United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Acting Secretary of Labor, Complainant, v. Sofidel America Corp., Respondent.	OSHRC Docket No. **23-0494**

Appearances:

Stephen M. Pincus, Esq.
Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio
For Complainant

J. Micah Dickie, Esq.
Fisher Phillips, LLP, Atlanta, Georgia
For Respondent

William E. Curphey, Esq.
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For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

INTRODUCTION

In 2022, Sofidel America Corp. (Sofidel or Respondent) operated a facility in Circleville, Ohio (worksite). (Ex. J-1 at 1). Sofidel utilized machine rollers, like the R88 Line Gambini Rewinder (R88 Rewinder), to make paper products such as toilet paper and paper towels at the worksite. (Ex. J-1 at 1). On September 21, 2022, a Sofidel employee sustained injuries while clearing jammed material from the R88 Rewinder. (Ex. J-1 at 1-2).

Sofidel reported the work-related injury to the Occupational Safety and Health Administration (OSHA), and OSHA then assigned a compliance safety and health officer (CSHO) to lead an inspection and investigation. (Tr. 308; Ex. J-1 at 2). The investigation concluded in February 2023 when OSHA issued to Sofidel a six-item serious and one-item other than serious Citation and Notification of Penalty (Citation) pursuant to section 9(a) of the Occupational Safety

and Health Act of 1970, 29 U.S.C. §§ 651–678 (Act). Sofidel timely contested the Citation and the proposed penalty pursuant to section 10(a) of the Act, thereby bringing the matter before the Occupational Safety and Health Review Commission (Commission) under section 10(c). (Ex. J-1 at 2-3).

The matter was assigned to the undersigned Commission Judge in June 2023, and in January 2024 a two-day evidentiary hearing was conducted in Columbus, Ohio. Post-hearing briefing was completed on April 8, 2024.

The Citation alleges violations of the general duty clause and health and safety standards relating to the use of personal protective equipment, control of hazardous energy, and recognition of applicable hazardous energy sources training. The Secretary withdrew Citation 1 Item 1 (the general duty clause violation), Citation 1 Items 2a and 2b, and Citation 1 Item 5 at the outset of the hearing. (Tr. 15-17). Remaining at issue are Citation 1, Items 3 and 4, as well as Citation 2, Item 1.

Citation 1 Item 3 alleges Sofidel violated the control of hazardous energy standard (known as "lockout/tagout" or LOTO) at § 1910.147(c)(4)(i), which provides: "Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section." The Citation alleges Sofidel violated § 1910.147(c)(4)(i), when it did "not ensure that the documented energy control procedure for the R88 Gambini ProFlex700 Unwinder machine was utilized while employees cleared jammed cores from the head unit and rewinder section of the machine" which "exposed employees to being caught-in/between rollers and in-going nip-points, and being struck-by/against sharp parts of the rollers and knives and guide plates." The Secretary proposed a penalty of $15,625 for Citation 1 Item 3, which alleges two instances of this violation, with instance "a" occurring on or about September 29, 2022, and instance "b" occurring on or about September 21, 2022.

Citation 1 Item 4, alleges a violation of § 1910.147(c)(7)(i)(A) of the LOTO standard, which provides: "Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control." As set forth in Citation 1 Item 4, Sofidel violated § 1910.147(c)(7)(i)(A), when it did "not ensure that each employee performing servicing and maintenance covered tasks on the R88 Gambini ProFlex700 unwinder machine…" "received training in the recognition of hazardous energy sources, the type and

magnitude of the energy in the workplace, and the methods and means necessary for energy isolation and control." The Secretary proposes a penalty of $15,625 for Citation 1 Item 4.

Citation 2 Item 1 alleges an other-than-serious violation of the general requirements standard at § 1910.132(d)(2), which provides: "The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the 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." The Citation alleges Sofidel violated § 1910.132(d)(2), when it did not "verify that the required personal protective equipment (PPE) workplace hazard assessment was performed through a written certification." No penalty was proposed for Citation 2 Item 1.

For the reasons set forth in detail below, Citation 1, Items 3 and 4 are **AFFIRMED** and a penalty of $15,625 is assessed each for Item 3 and for Item 4. Citation 2, Item 1 also is **AFFIRMED**. No penalty was proposed for Citation 2, Item 1, and none is assessed.

JURISDICTION AND COVERAGE

The parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to §10(c) of the Act. (Tr. 24; Ex. J-1 at 2-3; Resp't Br. at 2). Sofidel admits at all times relevant to this proceeding it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). (Ex. J-1 at 2-3). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act and Sofidel is a covered employer under § 3(5) of the Act.

STIPULATIONS

The parties reached the following stipulations which were entered into the record:

1. Respondent owns and operates a facility at 25910 US 23, Circleville, OH 43113 ("the worksite").
2. Respondent is an employer who was subject to the OSH Act on September 21, 2022.
3. Respondent makes paper products such as toilet paper and paper towels at the worksite.
4. Respondent utilizes a R88 Line Gambini Rewinder ("R88 Rewinder") in one of its production lines in its operations.
5. The accident giving rise to this litigation occurred on September 21, 2022, at the worksite.

