 7;7-11. The Respondent objected to the
17 admission of the documents authored by Josh Withers, the OSHA inspector in this matter.³ *See*, Tr.,
18 pp. 7;13-25, 8;1-13. The gravamen of the Respondent's objection was that the evidence which Mr.
19 Withers would provide would not be subject to cross examination. Mr. Casey indicated he had
20 concerns regarding Mr. Withers' competency and veracity in the questioning the Respondent's
21 employees and reducing the conversations to written notes. *See*, Tr., p. 9;11-20.

22 The Respondent's objection is best categorized as a hearsay objection. *See, Id.* Hearsay is a
23 statement offered in evidence to prove the truth of the matter asserted therein. *See*, NRS 51.035.
24 This is exactly what the State wanted to do, use Mr. Withers' notes as evidence to prove the claims
25 made therein. Therefore, the State had to overcome this objection.

26 Hearsay is inadmissable unless it is subject to one or more of the exceptions set forth in
27 Chapter 51 of NRS. In response, the State argued that Mr. Withers' notes were admissible under
28 State law. The State's argument commenced by stating that there was no general prohibition against
the admission of hearsay evidence in administrative hearings. *See*, NRS 233B.123(1) ("Evidence

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³The specific documents are State's Exhibit 1, C15 through and including C20. *See*, Tr., p. 9;2-12.

1 may be admitted, except where precluded by statute, if it is of a type commonly relied upon by
2 reasonable and prudent persons in the conduct of their affairs.”) *See, Id.*

3 Turning to Nevada law, the State provided several hearsay applicable exceptions. The first
4 was a general exception to the prohibition against the admission of hearsay evidence when the
5 statement is of nature and made in circumstances which offer assurances of accuracy. *See, State,*
6 *Dep't of Motor Vehicles v. Kiffe*, 101 Nev. 729, 732, 709 P.2d 1017, 1019 (1985); NRS 51.075(1).
7 More specifically is the exception for present sense impressions. *See, NRS 51.085* (“A statement
8 describing or explaining an event or condition made while the declarant was perceiving the event or
9 condition, or immediately thereafter, is not inadmissible under the hearsay rule.”). In this instance,
10 Mr. Withers’ notes were taken contemporaneously with the walk through. *See, State’s Exhibit 1,*
11 *pp. C6, C7.* Mr. Withers’ interviewed the Respondent’s employees on January 19, 2023. *See,*
12 *State’s Exhibit 1, pp. C15-C20.* Each of the employees signed and dated his notes of the interview
13 on that same day. *See, Id.* Accordingly, Mr. Withers’ notes and interviews described his actions as
14 an investigator and were made contemporaneously therewith. Accordingly, this exception to the
15 hearsay rule would apply.

16 Further, there is the public records exception to the hearsay rule. *See, NRS 51.155*
17 (“Records, reports, statements or data compilations, in any form, of public officials or agencies are
18 not inadmissible under the hearsay rule if they set forth...(m)atters observed pursuant to duty
19 imposed by law.”). Here, Mr. Withers, an OSHA inspector, had a duty under Chapter 618 of the
20 Nevada Revised Statutes to enforce the provisions of State OSHA. The records that he kept during
21 his investigation were exactly the type of material which the legislature sought to allow into
22 adjudicative hearings.

23 The Respondent also argued that allowing Mr. James to testify regarding the employee
24 interviews would be prejudicial because some of the information supplied by Mr. Withers was
25 factually incorrect. *See, Tr., p. 10;6-11.* In this matter, it was explained that Mr. Casey could
26 provide testimony to show any errors which Mr. Withers made in drafting the employees’
27 statements. *See, Tr., p. 10;12-14.* Mr. Casey found this to be acceptable. *See, Id.*

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1 After considering the arguments of the State and the Respondent, Chairman Macias
2 overruled the Respondent's objection and admitted the State's exhibits. *See*, Tr., p. 15;5-8. For its
3 part, the Respondent did not offer any exhibits. *See*, Tr., p. 15;9-15.

4 At the duly noticed hearing conducted on August 14, 2024, the State presented the
5 testimony of DeWaune James, Jeremy Richnow and José Barba. Mr. Casey testified on behalf of
6 the Respondent.

7 Nevada has adopted all Federal Occupational Safety and Health Standards which the
8 Secretary of Labor has promulgated, modified or revoked and any amendments thereto. They are
9 then deemed the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8).
10 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS
11 618.315.

12 FINDINGS OF FACTS

13 The inspection occurred at the Respondent's business location of 6415 Karms Park Court,
14 Las Vegas, NV. *See*, State's Exhibit 1, p. C5. The inspection was a planned program inspection.
15 These types of inspections are of workplaces in industries identified as high hazards by the Bureau
16 of Labor and Statistics. The inspections of these workplaces are then randomly assigned to
17 inspections by Nevada OSHA. *See*, Tr., pp. 20;8-25, 21;1-21, 42;9-24, 43;1-2.

