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OSHA REVIEW BOARD
BY A. 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. LV 19-1990

Inspection No. 1356344

Complainant,

vs.

**SOFIDEL AMERICA CORP. dba
SOFIDEL AMERICA,**

Respondent.

DECISION OF THE BOARD

This matter came on for hearing before the Nevada Occupational Safety and Health Board of Review on July 11, 2019. The deliberations and disposition of the matter also took place on the same date of July 11, 2019.

The hearing was conducted in furtherance of the notice duly provided according to law. Salli Ortiz, Esq., appeared on behalf of the complainant, Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations (the "State" or "OSHA"). William Curphey, Esq., Curphey & Badger, 25400 U.S. Highway 16 North, Suite 236, Clearwater, FL and Allison Kheel, Esq., Fisher Phillips, 300 South Fourth Street, Suite 1500, Las Vegas, NV appeared on behalf of the respondent, Sofidel American Corp. dba Sofidel America ("Sofidel").

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1 The Board of Review members in attendance, throughout this matter, were Rodd Weber,
2 Secretary and Acting Chairperson, Frank Milligan, member and Jim Halsey, member. Tr., p. 3.
3 There being three members of the Board present to hear this matter with at least one member
4 representing management and one member representing labor in attendance, a quorum was present
5 to hear the matter and conduct the business of the Board.

6 Jurisdiction is not disputed and is conferred with NRS 618.315. Also, a complaint may be
7 prosecuted which arises before or during an inspection of the employer's workplace. See, NRS
8 618.435(1). And, Nevada has adopted all Federal Occupational Safety and Health Standards which
9 the Secretary of Labor has promulgated, modified or revoked and any amendments thereto and shall
10 be deemed the Nevada Occupational Safety and Health Standards. See, NRS 618.295(8).

11 The State's complaint sets forth the allegations of the citations the State claims, constitute
12 violations of the Nevada Revised Statutes and Regulations. At the outset of the hearing, the State
13 offered for admission into evidence, Evidence Packet for the Division of Industrial Relations,
14 Exhibit 1, consisting of pages 1 through 90 and exhibit 2 of the evidence packet consisting of pages
15 91-156. The exhibits were admitted into evidence over the objection of Mr. Curphey as to pages 21
16 through 26 and pages 90 and 142. Tr., pp. 13, 17, 18. Sofidel offered no exhibits for admission into
17 evidence at the outset of the hearing but during the course of the hearing offered photographs
18 consisting of exhibits A through G which were admitted without objection. Tr., pp. 44, 49.

19 Briefly, the respondent in this case, Sofidel, is a mass producer of toilet paper on a grand,
20 commercial scale. Tr., p. 21. In the production of toilet paper, Sofidel employs a high speed roller or
21 embosser, manufactured by Fabio Perini, Tr., p. 74;1-2. The embosser model used in this matter is
22 called a Constellation Rewinder. Tr., p. 137;7-9. Because of breaks in the rolls of toilet paper being
23 embossed, Sofidel's employees are occasionally required (ten times in a day) to work around the
24 embosser, with the gates opened, exposing the employees to the NIP point where the paper passes
25 through the rollers while being embossed.

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1 29 CFR 1910.212(a)(1) provides:

2 Types of guarding. One or more methods of machine guarding shall be provided to
3 protect the operator and other employees in the machine area from hazards such as
4 those created by point of operation, ingoing NIP points, rotating parts, flying chips
and sparks. Examples of guarding methods are: barrier guards, two-hand tripping
devices, electronic safety devices, etc.

5 The "etc." portion of the Regulation is no where defined.

6 Sofidel's attempt at compliance with these guarding requirements involving the NIP points
7 on the embosser consisted of a combination of locked doors, gates, inter-locks, a jogging button and
8 protocol, an emergency button, verbal and visual cues, hand signals, varying speeds of the rollers
9 and the training of personnel. The system was not fool proof because an employee interacted with
10 the rollers resulting in a partial amputation of his right hand. The question in this case becomes
11 whether there was a breakdown in the system resulting in the partial amputation of the right hand of
12 Sofidel's employee, which is an actionable offense against Sofidel. The State alleged a violation of
13 29 CFR 1910.212(a)(1) in Citation 1, Item 1, calling it a serious offense for which a penalty of
14 \$5,670 was sought, giving due consideration to the probability, severity and extent of the violation,
15 the employer's history of previous violations and the employer's size and good faith.

16 In addition, the State alleged that Sofidel in Citation 2, Item 1, called "other," violated 29
17 CFR 1904.32(a)(1). This Regulation provided as follows:

18 Basic requirement. At the end of each calendar year, you [the employer] must review
19 the OSHA 300 Log to verify that the entrees are complete and accurate, and correct
any deficiencies identified.