6. Employee 1[1] was an employee of Respondent on September 21, 2022.

7. On September 21, 2022, an employee, Employee 1, went inside an interlocked door into the R88 Rewinder to clear jammed material.

8. A second employee, Employee 2, accompanied Employee 1.

9. Employee 2 operated the process controls to rotate the machine rollers while Employee 1 began to remove the jam by hand.

10. Employee 1's left hand was caught in a pinch point between a roller and a stationary guide plate on the rewinder head unit of the R88 Rewinder.

11. Employee 1 suffered a degloving injury to his left-hand involving avulsions to the thumb and palm area.

12. Neither Employee 1 nor Employee 2 was a manager or supervisor of Respondent on September 21, 2022.

13. As a result of Employee 1's accident, OSHA conducted an inspection of the worksite.

14. Lauren Eberts is the Compliance Safety and Health Officer who conducted the inspection following the accident which occurred on September 21, 2022.

15. OSHA issued a Citation and Notification of Penalty to Respondent as a result of its inspection.

16. Respondent timely filed a Notice of Contest regarding the Citation and Notification of Penalty in which it contested all issue[s] and matters relating to the Citations, including abatement dates and proposed penalties.

(Tr. 25-27; Ex. J-1).

BACKGROUND

Sofidel operates a manufacturing facility in Circleville Ohio which produces paper products such as toilet paper and paper towels. (Stip. ¶¶ 1, 3; Ex. J-1 at 1). The facility utilizes machines, such as the R88 Line Gambini Rewinder, to produce paper products such as toilet paper and paper towels. (Stip. ¶¶ 3, 4; Ex. J-1 at 1). The R88 Rewinder is located in the converting department of the facility. (Tr. 54-58, 62-63, 490; Exs. J-1 at 1, C-9 at 9). In the converting department, large paper rolls are delivered to production lines, the rolls are loaded onto an unwinder, then the paper is fed through the rewinder section of the machine. (Tr. 54-56; Ex. J-3).

1 To protect the identity of employees; all non-management employees will be referred to herein as "employee and number." The injured employee will be referred to as "Employee 1" or injured employee.

The paper is then transferred to an accumulator for storage, cut to the proper diameter or width, and ultimately sent for packaging. (Tr. 55).

The R88 Rewinder is used, in part, to unwind the large rolls of paper. (Tr. 55-56). Employees cannot enter the R88 Rewinder while it is operating because there is a wall surrounding the machine with doors, which are locked by an interlock. (Tr. 67; Ex. J-3). While the R88 Rewinder is operating, wrap-ups, jams, and paper breaks can happen for a variety of reasons. (Tr. 80, 82-84, 86-87, 223, 294-96, 376-77, 435; Ex. R-3).[2] These jams can happen a minimum of once an hour during the production process. (Tr. 84). When a jam occurs, the computerized control system will stop the R88 Rewinder. (Tr. 80-82, 130-31, 135, 295, 498-99). To clear a jam, machine operators will go inside the R88 Rewinder through interlocked doors. (Tr. 66-67, 71, 89: Ex. J-3). To enter the machine, the interlocked doors must first be unlocked and opened. (Tr. 476).

While the interlocked door is open, the R88 Rewinder can be jogged to help unjam the machine. (Tr. 134, 209, 214, 372, 485-86). Jogging the machine is running the machine very slowly forward in the same direction as normal production. (Tr. 121, 130, 145-46, 225, 257; Ex. J-2 at 5). Operators routinely use their hands and machine jogging function to unjam the machine. (Tr. 130, 187, 225, 335-38, 364, 435-36, 484, 501). To perform the jogging function, there is a control panel inside the R88 Rewinder with a jog button, reset button, emergency stop button, blue deceleration button, and a key. (Tr. 114-15, 277; Exs. J-2 at 4-5, C-9 at 7). Before the jog button can be used, the R88 Rewinder must be reset. (Tr. 120; Ex. J-2 at 4). When the jog button is pressed, an alarm sounds three times to notify the operator the machine's rollers are about to move forward at a reduced speed. (Tr. 120-22, 265). The machine can then be jogged forward while holding the jog button down. (Tr. 120-21, 145, 254, 439, 497-500). The R88 Rewinder also has a portable jog switch so employees can reach different parts of the machine and jog it as necessary by holding down the switch. (Tr. 122-24, 144-46, 254, 257; Ex. J-2 at 1, 5).

While the R88 Rewinder's jog button moves the machine's rollers forward in the same direction as normal production, its reverse button moves the rollers in the opposite direction. (Tr. 121, 146, 277). The reverse jogging function can only be performed by pressing the reverse jogging button on the control panel inside the R88 Rewinder. (Tr. 146-47, 254, 276-78, 292, 439-40; Ex. J-2 at 3-4). When the reverse button is pressed, no alarm sounds and the machine's roller

2 "Wrap-ups," "wraparounds," and "jams" will hereinafter be collectively referred to as "jams."

immediately moves. (Tr. 122, 235-36). The jog button and the reverse button are located near each other on the control panel. (Ex. J-2 at 4).