18 Mr. Withers arrived at the Creative Printing facility, on December 7, 2022, at 8:00. *See*,
19 State's Exhibit 1, p. C6. However access was not granted until later because Mr. Casey was not
20 available. *See*, State's Exhibit 1, p. C6, *see also*, Tr., p. 38;6-21. The inspection commenced at
21 approximately 2:00 p.m. on December 7, 2022. *See*, State's Exhibit 1, p. C6.

22 The facility contained three printing presses all of which are over 60 years old. *See*, Tr., p.
23 71;4-11. One of the presses was a Heidelberg cylinder press (Cylinder Press).⁴ *See*, State's Exhibit
24 1, pp. C45, C46, C47. The Respondent does not use the Cylinder Press for printing, only for dye
25 cutting, *See*, Tr., p. 69;6-13. The Cylinder Press is not the subject of this citation.

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27
28 ⁴A cylinder printing press operates by placing a cylinder onto plane, called flatbed presses. The
cylinder provides the pressure while the type form retains its flat surface, generally in a horizontal position.
See, <https://www.britannica.com/topic/printing-publishing/Cylinder-presses>

1 Also located at the facility were two Heidelberg windmill printing presses.⁵ Windmill Press
2 # 1 was the functioning machine which the Respondent used for printing on a regular basis. *See*,
3 *Tr.*, p. 68;10-23. Windmill Press # 2 is the machine which the Respondent claims to be non-
4 functional and non-operable. The Respondent keeps Windmill Press # 2 on site as an informal parts
5 inventory for Windmill Press # 1. *See, Id.* Windmill Press # 2 was the machine lacking its belt
6 guard and is the subject of this citation.

7 During the walk around Mr. Withers' notes state that he questioned Mr. Barba. In turn Mr.
8 Barba said he used the machine with the missing guard approximately twice a week for about an
9 hour. *See, State's Exhibit 1, p. C7.*

10 Subsequent to the walk around, Mr. Withers created the inspection narrative. *See, State's*
11 *Exhibit 1, p. C12.*

12 In the production shop, Creative Digital Printing's employees of utilized the Original
13 Heidelberg Cylinder to print various materials and [to] **conduct equipment**
14 **maintenance** on the windmill letterpress. The equipment was not equipped with a
15 guard at the rotating belt pulley, which exposed the employees to the ingoing nip
16 point of the unguarded pulley belt. Management and employee interviews indicated
17 that the windmill press machine main belt guard had been missing prior to the
18 inspection. *See, State's Exhibit 1, p. C12 (Emphasis added).*

19 The phrase, "utilized . . . to print various materials and conduct equipment maintenance"
20 indicates Mr. Withers understood, at some level, that one or more of the printing presses had a
21 maintenance function. *See, Id.*

22 Mr. Withers took several photographs during the walk through. Three photographs were
23 taken of the Cylinder Press. *See, State's Exhibit 1, pp. C45, C45, C47, see also, Tr., p. 67;10-18.*
24 Four photographs were taken of Windmill Press # 2. *See, State's Exhibit 1, pp. C48, C49, C50,*
25 *C51, see also, Tr., pp. 67;18-24.* Specific to this citation, one of the photographs of Windmill Press
26 # 2 showed the width of the exposed belt to be 16 inches. *See, State's Exhibit 1, p. C51.* Another
27 photograph showed a large electric motor connected to the partially guarded belt. *See, State's*
28

26 ⁵These are printing presses which feature a double-sided rotating arm that feeds the machine itself,
27 removing the need for a person to manually feed paper to and from the machine. The Heidelberg Windmill
28 first picks up a sheet of paper using its patented "propeller-gripper" vacuum built in the arm, then holds it in
place while pressing it against the platen. When it's finished, the Heidelberg printing press drops the printed
paper into a tray while simultaneously feeding another blank sheet of paper. *See,*
<https://printbindship.com/what-is-a-heidelberg-press/>

1 Exhibit 1, p. C48. Extending from the electric motor is what appears to be a large power cable or
2 conduit.⁶ *See, Id.*

3 On January 19, 2023, Mr. Withers interviewed four of Creative Printing's employees. The
4 first to be interviewed was Mr. Casey, who stated that the belt guard for Windmill Press #2 had
5 been missing for a couple of weeks. *See, State's Exhibit 1, p. C15.* He said that the reason that the
6 belt guard was missing was for maintenance. *See, Id.* Regarding the use of Windmill Press #2, Mr.
7 Casey said that Alejandro and another employee use it two to three times per week. *See, Id.*