20 No penalty was proposed for Citation 2, Item 1.

21 Finally the State alleged in Citation 2, Item 2, a violation of 29 CFR 1910.132(d)(2), which
22 provides:

23 The employer shall verify that the required workplace hazard assessment has been
24 performed through a written certification that identifies the workplace evaluated, the
25 person certifying that the evaluation has been performed, the date(s) of the hazard
assessment, and which identifies the document as a certification of hazard
assessment.

26 The State or complainant classified the violation of Citation 2, Item 2, as an "other" violation. No
27 penalty was proposed for Citation 2, Item 2.

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1 Pursuant to NAC 618.788, the burden throughout is upon the State or complainant to prove
2 the three Citations. For each Citation, the State must prove a *prima facie* case which entails a
3 showing of: (1) the applicability of the OSHA regulation to the matter at hand; (2) non-compliance
4 with the OSHA regulation; (3) employee exposure to the hazardous conditions, the subject of the
5 OSHA regulation; and, (4) the employer's actual or constructive knowledge of the wrongful conduct.
6 *See, Original Roofing Company, LLC. v. Chief of Administrative Officer of the Occupational Safety*
7 *and Health Administration*, 442 P.3d 146, 149 (2019).

8 The Board of Review concludes that the State has met this burden in the prosecution of
9 Citation 1, Item 1. The Board dismissed, however, Citation 2, Item 1. Tr., p. 22. The Board voted to
10 uphold Citation 2, Item 2, with no fine. Tr., p. 27.¹

11 FINDINGS OF FACT

12 This matter came to the attention of State OSHA upon a referral by the employer, Sofidel, of
13 an incident that took place on September 14, 2018, Exhibit 1, p. 29, at Sofidel's premises located at
14 315 North Las Vegas Boulevard, Las Vegas, Nevada. Tr., p. 25;1-5.

15 The overt incident occurred when the paper spooling through the Constellation embosser
16 jammed. Three Sofidel employees, Geovanay Hernandez, the injured worker, Joanny Rodriguez,
17 the jog operator, and Tony Chavez, convened to service the machine by starting the paper flowing
18 through the embosser, again. Holes on occasion appear in the paper being embossed by the high
19 speed Constellation, Tr., p. 39;16, which can cause a paper jam and stop the embosser. Employees
20 must access the paper jam to relieve the problem. The job for Hernandez and Chavez was to feed
21 the paper into the rollers. Mr. Rodriguez's job was to stand by the door to the room where the
22 embosser was situated, peer into the room and operate the jog button to jog the machine to get the
23 paper fed.

24 During the time after the paper had been fed into the rolls, at some point, Mr. Hernandez
25 must have noticed that the paper was bunching up or not feeding correctly. He reached into the
26 embosser to smooth the paper on its way into the rollers. He did this while the paper was being
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28 ¹"Tr." refers to the transcript of the Evidentiary hearing "2Tr." refers to the transcript of the deliberations.

1 jogged by Mr. Rodriguez. That is, the rollers and paper were in motion as he reached into the area
2 to adjust the paper. His hand was sucked into the roller.

3 Mr. Hernandez yelled to stop the machine. Eventually, they caught Mr. Rodriguez'
4 attention and he stopped the machine. At that point, it was too late. Mr. Hernandez was already
5 injured as Mr. Rodriguez and Mr. Chavez helped to pull Hernandez's hand out of the rollers. Tr., p.
6 28;1-16.

7 According to Mr. Chavez, he was in the machine with Mr. Hernandez while they were re-
8 threading the machine. Mr. Chavez claims that two people are required because of the width of the
9 sheet. Mr. Rodriguez was the one on the jog button and he was outside the cage. Mr. Chavez was
10 fixing the rolls with Mr. Hernandez to his left and Mr. Rodriguez then would be to his right.

11 Apparently Mr. Hernandez reached into the embossing rollers. Mr. Chavez did not see it but
12 he heard Mr. Hernandez scream and yell to stop the machine. Mr. Chavez then yelled to Mr.
13 Rodriguez to stop the jogging machine. According to Mr. Chavez this happened quite quickly. Tr.,
14 pp. 31;18-24, 32;1-13.

15 According to Mr. Hernandez, the paper broke and he and Mr. Chavez went to the machine to
16 re-thread the paper. Mr. Rodriguez was outside the cage using the jog button. Tr., p. 36;21-25.