Sofidel

Employee 1 was working for Sofidel on September 21, 2022. (Stip. ¶ 6; Ex. J-1 at 1). At that time, Jacob Giammarino was a superintendent in the converting department. (Tr. 48, 52, 489). He reported to the production manager, George Stiles, who reported to the plant manager, Marco Lombardi. (Tr. 48, 52, 489). In September 2022, Randy Kuhner was the health and safety manager for the worksite, Joseph Frazier was the converting supervisor, and Boone Sabine was the maintenance manager for the worksite. (Tr. 159, 447-48, 480).

Sofidel considered only maintenance employees to be "authorized employees" as that term is defined in 29 C.F.R. § 1910.147(b). (Tr. 142, 164-66). All other employees in the converting department, including operators, were not required by Sofidel to perform lockout/tagout procedures and thus Sofidel did not train them as "authorized employees." (Tr. 142, 164-66). Instead, Sofidel provided training on lockout/tagout to these employees as "affected employees" as that term is defined in § 1910.147(b). (Tr. 142, 164-66, 442, 465; Ex. J-11 at 3-4). Operators, such as Employee 1, are not trained as authorized employees to lock out the R88 Rewinder. (Tr. 142, 165, 465; Ex. J-7). If an operator has an issue with an object they cannot unjam, they can call maintenance employees or tuners to help adjust the machine and free up the jams. (Tr. 104-05, 149).

Employee 1 Injury on September 21, 2022, and Subsequent OSHA Inspection

On September 21, 2022, Employee 1 was injured while clearing jammed material from the R88 Rewinder. (Stip. ¶¶ 5, 6, 7, 11; Ex. J-1 at 1-2). At the time, Employee 1 and operator assistant, Employee 2, went inside the interlocked door of the R88 Rewinder to clear out a jam between the machine's rollers. (Stip. ¶¶ 7, 8; Tr. 117, 235; Exs. J-1 at 2, J-2 at 1, C-9 at 7-8). Employee 1 and Employee 2 performed a two-person jog to unjam the machine.[3] (Tr. 235-36).

While Employee 1 attempted to unjam the machine by hand, Employee 2 operated the process controls to rotate the machine rollers. (Stip. ¶ 9; Ex. J-1 at 2). While operating the process controls, Employee 2 pressed the reverse button on the control panel. (Stip. ¶ 9; Tr. 235-36, 241; Ex. J-1 at 2). The roller moved in the reverse direction and Employee 1's left hand became caught

3 Respondent claims two-person jogging is prohibited. (Resp't Br. at 11-12).

in a pinch point between the lower roller and a metal guide plate. (Stip. ¶ 10; Tr. 233, 235-36, 241; Exs. J-1 at 2, J-2A, C-5, C-9 at 7). Employee 1 suffered a degloving injury to his left-hand involving avulsions to the thumb and palm area. (Stip. ¶ 11; Ex. J-1 at 2). He was taken to a local hospital before taking a med-flight to a Columbus hospital where he underwent emergency surgery. (Tr. 237-38; Ex. C-5 at 1).

On September 29, 2022, Compliance Safety and Health Officer (CSHO) Lauren Eberts conducted an inspection at Sofidel's facility because of the incident. (Tr. 308). As part of the inspection, CSHO Eberts observed the work area where Employee 1 was injured, took video and photographs, and interviewed certain Sofidel personnel. (Tr. 308-10, 316-17, 328-38; Exs. J-4, C-7, C-8, C-9, R-1). As a result of the inspection, OSHA issued a six-item serious and one-item other-than-serious Citation to Sofidel, of which only Citation 1 Items 3 and 4, and Citation 2, Item 1 remain for disposition.

DISCUSSION

The parties stipulated to facts which establish Sofidel is an "employer" as defined in section 3(5) of the Act and thus subject to the compliance provisions of section 5(a). (Stip. ¶ 2; Ex. J-1). 29 U.S.C. §§ 652(5), 654(a).

Citation 1, Items 3, 4 and Citation 2, Item 1

To establish a violation of an OSHA standard, the Secretary bears the burden of proving by a preponderance of the evidence that "(1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition." *JPC Group, Inc.*, 22 BNA O.S.H.C. 1859, 1861 (2009).

Citation 1, Item 3

Citation 1, Item 3 alleges a serious violation of 29 C.F.R. § 1910.147(c)(4)(i) as follows:

> 29 C.F.R. § 1910.147(c)(4)(i): Procedures shall be developed, documented, and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section:
>
> a. On or about September 29, 2022, and at times prior, the employer did not ensure that the documented energy control procedure for the R88 Gambini ProFlex700 Unwinder machine was utilized while employees cleared jammed cores from the head unit and rewinder section of the machine. Thereby exposing employees to being caught-in/between rollers and in-going nip-points and being struck-

by/against sharp parts of the rollers and knives and guide plates.

b. On or about September 21, 2022, and at times prior, the employer did not ensure that the documented energy control procedure for the R88 Gambini ProFlex700 Unwinder machine was utilized while two employees were clearing jammed material that was wrapped up in rollers on the rewinder section of the machine. Thereby exposing employees caught-in/between rollers and in-going nip-points and being struck-by/against sharp parts of the rollers and knives and guide plates. As a result, an employee was seriously injured resulting in hospitalization.