8 Mr. Richnow, a current employee, told Mr. Withers that guard for the belt on Windmill
9 Press #2 had been missing for an extended amount of time, probably years. *See, State's Exhibit 1,*
10 *p. C17.* He told the inspector that he uses the Windmill Press one to two times per week for
11 anywhere between 10 minutes and one hour. *See, Id.*

12 Mr. Barba, a previous employee, told Mr. Withers that he had worked for the Respondent
13 for about a year. *See, State's Exhibit 1, p. C19.* Further, he said he was the "main person to work on
14 the windmill machines" *See, Id.* He had never witnessed that machine with a belt guard in place.
15 *See, Id.* Further, he said that he uses "it 1 to 2 times per week for about 45 minutes." *See, Id.* The
16 reasonable inference here is that the "it" Mr. Barba discussed was Windmill Press #2 because he
17 was discussing that machine in the previous sentence. *See, Id.*

18 On May 17, 2023, the closing conference was conducted with Creative Printing. *See, State's*
19 *Exhibit 1, p. C14.* Clementina Choky conducted the closing conference because Mr. Withers was
20 no longer employed by Nevada OSHA at that time. *See, Id., see also, Tr., p. 30;15-17.* The
21 Respondent was represented by Mr. Casey. *See, State's Exhibit 1, p. C14.* In this conference, Mr.
22 Casey was informed that a citation was proposed. *See, Id.*

23 On June 1, 2023, the State sent a Citation and Notice of Penalty to the Respondent. *See,*
24 *State's Exhibit 1, pp. C26-C37.* Therein, the State provided notice that the total penalties would be
25 \$4,099. *See, State's Exhibit 1, p. C37.* For Citation 1, Item 1 the assessed penalty was \$4,099 after
26 adjustments. There was no fine assessed for Citation 2, Item 1. *See, Id.*

27
28 ⁶ Oddly, in the State's Evidence package did not contain any photographs of Windmill Press # 1.
See, Tr., p. 75;2-9.

1 On June 2, 2023, the Respondent sent its contest notice to the State. *See*, State's Exhibit 1, p.
2 C38. Creative Printing contested only Citation 1, Item 1. *See, Id.* The Respondent's contest letter
3 did not contain any factual grounds upon which the contest was based. On June 23, 2023, the State
4 filed and served its Summons and Complaint. *See*, State's Exhibit 1, pp. C39-C43. On June 30,
5 2023, the Respondent provided its answer to the State's complaint. *See*, State's Exhibit 1, p. C44.

6 We had two Heidelberg Cylinder windmill letter presses at the time of the OSHA
7 inspection. They are both approximately 50 years old. One machine was plugged in
8 and working, and one was not. The machine that was not working had the machine
9 guard off as it was being service (sic) for repair. The machine was also turned off
10 and not plugged in. This is the machine I am being fined \$4099 .00 for (under repair,
11 not in service, turned off and unplugged). The other machine works fine and has its
12 proper machine guard in place. They were placed next to each other. This was told to
13 the OSHA inspector at the time of his visit, and he took lots of pictures of this.

14 My employee in charge of that department told me the OSHA inspector had him
15 plug it in and operate the machine to see it running. The machine will turn on and
16 run but it will not work accurately, finding parts for these is almost impossible,
17 because of this we has (sic) since sold the machine to an exporter and no longer have
18 it.

19 I am confused as to why I am being fined \$4,099.00 for a machine that was being
20 serviced and not functional for not having the proper machine guard on it. The
21 machine guard must come off to work on it, kind of like opening the hood of a car.
22 You cannot work on the engine with the hood closed. *See, Id.*

23 Accordingly, this was the first time in the proceedings when Creative Printing alleged that
24 Windmill Press #2 was a non-functional piece of equipment. *See, Id.* At the August 14, 2024,
25 hearing, the State presented the testimony of DeWaune James. Mr. James was Mr. Withers'
26 supervisor at the time of the inspection of Creative Printing. *See*, Tr., p. 18;15-24, 19;9-11. Mr.
27 Withers was no longer with Nevada OSHA at the time of the hearing. Mr. James had accompanied
28 Mr. Withers in his inspection of Creative Printing's business facility. *See*, Tr., p. 19;12-16.

Mr. James testified regarding the State's calculation of the penalty. *See*, State's Exhibit 1, p.
C22-C 25, *see also*, Tr., pp. 35-37. Mr. James explained that the preliminary gravity-based penalty
amount was \$13,394. *See*, State's Exhibit 1, p. C22. The penalty was subject to a 60% reduction as
the result of the size of the employer. *See, Id.* Further, the penalty was reduced by another 15% for
good faith. *See, Id.* An additional 10% discount was provided because the Respondent did not have
a history of violations. *See, Id.* Accordingly, the final penalty recommended was \$4,099. *See*,

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1 State's Exhibit 1, p. C23. The Respondent neither objected to any of Mr. James' testimony
2 regarding the calculation of the penalty nor asked any questions about the matter.