17 Mr. Hernandez felt that Mr. Rodriguez was talking to someone outside of the unit while Mr.
18 Chavez and Mr. Hernandez were doing the re-threading. Mr. Hernandez claims he told the jogger,
19 Mr. Rodriguez, to stop jogging, so he could fix the paper. Without waiting for Mr. Rodriguez to
20 stop the machine, Mr. Hernandez reached in while the machine was still moving and caught his
21 hand. He yelled for Mr. Rodriguez to stop the jogging machine. Tr., p. 37;1-6, Exhibit 1, pp. 17, 18.

22 According to Mr. Hernandez, he had re-thread the machine about ten times. Re-threading
23 was a common occurrence. There are holes in the paper that can cause the tear necessitating the re-
24 threading of the rolls. Exhibit 1, pp. 15, 17, 18. According to Mr. Hernandez, re-threading paper
25 was a common part of his job. Tr., p. 39;18-20. Mr. Rodriguez was an operator-winder at the time
26 of the incident. Tr., p. 40;10. Mr. Rodriguez claims that when he heard yelling, "stop," "stop," he
27 immediately pressed the jog button to stop the machine." Tr., pp. 116; 6-12, 118;23-25, 119;1-3.

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1 Mr. Rodriguez claims that Mr. Hernandez was in charge of the process because he was the
2 one operating it. Mr. Rodriguez stated he was in charge of the machine. Tr., p. 116;18-25.

3 In this instance, Mr. Rodriguez was at the door to the room where the embosser was situated,
4 operating the jog button and the emergency button. Mr. Hernandez and Mr. Chavez were in the
5 room adjacent the embosser with the gate to the embosser opened and while the embosser was
6 operating at a jogging speed. Mr. Hernandez was closest to the embosser having placed his hand at
7 the NIP point of the rollers, the result of which was that his hand was dragged into the NIP point of
8 the rollers, thereby suffering a laceration and a partial amputation of his right hand. See, photo,
9 Exhibit 1, pp. 88-90.

10 Mr. Rodriguez testified that if the paper needs to be removed, a person such as Mr. Hernandez,
11 is supposed to tell Mr. Rodriguez, operating the jog button, to stop the machine before anyone
12 attempts to retrieve the paper. Tr., p. 119;22-23. Mr. Rodriguez claimed it was wrong for Mr.
13 Hernandez to reach inside the machine. Tr., p. 124;2-3.

14 According to Edwin Lopez, a Sofidel shift leader, and supervisor, Tr., p.163;22, when the
15 machine is jammed and operating on the real slow mode of jogging, there is no reason for anyone to
16 put their hand in the machine by the rollers. That's why there are jogging belts to take the paper
17 across to the other side of the door. Tr., pp. 175, 176.

18 As indicated, the embosser was a Constellation re-winder. It operates in an enclosed
19 environment (a room). See, photos, Exhibits A through F. Access to the enclosed area is limited to
20 a door adjacent to which is located the jogging button and the safety switch. See, photos, Exhibits
21 A-G. If the machine is at operating speed and the door to the embosser is opened, the speed of the
22 embosser is reduced from operating speed to the first jogging speed level.

23 Once inside the enclosed area, there are a screen and gates which separate employees from
24 the embosser itself. When the gate is opened, the embosser reduces speed again. There are,
25 therefore, three speeds to the embosser, one being the operational speed which exists when the door
26 and gates are closed. When the door is opened and the gates are closed there is a reduced jogging
27 speed. When both the door and the gates are opened, there is a further reduction in the jogging
28 speed. The operational speed is super fast. The jogging speed for when only the door is open is 5

1 meters per second. Tr., p. 136;2-4. The jogging speed when both door and the gates are opened is 1
2 meter per second. 135;21-24. See also, Exhibits A through F.

3 When the jog button is depressed, see, Exhibit F, an alarm sounds for about 3-4 seconds to
4 warn that the jogging process is beginning and the rollers will start to move. Tr., p. 139;3-8. If, at
5 any point, the jogging operator removes his finger from the jog button, the embosser stops
6 immediately. Tr., p. 139;11-12.

7 The embosser includes an inter-lock device that, when it is together, makes contact and
8 allows the machine to run at operating speed. Tr., p. 54;21-24. The inter-lock is tied into the gates.
9 When the gates are opened, the inter-lock is opened and it inhibits the machine limiting it to running
10 in a jog mode, only. Tr., p. 54;6-13. As long as the door is opened and remains open and the inter-
11 locks are not in contact, the embosser can run only in jog mode. Tr., p. 55;5-7.

12 To re-thread the toilet paper into the machine, there are strips that are attached to the parent
13 roll. They are glued onto the parent roll paper and that's what is fed into the rollers and that pulls the
14 sheet down evenly across the entire width to ensure or attempt to make it feed to the rollers. Tr., p.
15 68;9-21. The strips are then fed into the rollers after which paper strips are jogged, pulling the sheet
16 into the embossing rollers but only after the employees have removed themselves from the direct
17 location. Tr., p. 60;6-11. Employees are suppose to be removed from the hazards. Tr., p. 59;18-25.