The Cited Standard Applies to the Conditions

Commission precedent dictates that proving the application of the cited standard pertains to the cited work conditions, not the particular cited employer. *Ryder Transp. Servs.*, 24 BNA OSHC 2061, 2064 (No. 10-0551, 2014) (concluding "that the Secretary has failed to establish that the cited general industry standard applies to the working conditions here"); *Active Oil Serv., Inc.*, 21 BNA OSHC 1092, 1094 (No. 00-0482, 2005)(finding "that the confined space standard applies to the cited conditions" because "the vault was a confined space"); *Arcon, Inc.*, 20 BNA OSHC 1760, 1763 (No. 99-1707, 2004)("In order to establish a violation, the Secretary must show that the standards applied to the cited conditions.").

The Secretary contends standard 29 C.F.R. § 1910.147(c)(4)(i) is applicable to the unjamming of the R88 Rewinder. (Sec'y Br. at 12-14). The Secretary argues the R88 Rewinder is covered by the standard, as inadvertent operation (i.e., "unexpected energization or start up") can occur. (Sec'y Br. at 13-14). The Secretary also contends, under § 1910.147(a)(2)(i), the "standard applies to the control of energy during servicing and/or maintenance of machines and equipment," as the unjamming of the R88 Rewinder was a service or maintenance activity. (Sec'y Br. at 13).

Respondent claims § 1910.147(c)(4)(i) is not applicable to the re-threading and unjamming of the R88 Rewinder. (Resp't Br. at 15-16). Respondent argues the unjamming of the R88 Rewinder is not maintenance or servicing of machine or equipment but is instead part of normal production operations (NPO). (Resp't Br. at 5-6, 18-19). Respondent argues further that the cited standard does not apply because the minor servicing exception exempts Respondent from utilizing LOTO procedures during unjamming of the R88 Rewinder. (Resp't Br. at 15-18).

When interpreting a standard, the first consideration is the plain text of the standard. "If the meaning of the [regulatory] language is 'sufficiently clear,' the inquiry ends there." *Davey Tree Expert*, 25 BNA OSHC 1933, 1934, 1937 (No. 11-2556, 2016), quoting *Beverly Healthcare-*

Hillview, 21 BNA OSHC 1684, 1685 (No. 04-1091, 2006), *aff'd in relevant part*, 541 F.3d 193 (3d Cir. 2008). The regulatory language is considered ambiguous where the meaning is "not free from doubt." *Martin v. OSHRC* (*CF&I*), 499 U.S. 144, 150-51 (1991).

The parties disagree regarding whether the LOTO Standard applies to the unjamming of the R88 Rewinder. The Secretary argues the unambiguous language of 29 C.F.R. § 1910.147 states "unjamming" is specifically included among the activities covered by the standard. (Sec'y Br. at 12-13). Respondent argues unjamming of the R88 Rewinder is part of normal production operations, is exempt from the standard by the minor servicing exception, and that any reenergization of the R88 Rewinder is not unexpected. (Resp't Br. at 5-6, 15-21). Respondent's contentions fail.

The plain text of the standard supports the Secretary's interpretation that the R88 Rewinder is a machine where "unexpected energization or start up" could occur and cause injury, unless all potentially hazardous energy sources have been locked out. The standard's "Scope, application, and purpose" section provides:

> This standard covers the servicing and maintenance of machines and equipment in which the unexpected energization or start-up of the machines or equipment, or release of stored energy could cause injury to employees. This standard establishes minimum performance requirements for the control of such hazardous energy. 29 C.F.R. 1910.147(a)(i).

The standard defines the terms "normal production operations," "servicing and/or maintenance," and "setting up," in § 1910.147(b) as follows:

> *Normal production operations*. The utilization of a machine or equipment to perform its intended production function. 29 C.F.R. 1910.147(b).
>
> *Servicing and/or maintenance*. Workplace activities such as constructing, installing, setting up, adjusting, inspecting, modifying, and maintaining and/or servicing machines or equipment. These activities include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the unexpected energization or startup of the equipment or release of hazardous energy. 29 C.F.R. 1910.147(b).
>
> *Setting up*. Any work performed to prepare a machine or equipment to perform its normal production operation. 29 C.F.R. 1910.147(b).
>
> Thus, the LOTO standard will apply *if*, during unjamming of the R88 Rewinder, an