3 On cross examination, Mr. Casey asked whether it was Mr. Withers or Mr. James who
4 decided to issue the citation. *See, Tr.*, p. 48;1-17. Mr. James responded that the citation and penalty
5 amounts were recommended by the inspector but that he gave the final approval. *See, Tr.*, pp. 31;3-
6 13; 32;1-12. Mr. Casey followed up with a series of questions regarding Creative Printing's
7 allegation that Windmill Press #2 was down for maintenance. *See, Tr.*, pp. 49, 50. Mr. James
8 testified that he would not authorize the issuance of a citation for a safety feature on a machine
9 while it was being maintained. *See, Tr.*, p. 50;4-12. The problem here was the long amount(s) of
10 time that the belt guard was not on the windmill press. *See, Tr.*, pp. 52;11-25, 53;3-10.

11 Mr. Richnow was the State's second witness. On direct examination, Mr. Richnow testified
12 that he had been employed by Creative Printing for fifteen years. *See, Tr.*, p. 63;3-5. Further, he
13 reiterated that the belt guard for Windmill Press #2 could have been missing for years. *See, Tr.*, p.
14 66;4-7. Mr. Richnow reiterated that he had told Mr. Withers that Windmill Press #2 was used one to
15 two times per week. *See, Tr.*, p. 66;11-14.

16 On cross examination, Creative Printing attempted to make its point that Windmill Press # 2
17 was nonfunctional and that the inspector did not take this into account when issuing the citation.
18 Mr. Richnow specifically identified photographs C48, C49 and C50 as being Windmill Press #2,
19 *i.e.*, the parts machine. *See, Tr.*, pp. 67;18-24, 68;1-2. This led to Mr. Richnow's testimony that the
20 Respondent possesses only one fully functional windmill press, that being Windmill Press #1.

21 Mr. Casey: I just wanna be clear, there's three different machines?

22 Mr. Richnow: Correct.

23 Mr. Casey: And Mr. Withers knows (sic) there's three different machines?

24 Mr. Richnow: Yes. They were there.

25 Mr. Casey: Mr. James was there and there were still three different machines?

26 Mr. Richnow: Correct.

27 Mr. Casey: So it's not just one as they've stated?

28 Mr. Richnow: Correct. *See, Tr.*, 70;9-20.

1
2 Further, the Respondent attempted to clarify that Windmill Press # 2 is nothing more than a
3 standing parts inventory.

4 Mr. Casey: Okay. Which windmill machine is usually in operation? This one or the other
5 machine that's not shown here at all?

6 Mr. Richnow: Correct. There's three total presses in that area. Two are identical. One is
7 primarily used all the time because it has all its functioning parts. Um, the
8 other is a backup for parts. That is the one you're showing pictures of with no
9 cover. *See, Tr., p. 68;14-21.*

10 In order to show that Windmill Press #2 was completely non-operable, Mr. Richnow
11 explained that there is only one source of power for the two windmill presses. "there's only power
12 in that particular area for one machine or between the two letter presses. The -- the cylinder press
13 has its own power." *See, Tr., pp. 79;16-23, 80;1-13.*

14 However, some of Mr. Richnow's certainty regarding the inability of Windmill Press #2 to
15 function was vitiated by his later testimony. First, he essentially admitted that Windmill Press #2
16 had, on some number of occasions, been energized to move some of the parts.

17 Mr. Spielberg: Has anybody ever been directed to turn [Windmill Press #2] on?

18 Mr. Richnow: The parts machine?

19 Mr. Spielberg: Yes.

20 Mr. Richnow: I'm sure it's been turned on to rotate it to get parts of the move. *See, Tr., p.*
21 *81;1-6.*

22 Further, Mr. Richnow's testimony indicated that no protective measures were taken to
23 prevent the unguarded belt of Windmill Press #2 from turning, that the hazard of the ingoing nip
24 points was not fully abated until the machine was removed from the production area.

25 Mr. Hollis: Is there anything that would lead employees to know... anything that
26 would say, "This machine is not to be turned on?" Tags, programs,
27 training, anything.

28 Mr. Richnow: Do we have a lockout-tagout program? Is that what you're asking?

Mr. Hollis: Was this machine in question that has a hazard that was not being
operational, was it underneath your lockout-tagout program and was it
locked and tagged out?

Mr. Richnow: It doesn't have its own dedicated power. So essentially, it's not
functional when it's sitting there.

1 Mr. Hollis: Can anybody -- can someone make it work if they wanted to? Like,
2 can you find a way to plug her in and turn it on? Is there anything
3 keeping them, notifying them, "Don't turn this thing on. Don't make
4 it work."