18 Therefore, as indicated, it is absolutely unnecessary to have one's hands in the vicinity of the
19 rollers as the jogging strips feed the paper into the rollers to be embossed. According to the report
20 generated by Sofidel of the incident: "It was found that the effective employee violated the
21 manufacturer's and Sofidel's America Policy, known work practices and procedures by placing his
22 hand in the NIP point while the machine was operating." Tr., pp. 80;23-25, 81;1.

23 On these facts, it is clear, where the NIP points on the rollers where Mr. Hernandez caught
24 his hand are located, there is no actual, physical guard to the machine. There are, to be sure, multi-
25 levels of physical protection from harm caused by the NIP points of the rollers. First, the embosser
26 is enclosed in a room, with access only through a door. Once through the door, and in the vicinity of
27 the location of an embosser, the embosser's NIP points are walled off by a screen. With the gates to

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1 the screen closed, there is no physical way one can access, intentionally or unintentionally, the NIP
2 points.

3 If, however, the gates are open, and an employee is inside the screen, through the gates, there
4 is no physical barrier or guard, between the NIP point and personnel. There is full exposure, be it,
5 intentional or unintentional, to the NIP points. Access to the NIP points is physically possible.

6 That means, ultimately, protection or guarding from the NIP points consists of that which is
7 other than a physical barrier. Protection, it is beyond dispute, turns upon non-structural methods
8 such as coordination with the jogging button operator, self-control to refrain from stepping inside the
9 gates while the rolls are jogging, self-control to keep from reaching into the roller area, rock solid
10 training, to cause employees to exercise self-control, being careful where one is standing and placing
11 one's hands, hand signaling, focus and attention, and the like. These non-structural methods are
12 required to fill the void created by the fact that there is, indeed, ultimately, no physical guarding of
13 the NIP points by reason of the design of the equipment by Perini.

14 As 29 CFR 1210.212 (a)(1) imposes a duty to provide protection by guards or something
15 amounting to "etc.," it is incumbent upon Sofidel to fill the void. Chris Davis, who was at the time
16 Environmental Health and Safety manager for Sofidel, admits that OSHA requires that embosser
17 NIP points be guarded. Tr., pp. 128, 129, 134;16-19. What, then, did Sofidel do to adequately fill
18 the void created by the ultimate lack of a structural barrier? Or, was the injury, the product of a
19 rogue employee or employees? The State never claimed the absence, ultimately, of a physical guard
20 over the NIP point was, itself, a violation by reason of a design flaw. Given that the regulation
21 includes "etc.," as a means of guarding, it would be difficult to cite Perini for a design devoid of a
22 physical barrier, alone. What, then, do these findings of fact to show regarding fault, if any,
23 according to Citation 1, Item 1.

24 According to Sofidel the NIP point was guarded. Sofidel claims:

25 This NIP point is guarded by Letter. There was the Letter of Interpretation as far as
26 the NIP point, not only is the gate suppose to remain opened during the jog process,
27 but also the Letter of Interpretation also states that an employee, during two rollers,
should pull from the bottom side not the entry side, the return side of the NIP point.
Tr., pp. 134;21-25, 135;1-3.

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1 The Letter of Interpretation, however, was never produced by any of the parties to this
2 matter. Without something more than this, the Board finds this Letter is no reason to conclude that
3 the void created by the lack, ultimately, of a physical barrier has been filled to protect against the
4 NIP points.

5 As a result of the incident, Mr. Hernandez was disciplined. Sofidel gave him a final notice or
6 warning of violation. The final notice means another notice of violation will result in termination.
7 Tr., p. 132;21-25. Mr. Hernandez was not docked any pay, suspended or otherwise disciplined as a
8 result of the incident. No discipline was meted out to either Mr. Rodriguez or Mr. Chavez as a result
9 of this incident.

10 According to Mr. Davis, Tr., pp. 128, 129, what should have happened when re-
11 threading the machine was that the employees are trained to keep the gate opened and they are to
12 maintain contact with the employee, the person in the position of Mr. Hernandez, who was to be
13 clearing the jammed paper. Employees are to keep verbal, visual and audible contact with each
14 other and the person operating the jogging button. Those inside the gate are to keep their hands in
15 the air to let the jogger operator know when they have cleared the machine. Tr., p. 138;12-23.

16 If a rewind is an issue like that which happened during the course of this incident,
17 employees are to notify the person operating the jog button to stop the jog process. Only after the
18 jog process has stopped, may employees enter the machine and pull the paper out from the non-feed
19 side of the roll. The jog is not to continue until the employee steps back outside the gate. This
20 gives the employee space from the point of injury and hands are to be raised again. Tr., p. 138;12-23.