employee would be exposed to the potential for unexpected energy that could cause injury (i.e., "hazardous energy"). *See Otis Elevator Co. v. Sec'y of Labor*, 762 F.3d 116, 121 (D.C. Cir. 2014) (indicating whether an energy source presents the potential for hazardous energy involves a two-pronged test: (1) whether unexpected energization, start up or release of stored energy could occur, and (2) if it can occur, whether it could cause injury to employees); *see also Control of Hazardous Energy Sources (Lockout/Tagout): Final Rule*, 54 Fed. Reg. 36644, 36666 (Sept. 1, 1989) ("If an energy source does not have the capability of causing injury to employees, it is not 'hazardous energy' within the scope of this standard"). Here, a preponderance of the evidence establishes the unjamming activities alleged in the Citation would subject employees to hazardous energy (i.e., the potential unexpected energization or release of energy that could cause injury). (Stip. ¶¶ 9, 10, 11; Tr. 233, 235-36, 241; Exs. J-1 at 2, J-2A, C-5, C-9 at 7).

Respondent Failed to Comply with the Standard

Sofidel failed to comply with 29 C.F.R. § 1910.147(c)(4)(i) when it did not utilize LOTO procedures while its employees unjammed the R88 Rewinder. The Secretary contends Respondent failed to comply with the standard when Employee 1 and other operators attempted to unjam the R88 Rewinder while the machine was energized. (Sec'y Br. at 14-15). The Secretary argues Sofidel's operators were routinely exposed to hazards while unjamming the R88 Rewinder, while the machine was energized. (Sec'y Br. at 15).

It is undisputed Sofidel's operators performed unjamming activities while in and around the energized R88 Rewinder. (Tr. 130, 142, 164-66, 187, 225, 335-38, 364, 435-36, 442, 465, 484, 501; Sec'y Br. at 14-15, Resp't Br. at 5-6, 8-9, 16, 19). During the unjamming of the R88 Rewinder, the rollers are not only energized but can unexpectedly startup. (Tr. 122, 146-47, 236, 254, 276-78, 292, 439-40; Ex. J-2 at 3-4). The record shows the R88 Rewinder was unjammed while the machine was energized and could unexpectedly startup. (Tr. 122, 134, 165-68, 173-74, 236).

At the time of the inspection, Respondent had a written lockout work instruction which established requirements for the lockout of energy isolating devices whenever servicing or maintenance is done on machines or equipment by maintenance employees. (Tr. 173-74; Ex. J-11). The LOTO work instruction defines servicing and/or maintenance to "include lubrication, cleaning or unjamming of machines or equipment and making adjustments or tool changes, where the employee may be exposed to the unexpected energization or startup of the equipment or release

of hazardous energy." (Ex. J-11 at 16-17). Respondent had written machine-specific lockout procedures for the R88 Rewinder. (Tr. 167-68). However, these programs and procedures were not utilized by Respondent's operators. (Tr. 134, 167-68). The record shows unjamming activities were performed on the R88 Rewinder, including on the day of the incident, and Respondent's operators unjammed the R88 Rewinder while it was energized. (Tr. 122, 134, 146-47, 165-68, 173-74, 236, 254, 276-78, 292, 439-40; Ex. J-2 at 3-4). Respondent failed to utilize energy control procedures to protect operators from hazardous energy while unjamming the R88 Rewinder. (Tr. 122, 134, 146-47, 165-68, 173-74, 236, 254, 276-78, 292, 439-40; Ex. J-2 at 3-4).

Respondent argues it is not possible for an operator to be exposed to the unexpected reenergization or hazards from the tasks done on the R88 Rewinder because "before jogging can occur, an audible alarm sounds three times, there is a delay, and then the machine can be jogged while holding the button down, and if an employee releases the jog button, the jogging stops." (Resp't Br. at 21-22). To the contrary, the record shows the R88 Rewinder was unjammed, and could be reverse jogged, while the machine was energized and unexpectedly started up. (Tr. 122, 134, 165-68, 173-74, 236).

Respondent also has failed to carry its burden to prove the minor servicing exception applies. Respondent argues even if unjamming were regarded to constitute service and/or maintenance activities, it was conducted during normal production operations within the meaning of § 1910.147(a)(2)(ii). (Resp't Br. at 15-16). Respondent's argument is unpersuasive. Respondent has not proven unjamming the R88 Rewinder constitutes "minor servicing activities" within the meaning of the exception. While the unjamming activities may be "routine" and "repetitive," they are not "integral to the use of the equipment for production" but rather occur pre-production. When the R88 Rewinder jams, the machine shuts down and no longer performs its intended function of producing toilet paper. *See Westvaco Corp.*, 16 BNA OSHC 1374, 1380 (No. 90-1341, 1993). (Tr. 80-82, 130-31, 135, 295, 498-99).

Respondent failed to comply with the standard by not utilizing LOTO procedures when unjamming the R88 Rewinder before proceeding with normal production operations.

Respondent's Employees Were Exposed to Hazardous Conditions

"The Secretary always bears the burden of proving employee exposure to the violative conditions." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). To establish exposure, the Secretary "must show that it is reasonably predictable either by operational

necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods*., 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997). The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (citing *RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The zone of danger is determined by the hazard presented by the violative condition and is normally the area surrounding the condition which presents the danger to employees that the standard was intended to prevent. *RGM Constr.*, 17 BNA OSHC at 1234; Gilles *& Cotting, Inc*., 3 BNA OSHC at 2003.