5 Mr. Richnow: Besides common sense?

6 Mr. Hollis: Anything?

7 Mr. Richnow: No. Besides common sense not to use it. *See, Tr.*, p. 84;4-21.

8 A further problem with Mr. Richnow's testimony was that it was incomplete and/or evasive.
9 When asked if whether Windmill Press #2 would run at all, Mr. Richnow responded "not really."
10 *See, Tr.*, p. 71;18-20. When pressed for an answer as to whether there was some level of
11 functionality to Windmill Press #2, Mr. Richnow was evasive.

12 Mr. Fullerton: And it doesn't run at all?

13 Mr. Richnow: Not really. I mean..

14 Mr. Fullerton: What do you mean not really?

15 Mr. Richnow: Well, no. It's not gonna run the right way because it's missing parts.

16 Mr. Fullerton: Does it run at all?

17 Mr. Richnow: No, it's wrapped up in a bag. *See, Tr.*, p. 71;19-25.

18 Mr. Richnow avoided Board Member Fullerton's question. The issue was not the current
19 condition of Windmill Press #2, the issue was its functionality before and during the time of the
20 inspection. Mr. Richnow's testimony failed to resolve this concern. On the other hand, Mr. Casey
21 affirmed that the machine would run on a limited basis, if Windmill Press #1 were unplugged and
22 Windmill Press #2 were plugged into the electrical outlet. *See, Tr.*, pp. 129;1-7, 131;11-16.

23 Mr. Casey was the Respondent's only witness. He argued that Mr. Withers' notes and the
24 statements he gathered from the employees were suspect. The record was unclear as to whether Mr.
25 Withers knew that there were three printing presses at the business location. *See, Tr.*, p. 118;10-17.
26 Further, Mr. Casey testified that Mr. Withers told him that no citation would be issued. *See, Tr.*, pp.
27 118;24-25, 119;1-16.

28 On cross examination Mr. Casey admitted that when he received the notice of the hearing
Creative Printing still possessed and owned Windmill Press #2. *See, Tr.*, p. 126;1-12. This was in

1 contrast to his assertion in his answer that Windmill Press #2 was sold to a third party and no longer
2 in Creative Printing's possession. *See*, State's Exhibit 1, p. C44. Mr. Casey explained that he
3 thought he had the machine sold, however, the buyer did not take possession of it. *See*, Tr., p.
4 125;17-24.

5 To the extent that any of the Conclusions of Law constitute Findings of Fact, they are
6 incorporated herein.

7 CONCLUSIONS OF LAW

8 The State is obligated to demonstrate the alleged violation by a preponderance of the
9 reliable evidence in the record. Findings must be based upon the kind of the evidence which
10 responsible persons are accustomed to rely in serious affairs. *William B. Hopke Co., Inc.* 1982
11 OSHARC LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). The Board's
12 decision must be based on consideration of the whole record and shall state all facts officially
13 noticed and relied upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974
14 OSHD ¶ 16, 958 (1973). *Olin Construction Inc. v. OSHARC and Peter J Brennan, Secretary of*
15 *Labor*, 525 F.2d 464 (1975).

16 In the case in chief, the burden is on the State to prove by a preponderance of the evidence, a
17 *prima facie* case against the Respondent. *See*, NAC 618.788(1), *see also*, *Original Roofing*
18 *Company LLC v. Chief Administrative Officer of the Nevada OSHA*, 442 P.3d 146, 149 (Nev.
19 2019). Thus, in matters before the Board of Review, the State must establish: (1) the applicability of
20 a standard being charged; (2) the presence of a non-complying condition; (3) employee exposure or
21 access to the non-complying condition; and, (4) the employer's actual or constructive knowledge of
22 its violative conduct. *Id.* at 149, *see also*, *American Wrecking Corp. v. Secretary of Labor*, 351
23 F.3d 1254, 1261 (D.C. Cir., 2003). Nevada law adopts Federal OSHA regulations. NRS 618.295(8)
24 states: "All federal occupational safety and health standards which the Secretary of Labor
25 promulgates, modifies or revokes, and any amendments thereto, shall be deemed Nevada
26 Occupational Safety and Health Standards."

27 The State presented evidence to show that the standard of 29 CFR 1910.212(a)(1) applied.
28 The State's photographs showed Windmill Press #2 with an unguarded rotating belt which resulted

1 in an exposed ingoing nip-point. *See*, State's Exhibit 1, pp. C48, C49, C50 and C51. Statements
2 given by Creative Printing's employees indicated that the missing belt guard was a permanent
3 condition or long lasting. *See*, State's Exhibit 1, pp. C17, C19. Therefore, the standard applied.