21 The Board accordingly finds, as Sofidel admits, that no employee should be inside the gate
22 adjacent the embosser while the embosser is operating, even if only in the jogging mode. Tr., p.
23 164;5-23. The Board finds further, it is equally basic that no hands should be required to guide
24 paper into the rollers and, thus, up to the NIP point, because of the jogging strips. They are to be
25 attached to the paper to thread it through the machine. Sofidel's management concedes the point.
26 Tr., p. 174;13-18.

27 According to Mr. Hernandez's written statement he gave after the incident, he claims that Mr.
28 Rodriguez was talking to someone (a morning supervisor) at the same time as Mr. Hernandez told

1 Mr. Rodriguez to stop jogging the machine so he could fix the paper. According to Mr. Hernandez,
2 Mr. Rodriguez didn't hear me and kept jogging and that's when Mr. Hernandez's hand got caught.
3 Exhibit 1, pp. 17-18.

4 Mr. Hernandez claimed he screamed for Mr. Rodriguez to stop but Mr. Rodriguez still didn't
5 hear him. Mr. Chavez started to scream at Mr. Rodriguez too, according to Mr. Hernandez written
6 statement. That's when Mr. Rodriguez finally stopped the machine. There is no reverse of the
7 machine according to Mr. Hernandez but the rollers open up when the "stop" is pressed. Exhibit 1,
8 p. 17. According to Mr. Hernandez, if Mr. Rodriguez was watching Mr. Chavez and Mr.
9 Hernandez work, like Mr. Rodriguez is suppose to be doing, Mr. Hernandez doesn't think that this
10 would have happened. Mr. Hernandez places the blame on the jog button operator who he claims
11 was distracted. Exhibit 1, p. 18.

12 If Mr. Hernandez version of the events is true, the Board finds that there was a clear lack of
13 attention paid by Mr. Rodriguez to what was happening inside the cage with Mr. Hernandez. The
14 Board finds, however, no reason to doubt Mr. Hernandez version of the incident. No matter what
15 version of the incident is considered, the Board finds that none of the versions given come close to
16 approximating Mr. Davis' description of what he claims should have happened and what he claims
17 employees were trained to handle these kind of situations.

18 Further, Sofidel, through Mr. Davis, contends in Mr. Davis investigation report:

19 It was found that the effected employee violated the manufacturer's and Sofidel
20 America policy, known work practices and procedures by placing his hand in the NIP
point while the machine was in operation. Tr., pp. 80;23-25, 81;1.

21 Mr. Hernandez admitted that he experienced other incidents like the instant situation at work.
22 His right arm was dislocated while threading paper. He also had a laceration on his right hand. Mr.
23 Hernandez had no retraining, he claims, after either incident. Exhibit 1, p. 18. According to Mr.
24 Hernandez, the training received was on the job training (OJT), which he thought was fine. The
25 problem, according to Mr. Hernandez, is that people don't pay attention, they need to concentrate
26 instead of looking somewhere else. Exhibit 1, p. 18.

27 Though Mr. Hernandez had been injured in similar situations, Sofidel, itself, was unsure if
28 Mr. Hernandez had been retrained after those incidents. Sofidel concedes that whatever training Mr.

1 Hernandez may have received was not documented. Tr., p. 29;12-17. According to Mr. Chavez, he
2 was unaware whether other people had been retrained after incidents. Tr., p. 33;19-20. The Board
3 finds that Sofidel produced no credible evidence of a comprehensive training program for its
4 employees working in and around the embosser.

5 There is confusion concerning whether supervision was present during the course of the
6 incident. According to Steve Pupp, the State's safety inspector on this case, Tr., p. 23, Mr.
7 Hernandez was not the supervisor of this operation. Tr., p. 79;16-18. Mr. Pupp stated that a
8 supervisor should have been present according to the manufacturer's directions. Tr., p. 79;20-23.
9 According to James Ruiz, the Director of Environmental Health and Safety, Tr., p. 153;13-14, at the
10 time of the hearing, Mr. Rodriguez was an operator, not a supervisor. Mr. Ruiz was uncertain
11 whether Mr. Chavez was a supervisor. Tr., p. 160. Mr. Ruiz labeled Mr. Hernandez as the "effected
12 employee." Tr., p. 160.