Here, "access" to the hazard is established as the evidence shows it is reasonably predictable that an employee engaged in unjamming activities, in and around the energized R88 Rewinder, without first locking out the power sources, will be exposed to the hazard of "inadvertent operation," in violation of standard 29 C.F.R. § 1910.147(c)(4)(i). *Cf.*, *Gen. Motors Corp., (GM),* 22 BNA OSHC 1019, 1029-30 (No. 91-2843E, 2007) (consolidated) (holding "access" to LOTO hazard is established "where the evidence shows it is reasonably predictable that an employee engaged in servicing or maintenance will be exposed to the hazard of unexpected energization.").

Respondent's operators were routinely involved in unjamming the R88 Rewinder while the machine was energized. (Tr. 122, 134, 165-68, 173-74, 236). Respondent's operator, Employee 1, was exposed to a hazardous condition. Employee 1 had access to the inside of the R88 Rewinder and its rollers within, and was routinely involved in unjamming the R88 Rewinder, including on the day of the incident. (Stip. ¶¶ 5, 6, 7; Tr. 122, 134, 165-68, 173-74, 236; Ex. J-1 at 1-2). Moreover, the risk of injury is not theoretical in this instance, as Employee 1 was severely injured while unjamming the R88 Rewinder. (Stip. ¶¶ 5, 6, 7, 11; Ex. J-1 at 1-2). Actual exposure to the hazardous condition with resulting injuries establishes exposure. *See S & G Packaging, Co., LLC* (*S&G*), 19 BNA OSHC 1503, 1506 (No. 98-1107, 2001) (employee injury resulting from violative condition establish actual exposure to that condition).

Complainant Established Employer Knowledge

To meet the burden of establishing employer knowledge, the Secretary must show the cited employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the violative condition. *Pride Oil Well Serv.,* 15 BNA OSHC 1809, 1815 (No. 87-692, 1992). An employer is required to make a reasonable effort to anticipate the particular hazards to

which its employees may be exposed during the course of scheduled work. *Automatic Sprinkler Corp. of Am.*, 8 BNA OSHC 1384 (No. 76-5089, 1980). When determining whether an employer has been reasonably diligent, the Commission considers "several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations." *Precision Concrete Constr.*, 19 BNA OSHC 1404, 1408 (No. 99-0707, 2001). An employer's awareness may be shown through actual or constructive knowledge of the condition. It is not necessary to show the employer knew or understood the condition was hazardous – just knowledge of the condition. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076 (No. 90-2148, 1995). The actual or constructive knowledge of a supervisor may be imputed to the employer. *See Kerns Bros. Tree Serv*., 18 BNA OSHC 2064, 2069 (No. 96-1719, 2000); *A.P. O'Horo Co*., 14 BNA OSHC 2004, 2007 (No. 85-369. 1991); *Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 283 (6th Cir. 2016).

The Secretary contends Respondent had knowledge, through its management and supervisors, that the R88 Rewinder was energized and not locked out while operators attempted to unjam it. (Sec'y Br. at 15). The actual or constructive knowledge of a foreman or supervisor is generally imputed to the employer. *Tampa Shipyards,* 15 BNA OSHC 1533 (Nos. 86-360, 86-469, 1992). It is undisputed Jacob Giammarino was Respondent's converting department superintendent, Randy Kuhner was Respondent's worksite health and safety manager, and Boone Sabine was Respondent's worksite maintenance manager at the time of the incident. (Tr. 48, 52-53, 159, 447-48, 480, 489). Sofidel's management knew the R88 Rewinder was energized and not locked out when operators attempted to unjam it. (Tr. 121-25, 134-35, 165-68, 173-74, 214, 485-86). At the time of the incident, Jacob Giammarino was a superintendent who supervised the department Employee 1 worked in. (Tr. 48, 52-53). Giammarino specifically testified as follows:

> Q. Okay. So you would agree that when an operator goes into the machine and is clearing out a jam, lockout-tagout does not apply?
> A. Yes, I agree.
> Q. You agree. And that there is energy to the roll – to the jog function during these unjamming – when someone's unjamming?
> A. Yeah.
> Q. And there's also energy to the reverse button, the -- similarly to the jog button?
> A. You're correct, yeah.

(Tr. 134).

Respondent's worksite superintendent, Jacob Giammarino, had actual knowledge of the violative condition. His knowledge is imputed to Respondent. *Ga. Elec. Co. v. Marshall*, 595 F.2d 309, 321 (5th Cir. 1979); *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996); *Access Equip. Sys., Inc.*, 18 BNA OSHC 1718, 1726 (No. 95-1449, 1999); *Tampa Shipyards,* 15 BNA OSHC at *6.