4 The State provided evidence that the aforementioned standard was violated. The belt guard
5 was clearly missing from Windmill Press # 2 at the time of the inspection. *See*, State's Exhibit 1,
6 pp. C48, C49, C50 and C51. Further, evidence showed that this situation had existed for a sustained
7 amount of time. Mr. Richnow stated that the guard for the belt had been missing for years. *See*,
8 State's Exhibit 1, p. C17. Mr. Barba stated that he had never witnessed the belt guard installed on
9 Windmill Press #2. *See*, State's Exhibit 1, p. C19. Mr. Casey also admitted that the belt was missing
10 for a short time period, albeit, much less than the other Creative Printing employees. *See*, State's
11 Exhibit 1, p. C15. The State's evidence showed that the standard was violated.

12 To show that employee(s) are exposed to the hazard, the State must show that it was
13 reasonably predictable that employees have been, are or will be in the zone of danger. *See, Rio*
14 *Doce Pasha Terminal L.P., & Its Successors*, 19 O.S.H. Cas. 1084 (July 7, 2000). Here, the State
15 provided evidence showing that the Respondent's employees were exposed to the hazard. On the
16 day of the inspection, Mr. Barba told the inspector that he used the machine, which was missing the
17 belt guard, about twice a week. *See*, State's Exhibit 1, p. C7. On January 19, 2023, Mr. Barba
18 reiterated that he used the Windmill Press #2 as it was found on the inspection. *See*, State's Exhibit
19 1, p. C19. "That machine never had a guard in place. I use it 1 to 2 times per week for around 45
20 minutes." *See, Id.* Mr. Richnow corroborated Mr. Barba's statement. *See*, State's Exhibit 1, p. C17.
21 "He use (sic) the Windmill 1 to 2 times for 10 minutes to an hour or 2." *See, Id.*

22 Mr. Richnow confirmed that Windmill Press #2 was used or was likely to have been used by
23 Creative Printing's employees. *See*, Tr., p. 81;1-6.

24 Spielberg: Has anybody ever been directed to turn this on? Has anybody...

25 Richnow: The parts machine?

26 Spielberg: Yes.

27 Richnow: I'm sure it's been turned on to rotate it to get parts [from this press].
28 *See, Id.*

1 While this limited use sounds harmless or benign, infrequent and limited exposure to a
2 hazard can constitute exposure to the hazard. *See, Beaver Plant, supra; Walker Towing Corp.*, 14
3 OSHC 2072, 2074.

4 The Respondent sought to deny the State's allegation of employee exposure by providing
5 evidence that Windmill Press #2 was a non-functional machine. The Respondent alleged that
6 Windmill Press #1 is functional printing press while Windmill Press #2 is no more than a standing
7 parts inventory. *See, pp. Tr.*, 68;14-25, 69;1-3, 70;9-20.

8 Making this argument caused the burden of proof to shift to the Respondent. Stated more
9 precisely, the burden of proof is actually two different evidentiary obligations, the burden of
10 persuasion and the burden of going forward. The burden of persuasion is the ultimate burden
11 assigned to the State who must prove each element by a preponderance of the evidence. This burden
12 remains with the State throughout the case and does not shift. In contrast, the burden of going
13 forward, also known as the burden of production, is a shifting burden that requires a party to
14 produce sufficient evidence to support a particular issue at different stages of the adjudication. This
15 burden can shift back and forth between the State and the Respondent depending on the progression
16 of the hearing. The burden of going forward may be met by producing additional evidence or
17 presenting persuasive arguments based on new or existing evidence. *Dynamic Drinkware, LLC v.*
18 *Nat'l Graphics, Inc.*, 800 F.3d 1375, 1378-1380; *Google LLC v. IPA Techs. Inc.*, 34 F.4th 1081,
19 *1083; Washington v. Hovensa LLC*, 652 F.3d 340, 345.

20 To meet the burden of going forward, the Respondent's employees testified that no
21 employees were exposed to the hazard because Windmill Press #2 was not equipment used in the
22 operation of the business.

23 Zeh: The parts machine, in other words. Okay. Is that machine functional in any
24 way, shape, or form be used in the business?

25 Richnow: No, it does not. *See, Tr.*, p. 91;20-23.

26 Mr. Richnow further testified that Windmill Press #2 was not only not used, but that it could
27 not be used in Creative Printing's operations.

28 Zeh: Do your employees use the machine for something other than parts?

1 Richnow: No. *See*, Tr., p. 93;12-17.

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3 Zeh: And then when you were first being, uh, questioned, you said you wanted to
4 clarify something and you weren't allowed to clarify. What you -- what did
you wanna say?

5 Richnow: That there's three presses there or three pieces of equipment there.

6 Zeh: One being the parts, two being function.

7 Richnow: Correct.

8 Zeh: Is that correct? And the parts machine is not functional, is that correct?

9 Richnow: Correct. *See*, Tr., pp. 94;24-25, 95;1-9.

10 The Respondent's major problem was that the evidence showed that Windmill Press #2 was
11 operational, albeit, for the minimal purpose of moving the machine parts into place in order to
12 cannibalize a desired part.