13 On the other hand, according to Edwin Lopez, a Sofidel supervisor as a shift leader, Tr., p.
14 163; 22, Mr. Chavez was a supervisor. So was Mr. Hernandez because he's the one in charge, he's
15 the one that knows how to operate the machine. So all of this should have been known by passing
16 the paper on the jogging belt, according to Mr. Lopez testimony. Tr., p. 175;10-20. Supervision,
17 therefore, appears to be a question of who's on first, Mr. Hernandez or Mr. Chavez or both.

18 The instructions for the embosser from Perini contemplate that a supervisor would be in
19 charge. And the person supervising the operation would be the person operating the jog button. In
20 this instance, that should have been Mr. Rodriguez. The directions also contemplate that the
21 employees must be out of the hazardous area before jogging is allowed to commence. Tr., pp.
22 74;23-25, 75;1-17. This entire operation failed, Sofidel admits, because Mr. Rodriguez, who was
23 operating the jog button, was not a supervisor in charge of the operation. According to Mr. Davis:
24 "The injured employee as the rewinder operator had the responsibility of controlling the line and the
25 entry of others into the machine and workplace." Tr., p. 79;2-6, quoting Mr. Davis's investigative
26 report. Exhibit 1, p. 132.

27 The Board finds that persons in the capacity of a supervisor, however, were present
28 according to Mr. Ruiz and Mr. Lopez. The Board also finds that the supervision was ineffectual and

1 someone other than as contemplated by Perini, the manufacturer of the machine. According to
2 Perini, the supervisor should have been Mr. Rodriguez, the jog button operator. According to Mr.
3 Davis from Sofidel, it should have been the effected employee, Mr. Hernandez. The Board finds a
4 situation where the lines of communication and control were muddled.

5 Based upon the foregoing, the Board finds that when the gates to the embosser are open,
6 there is no physical barrier preventing access to the NIP points. And, the Board finds as a matter of
7 fact, the embosser system is so designed that when the gates are open, the rollers are in motion,
8 albeit in jog speed but in motion nonetheless.

9 The Board finds, also, as a matter of fact that Sofidel concedes that OSHA requires the NIP
10 points are to be guarded. Tr., p. 134;16-19.

11 The Board finds as a matter of fact, further, that Sofidel agrees that it was a serious violation,
12 if there was a violation of 29 CFR 1210.212(a)(1)m Citation I, Item 1. Tr., p. 88;3-5.

13 Sofidel concedes that it employs non-physical means to provide guarding for when the gates
14 to the embosser are open and employees are in the room where the embosser is located and there is
15 an issue with the toilet paper that is otherwise supposed to be flowing through the machine to be
16 embossed. The non-physical means of guarding employed by Sofidel include training, visual cues,
17 audio cues, use of the jogging button, use of an emergency stop switch and the deployment of
18 supervisory personnel. Sofidel also employs facial guarding, hand-signals, discipline and speed
19 control as means of protection for the employees.

20 Sofidel deploys these non-physical means of guarding once the gates are open to the
21 embosser to satisfy the “etc.,” portion of 29 CFR 1210.212(a)(1). Tr., p. 147;19-23

22 Sofidel employs these non-physical measures to fill the void created by the absence of
23 physical barriers or guards to the NIP points. Sofidel failed to provide non-physical means of
24 guarding the NIP points on the embosser because:

25 1. If there was a progressive disciplinary system, it was ineffectively applied. Mr. Chavez
26 and Mr. Rodriguez were not disciplined for their role in the incident, Tr., p. 152;12, Tr., p. 152;15-
27 17. and Mr. Hernandez was only given a warning. He was not suspended, docked pay, or demoted
28 for a serious violation of company policy and the Federal Regulations. On the issue of knowledge it

1 includes that Mr. Hernandez had been reprimanded and received a verbal warning and the warnings
2 were not recorded nor written down and Hernandez indicated he had never been retrained for any of
3 these warnings. Tr., p. 94;18-23.

4 2. Training was indifferent. Generally speaking, employees are not trained following
5 incidents like the present. And, if they were, there is no record.

6 3. Management at Sofidel knew or should have known of the serious issues with the
7 embosser based upon the fact that Mr. Hernandez had suffered serious injury in the past, working
8 the embosser.

9 4. Management should have been alerted to the protection/guarding issue because the re-
10 winding of paper in the embosser is a common experience. Relevant to information regarding
11 employer knowledge was the fact that Mr. Hernandez had recently been reprimanded for using a
12 similar machine, even though it was a different location. And he was doing similar tasks in 2016.
13 Tr., p. 92;25. 93;1-5.

14 5. There is no clear line of authority as evidenced by the confusion as to whether Mr.
15 Hernandez, Mr. Chavez, or both were in charge and, according to Perini, the job button operator,
16 Mr. Rodriguez, should have been the supervisor. As it turned out, Mr. Rodriguez was distracted,
17 talking to someone instead of paying attention to Mr. Hernandez, adjacent the embosser.