Unpreventable Employee Misconduct[4]

In order to prevail on a claim of unpreventable employee misconduct, Respondent must show: (1) it established work rules designed to prevent the violation; (2) it adequately communicated those rules to its employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were detected. *Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2096–97 (No. 10-0359, 2012). In other words, it is incumbent upon Respondent to "demonstrate that the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule [sic]." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013 (No. 87-1067, 1991).

None of the elements required for a showing of unpreventable employee misconduct were established in this case. Employees who performed unjamming activities on the R88 Rewinder according to Respondent's prescribed procedures, regardless of Respondent's two-person jog rule, violated the LOTO standard in the manner alleged in the citation. Respondent's operators were exposed to hazardous energy whether they engaged in one or two-person jogging. (Tr. 122, 236, 242, 338-39, 348-49; Exs. J-2 at 5, J-4). Thus, Respondent did not have "a work rule that effectively implemented the requirements of the standard." *TNT Crane & Rigging, Inc.*, No. 16-1587 (OSHRC June 2, 2022) citing *Capform, Inc.*, 16 BNA OSHC 2040, 2043 (No. 91-1613, 1994). Respondent's unpreventable employee misconduct affirmative defense fails.

Citation 1, Item 3 Serious Classification

The Secretary classified Citation 1, Item 3 as a serious violation of the Act. A violation is serious under the Act if "there is substantial probability that death or serious physical harm could result." 29 U.S.C. § 666(k). The Secretary need not show there was a substantial probability an

4 Respondent pled numerous defenses in its *Answer* that it did not argue in its post-hearing brief. Defenses not argued are deemed abandoned or waived. *Corbesco, Inc. v. Dole,* 926 F.2d 422, 429 (5th Cir. 1991) (affirmative defenses not argued waived); *Ga.-Pac. Corp.,* 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991) ("Commission declines to reach issues on which the aggrieved party indicates no interest.").

accident would occur, only that if an accident did occur, death or serious physical harm could result. *Mosser Constr., Inc.*, 23 BNA OSHC 1044, 1046 (No. 08-0631, 2010); *Wal-Mart Stores, Inc., v. Sec'y of Labor*, 406 F.3d 731, 735 (D.C. Cir. 2005); *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1388 (D.C. Cir. 1985).

Hazardous conditions existed in Respondent's facility on the day of the incident which could, and did, result in serious physical harm to one of Respondent's employees. The record establishes that in this instance the unexpected start-up and operation of the R88 Rewinder could result in serious injuries to employees attempting to unjam the machine. Employee 1 was severely injured while attempting to unjam the R88 Rewinder. (Stip. ¶¶ 5, 6, 7, 11; Ex. J-1 at 1-2). Employees were routinely exposed to the unexpected release of hazardous energy while unjamming the R88 Rewinder. (Tr. 122, 134, 165-68, 173-74, 236). Citation 1, Item 3 was properly characterized as a serious violation of the Act. Citation 1, Item 3 is **AFFIRMED**.

Citation 1, Item 4

Citation 1, Item 4 alleges a serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(A) as follows:

> 29 C.F.R. § 1910.147(c)(7)(i)(A): Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the energy available in the workplace, and the methods and means necessary for energy isolation and control:
>
> a. On or about September 29, 2022, and at times prior, the employer did not ensure that each employee performing servicing and maintenance covered tasks on the R88 Gambini ProFlex700 unwinder machine such as, but not limited to, clearing jammed cores or clearing jammed material, such as "wrap-ups", received training in the recognition of hazardous energy sources, the type and magnitude of the energy in the workplace, and the methods and means necessary for energy isolation and control.

The Cited Standard Applies and Sofidel Did Not Comply

The Secretary alleges Respondent failed to provide LOTO training to Employee 1 and other operators. (Sec'y Br. at 26-27). However, Respondent argues 29 C.F.R. § 1910.147(c)(7)(i)(A) is not applicable to the operator's unjamming activities of the R88 Rewinder and its operators were not authorized to perform LOTO. (Resp't Br. at 24).

As previously discussed, the plain language of the standard supports the Secretary's interpretation that the R88 Rewinder is a machine where the "unexpected energization or start-up of" could occur and cause injury, unless all potentially hazardous energy sources have been locked

out. Respondent's operators performed unjamming tasks while in and around the energized R88 Rewinder which is covered by the Lockout Standard. (Tr. 122, 134, 165-68, 173-74, 236).

The Lockout Standard defines an "affected employee" and "authorized employee" as follows:

> *Affected employee.* An employee whose job requires him/her to operate or use a machine or equipment on which servicing or maintenance is being performed under lockout or tagout, or whose job requires him/her to work in an area in which such servicing or maintenance is being performed. 29 C.F.R. 1910.147(b).
>
> *Authorized employee.* A person who locks out or tags out machines or equipment in order to perform servicing or maintenance on that machine or equipment. An affected employee becomes an authorized employee when that employee's duties include performing servicing or maintenance covered under this section. 29 C.F.R. 1910.147(b).