13 Zeh: Right. So.. back at the time of this inspection in... that machine's cannibalized state,
14 what would happen [] if you plugged it into [] the power?

15 Casey: The [] the only thing that would happen is that the belt would turn, but the machine
16 wouldn't do anything. It doesn't have any other parts that make it and do its
function, which is to move, score a part, that type of -- that type of stuff that the
machine does. *See*, Tr., p. 137;15-24.

17 Mr. Richnow confirmed that the belt on Windmill Press #2 was operational at more than one
18 time in his testimony. *See*, Tr., p. 81;1-6.

19 Zeh: Okay. Could [Windmill Press #2] be turned -- could that machine be turned
20 on so that the belt would be operational given that it was being used for
parts?

21 Richnow: I mean, I -- I guess you could plug it in if you wanted to, but no, it's
22 unplugged. *See*, Tr., p. 93;7-11.

23 This testimony indicates that the Respondent does not understand the scope of the
24 regulation. The Respondent appears to have believed that a belt guard was needed for any press
25 which operate as intended. Conversely, Creative Printing believed no belt guard was needed where
26 the belt was used to move the machine parts for an incidental purpose. Such interpretation would
27 serve to graft an exception to 29 CFR 1910.212(a)(1) for the limited or incidental use of equipment.
28 There is no such exception, even limited exposure to violative conditions constitutes employee

1 exposure. *See, Beaver Plant Operations, Inc.*, 18 O.S.H. Cas. 1972 (Sept. 30, 1999)(Rev'd on other
2 grounds) (Infrequent and limited exposure to a hazard can constitute exposure to the hazard.)

3 Another problem with the Respondent's argument was the conflicting statements and
4 testimony as to whether maintenance was performed on Windmill Press #2. Messrs. Casey and
5 Barba told the inspector that the belt guard was missing so that maintenance could be performed on
6 Windmill Press #2. *See, State's Exhibit 1*, pp. C15, C19. In contrast, testimony was provided that
7 Creative Printing did not maintain Windmill Press #2, with the exception of oiling the moving parts.
8 *See, Tr.*, p. 106;7-25. This was extremely inconsistent testimony. There would be no reason for the
9 Respondent to maintain a non-functional printing press. Conversely, if the unguarded belt on
10 Windmill Press #2 turned while driven by a motor, the Respondent's employees would be exposed
11 to the ingoing nip points.

12 Further, the statements made to Mr. Withers by Messrs. Richnow and Barba were
13 inexplicably inconsistent with their testimony at the hearing. Each of the Respondent's employees
14 were interviewed and had the opportunity to review their statements before signing them. *See, Tr.*,
15 pp. 59;2-10, 66;22-24, 98;9-20, 121;3-19. At hearing, all of them sought to change their statements
16 because they claimed to have been unsure as to which of the windmill presses Mr. Withers was
17 asking about. As Ms. Ortiz explained:

18 You were being asked to find that Mr. Withers started the conversation asking [Mr.
19 Barba] questions about the machine he worked on, how often he worked on it, how
20 long he worked on it, what he was supposed to do, and then for some reason
21 switched over to only asking him questions about the guarding on a machine that
22 they don't use. That simply doesn't make sense. And without any evidence, to the
23 contrary, you would be reversing what you can see in front of you based on
24 speculation that you're being given now. *See, Tr.*, p. 152;6-15.

25 The Respondent's treatment of Windmill Press #2 was also inconsistent with the allegation
26 that it was completely non-functional. The electrical cords Windmill Press #2 were loose, not coiled
27 or otherwise stowed away. *See, Tr.*, pp. 133-134. All that would have been required to energize the

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1 machine would be to unplug Windmill Press #1 and plug in Windmill Press #2.⁷ See, Tr., pp. 80;2-
2 24, 129;1-7. Thus, Windmill Press #2 was witnessed in a condition in which it was completely
3 ready to operate, on limited basis, merely by unplugging one machine and plugging in the other.
4 Further, Creative Printing did not behave in a manner consistent with Windmill Press #2 being
5 nonfunctional. The Respondent did not use its lock-out/tagout program for Windmill Press #2. See,
6 Tr., pp. 83;1-24, 84;1-3. Instead, an employee's decision to energize Windmill Press #2 was left to
7 "common sense." See, Tr., p. 84;4-22.