18 The Board finds and concludes that Sofidel did not adequately fill the void created by the
19 absence of a physical barrier to the roller NIP points.

20 For Citation 2, Item 1, the OSHA 300 log violation, the State concedes that the violation is
21 beyond the six month statute of limitations. The State was unable to answer why it issued a Citation
22 for an incident that was beyond the six month's statute of limitations. Tr., pp. 103;25, 104;1-5.

23 Also, with respect to Citation 2, Item 1, 29 CFR 1904.32(a)(1), Sofidel should have known
24 that the OSHA 300 logs were incomplete and inaccurate because the OSHA log itself gives
25 instructions that tells Sofidel or the employer exactly how to complete the OSHA 300 logs. No one
26 from Sofidel management offered an explanation as to why the standard was not being followed and
27 Sofidel gave no indication as to why they were not following the instructions. Tr., p. 99;10-22.

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1 For Citation 2, Item 1, the OSHA 300 logs are for the years 2015-2016 and 2017. The
2 Citation is, therefore, more than six months beyond the dates of the logs. Tr., pp. 103;25, 104;1-5.

3 Regarding Citation 2, Item 2, 29 CFR 1910.132(d)(2) requiring a hazard assessment to be
4 certified by someone on behalf of Sofidel, no one from Sofidel offered an explanation as to why this
5 part of the form was not completed. Tr., p. 102;15-18. 29 CFR 1610.132(d)(2) is the standard
6 which is applied to ensure that the hazardous assessment was certified as required. Tr., p. 100;1-7.
7 In fact, the hazardous assessment was not certified.

8 To the extent any of the Conclusions of Law below, constitute findings of fact or mixed
9 findings of fact and conclusions of law, they are incorporated herein.

10 **DISCUSSION**

11 The State has clearly shown a violation of 29 CFR 1910.212(a)(1). On its face, the
12 Regulation applies to this case. It requires guarding for employees against in-going NIP points and
13 rotating parts. Both exist with the rewinder embosser. There are NIP points, as the photos show,
14 and rotating parts, the rollers. Both pose, as Sofidel concedes, serious hazards to employee health.

15 The Regulation was also clearly violated. Employers must provide guarding to protect
16 against NIP points and rotating parts. It is undisputed, there was no physical barrier between
17 employees and the NIP points and rollers while they were active and the gate to the embosser was
18 open.

19 Given the mandatory language of Regulation, it is incumbent upon Sofidel to either provide a
20 form of acceptable physical guarding or some other, non-structural partition, given the usage of the
21 term "etc." in the Regulation. Sofidel chose to fill the void created by the absence of a physical
22 guard though the deployment of a combination of training, discipline, supervision, visual cues,
23 audible cues, hand signals, and the like as further enumerated in the Findings of Fact.

24 The Board concludes that Sofidel's non-physical guarding did not fill the void created by the
25 absence of an actual structural guard. That is, Sofidel did not, as the Regulation requires, provide
26 guarding against exposure to the NIP points and rollers. The Board reaches this conclusion
27 principally because the efficacy of the non-physical means of guarding chosen by Sofidel relies upon
28 adequate training and a meaningful form of progressive discipline. As enumerated in the Findings

1 of Fact, the training of personnel was indifferent, at best. For example, despite multiple incidents
2 involving Mr. Hernandez and the embosser, he could not recall if he was ever retrained after the
3 incidents. And, Sofidel relied upon OJT to train personnel but had no record of the training given.
4 The overt incident of this case was an accident waiting to happen. The Regulation requires more.
5 There is little proof of any serious attempt by Sofidel to ingrain safety first into the minds of its
6 employees. Sofidel violated the Regulation. *See, Original Roofing, supra*, at 150, for an example of
7 adequate training. The training described here pales in comparison.

8 Proof of a *prima facie* case also requires proof that employees are exposed to the hazardous
9 conditions. Mr. Hernandez' statements and Mr. Chavez' and Mr. Rodriguez' testimony make
10 abundantly clear employees were exposed to the hazardous conditions. Mr. Hernandez was adjacent
11 to the embosser rollers and NIP points, without any barrier between him and the rotating rollers and
12 NIP points. Moreover, the exposure was repetitious. Mr. Hernandez said, he had to fix paper jams
13 10 times on the day of the incident. And, previously, he had multiple run-ins with the embosser.
14 Hazardous exposure is shown.

15 Last, the *prima facie* case requires proof the employer had actual or constructive knowledge
16 of the wrongful conduct. This element is also well established in many ways, beginning with Mr.
17 Hernandez' repeated and long history of incidents like the present involving the embosser. Mr.
18 Hernandez had recently been reprimanded for using a similar machine even though it was at a
19 different location. He was performing tasks in 2016, similar to the instant incident. *Tr.*, pp. 92;25,
20 93;1-5.

21 Knowledge may also be established by imputing the knowledge of supervisors to
22 management in order to hold employers to account for unsafe conditions. *See, Original Roofing*
23 *Company, supra* at 149, 150.. The Board has found that there was supervisory presence while the
24 incident unfolded. Mr. Rodriguez should have been the supervisor. Mr. Chavez was a supervisor
25 while the incident took place before his eyes. He could and should have shut things down. Mr.
26 Hernandez was another supervisor. He should and could have shut things down, as well. He,
27 however, more than the others, committed malfeasance. It would be unfair to make an employer
28 vicariously liable based upon the misconduct of its own supervisor, except when the training

1 accorded the supervisor was so inadequate, that the supervisor's malfeasance would also be
2 reasonably foreseeable. *Original Roofing, supra* at 150, 151. *See, also, ComTran Group v. Dep't of*
3 *Labor*, 722 F. 3d. 1304, 1316 (2013).

4 That is the case, here, because as discussed, elsewhere, the training was so indifferent, the
5 Board finds it would well be foreseeable that Mr. Hernandez, Mr. Chavez, or Mr. Rodriguez would
6 fail to observe guarding requirements intended to provide for their safety. Moreover, as indicated
7 above, there is a long history of repeated serious injury incidents akin to the present. It is therefore
8 not unreasonable to impute knowledge of the dangerous conditions to Sofidel.

9 Of course, it might also be claimed, the injury was actually the product of the employees
10 themselves. They were rogue employees. This affirmative defense, however, rises and falls on a
11 showing that the employer deploys an adequate progressive discipline system. And, the defense
12 requires proof, employees were adequately trained so that they should know better than to act
13 improperly. *See, Royal Logging Co., 7 O.S.H. Cas. (BNA) 1744, 1751, (Rev. Comm'n 1979), aff'd*
14 *645 F.2d 822 (9th Cir. 1981).*

15 Both elements fail for Sofidel, here. As discussed, training was indifferent, and the
16 progressive discipline system was weak. The Board concludes the rogue employee affirmative
17 defense fails.

18 Aside from claiming that there was no violation of Citation 1, Item 1, Sofidel did not
19 seriously challenge this Citation. It concedes that if there were a violation, it was serious. Tr., p.
20 88;5. The Board accordingly concludes that the State also established that the probability of
21 reoccurrence was great and the violation was grave. Mr. Hernandez and Mr. Chavez were at
22 significant risk. A fine of \$5,670, without deduction is appropriate.

23 With respect to Citation 2, Item 1, 29 CFR 1904.32(a)(1), the OSHA 300 logs, it is
24 undisputed, the allegations involve the adequacy of the OSHA 300 logs took place more than six
25 months prior to the filing of the complaint before the Board for Citation 2, Item 1. Tr., pp. 103;25,
26 104;1-5. Accordingly, Citation 2, Item 1 must be dismissed. It is barred by the six month statute of
27 limitations. *See, AKM, LLC. v. Secretary of Labor*, 675 F.3d 752 (D.C. Cir. 2012).

28 ///

1 On January 13, 2021, the Board convened to consider adoption of this decision, as written or
2 as modified by the Board, as the decision and final order of the Board.

3 Those present and eligible to vote on this question consisted of 3 of the five current members
4 of the Board, to-wit, Secretary Rodd Weber, James Halsey and Frank Milligan. Upon a motion by
5 Rodd Weber, seconded by Frank Milligan, the Board voted 3-0-1 (Ingersoll abstaining), to approve
6 this Decision of the Board as the action of the Board and to authorize Rodd Weber, after any
7 grammatical or typographical errors are corrected, to execute, without further Board review, this
8 Decision on behalf of the Nevada Occupational Safety and Health Review Board.

9 On January 13, 2021, this Decision is, therefore, hereby adopted and approved as the
10 Decision of the Board of Review and the Final Order of the Board of Review.

11 DATED this 17th day of ^{February} ~~January~~, 2021.

NEVADA OCCUPATIONAL SAFETY AND
HEALTH REVIEW BOARD

12
13
14 By: 
15 Rodd Weber, Board Secretary

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1 **CERTIFICATE OF SERVICE**

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

7 Salli Ortiz, Esq.
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12 Curphey & Badger
13 36181 East Lake Road
14 Palm Harbor, FL 34685

15 Allison Kheel, Esq.
16 Fisher Phillips
17 300 South Fourth Street, Suite 1500
18 Las Vegas, NV 89101

19 Dated this 7th day of February, 2021.

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

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