8 One final problem for the Respondent was its credibility. The Respondent's allegation that
9 Windmill Press #2 was nonfunctional was not made for months after the inspection and employee
10 interviews. Another problem was that the Respondent's answer claimed that the machine was sold
11 and no longer on the premises. See, State's Exhibit 1, p. C44. However, the testimony was that the
12 machine was still on the premises, albeit, bagged up. As the result of these inconsistencies, the
13 Respondent failed to meet its burden of going forward. Conversely, the State met its burden of
14 persuasion showing that the Respondent's employees were exposed to the hazard.

15 The final element for the State to show is that the employer had knowledge of the violative
16 condition. The State can make its *prima facie* by showing of the employers knowledge by
17 demonstrating "that the employer either knew, or, with the exercise of reasonable diligence, could
18 have known of the presence of the violative condition." *Original Roofing Co., LLC v. Chief Admin.*
19 *Officer of the OSHA*, 135 Nev. 140, 143, quoting *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814
20 (No. 86-692, 1992) (discussing federal OSHA criteria).

21 Here, Mr. Casey told the inspector that the windmill letter press machine's main belt guard
22 was missing for a couple of weeks. See, State's Exhibit 1, p. C15, *see also*, Tr., p. C34;9-19. Mr.
23 Casey testified that the guard had to be removed to access some part which was beneath the belt
24 guard. See, Tr., p. 138;12-22. However, the guard had been off for a couple of weeks to find the
25 part. See, *Id.* Even if the guard had only been missing for a couple weeks, Mr. Casey knew that the
26 belt, lacking protection from ingoing nip points would turn. See, Tr., p. 137;15-24. Therefore, the
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28 ⁷Mr. Barba testified that he did not believe Windmill Press #2 would operate after being plugged in
because he had never done so. His testimony was that he manually circulated the belt in order to access any
needed parts. See, Tr., pp. 101;22-24, 102,1-8.

1 State established that the employer had the requisite knowledge to establish this element.
2 Accordingly, the State established its *prima facie* case that Creative Printing violated 29 CFR
3 1910.212(a)(1).

4 **ORDER**

5 It was moved by Board Member Hollis to uphold the citation and penalty. *See, Tr., p.*
6 *180;13-14.* The motion was seconded by Board Member Fullerton. *See, Tr., p. 180;15;17.*
7 However, during the discussion of the motion Board Member Hollis decided that he was concerned
8 about the amount of the penalty and withdrew the motion. *See, Tr., p. 183;3-5.* Board Member
9 Fullerton then moved to uphold the citation with a reduced penalty of \$2,000. *See, Tr., p.183;6-10.*
10 The motion was seconded by Board Member Bautista. *See, Tr., p. 183;17-20.* The motion was
11 approved upon a vote of four in favor and one in opposition. *See, Tr., p. 183;22-23.* Accordingly,
12 the State Occupational Safety and Health Board of Review hereby approved the citation with
13 assessed against Creative Printing with a penalty in the amount of \$2,000.

14 This is the Final Order of the Board.

15 IT IS SO ORDERED.

16 On December 12, 2024 the Board convened to consider adoption of this decision, as written
17 or as modified by the Board, as the decision of the Board.

18 Those present and eligible to vote on this question consisted of the 5 current members of the
19 Board, to-wit, Jorge Macias, Chairman, William Spielberg, Secretary and Members Scott Fullerton,
20 Tyson Hollis and Gled Bautista. Upon a motion by William Spielberg, seconded by Gled Bautista,
21 the Board voted 5-0 to approve this Decision of the Board as the action of the Board and to
22 authorize Chairman Jorge Macias, after any grammatical or typographical errors are corrected, to
23 execute, without further Board review this Decision on behalf of the Nevada Occupational Safety
24 and Health Review Board. Those voting in favor of the motion either attended the hearing on the
25 merits or had in their possession the entire record before the Board upon which the decision was
26 based.

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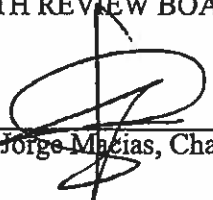
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On December 12, 2024 this Decision is, therefore, hereby adopted and approved as the Final Decision of the Board of Review.

Dated this 23rd day of December, 2024.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: 

Jorge Macias, Chairman

NOTICE: Pursuant to NRS 233B.130, any party aggrieved by this Final Order of the OSHA Review Board may file a Petition for Judicial Review to the District Court within thirty (30) days after service of this Order.

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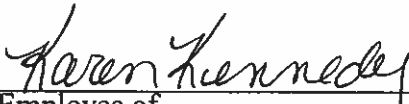
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I 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, *Decision and Order of the Board, Findings of Fact and Conclusion 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:

Salli Ortiz, Esq.
DIR Legal
1886 College Pkwy., Suite 110
Reno City, NV 89706

Jeff Casey
6415 Karns Park Court,
Las Vegas, NV 89118

Dated this 3rd day of January, 2025.



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

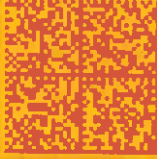
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