The evidence shows the unjamming activities, which were routinely performed on the R88 Rewinder while it was energized, fall under the definition of servicing and/or maintenance. (Stip. ¶¶ 9, 10, 11; Tr. 233, 235-36, 241; Exs. J-1 at 2, J-2A, C-5, C-9 at 7). As such, Employee 1 and the other operators are "authorized employees" under the standard and should be trained consistent with its requirements. However, Respondent acknowledges it never provided the appropriate LOTO training for Employee 1 or its other operators. (Tr. 142, 165-66, 442, 465; Ex. J-11 at 3-4).

Respondent failed to utilize energy control procedures to protect operators who performed unjamming (servicing and/or maintenance) on the R88 Rewinder while it was energized and failed to implement energy control procedures to protect those employees while they were exposed to the R88 Rewinder's energized parts. (Tr. 122, 134, 165-68, 173-74, 236). Respondent failed to train its operators on energy control procedures as authorized employees. As such, for the above-mentioned reasons, 29 C.F.R. § 1910.147(c)(7)(i)(A) applies and was not met.

Respondent's Employees Were Exposed to Hazardous Conditions and Employer Knowledge Has Been Established

Employee 1 and other operators had access to and were routinely involved in unjamming the R88 Rewinder. (Tr. 122, 134, 165-68, 173-74, 236). It is undisputed Respondent's operators had only been trained as "affected employees" rather than as "authorized employees." (Tr. 142, 164-66; Sec'y Br. at 27, Resp't Br. at 24).

Employee 1 had not been trained as an "authorized employee" when he was severely

injured while unjamming the R88 Rewinder. (Stip. ¶¶ 5, 6, 7, 11; Tr. 142, 165, 465; Exs. J-1 at 1-2, J-7). Jacob Giammarino, who was one of Employee 1's supervisors, monitored the operators and knew they were working around and attempting to unjam the R88 Rewinder while it was energized and not locked out. (Tr. 48, 52-53, 121-25, 134-35). As previously discussed, his knowledge is imputed to Respondent. Additionally, Respondent's other management knew the R88 Rewinder was energized and not locked out when operators attempted to unjam it. (Tr. 165-68, 173-74, 214, 485-86).

The Secretary has proven exposure to and knowledge of the violation.

Citation 1, Item 4 Serious Classification

The Secretary classified Citation 1, Item 4 as serious. A serious violation is committed where both a substantial probability of death or serious physical harm could have resulted from a hazardous condition and the employer knew, or with the exercise of reasonable diligence could have known of the condition. 29 U.S.C. § 666(k). The record shows Respondent's failure to train operators regarding the knowledge and skills required for the safe application, usage, and removal of energy controls associated with the R88 Rewinder could result in serious injuries. Indeed, an employee's hand was degloved. (Stip. ¶¶ 5, 6, 7, 11; Ex. J-1 at 1-2). The citation item is properly characterized as serious.

Citation 1, Item 4 was properly characterized as a serious violation of the Act and is **AFFIRMED**.

Citation 2, Item 1

Citation 2, Item 1 alleges an other-than-serious violation of 29 C.F.R. § 1910.132(d)(2) as follows:

> 29 C.F.R. § 1910.132(d)(2): The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the 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:
>
> a. On or about September 29, 2022, and at times prior, the employer did not verify that the required personal protective equipment (PPE) workplace hazard assessment was performed through a written certification.

The Cited Standard Applies and Sofidel Did Not Comply

The Secretary argues Respondent failed to verify the required PPE workplace hazard

assessment was performed through a written certification. (Sec'y Br. at 28). Respondent asserts it provided the required certification, which was reviewed and signed by its management official, Bryan Graves. (Resp't Br. at 24-25).

Respondent offered a document into evidence called "Sofidel Circleville Personal Protective Equipment Work Instruction" (Work Instruction) which was admitted into evidence. (Tr. 403, 468; Ex. R-2). Respondent's management official, Bryan Graves, revised and reviewed this document in October 2019, October 2020, and October 2021. (Ex. R-2 at 1). The document was effective on the day of the incident. (Tr. 467-68). Additionally, the document contains a "Personal Protective Equipment Matrix" which indicates what personal protective equipment is required for use. (Ex. R-2 at 6).

However, the plain text of the standard supports the Secretary's interpretation that Sofidel did not verify the required workplace hazard assessment had been performed through a written certification that "identifies the document as a certification of hazard assessment." The standard states:

> The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the 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. 29 C.F.R. 1910.132(d)(2).

Language in 29 C.F.R. 1910.132(d) also states:

> The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:
> (i) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment;
> (ii) Communicate selection decisions to each affected employee; and,
> (iii) Select PPE that properly fits each affected employee. 29 C.F.R. 1910.132(d)(1).

The plain language of the standard requires the employer to "verify that the required workplace hazard assessment has been performed through a written certification" that "identifies the document as a certification of hazard assessment." Employers are required to determine and identify which hazards are present at a workplace in the hazard assessment. *See* 29 C.F.R. 1910.132(d). Here, Respondent's Work Instruction does not identify which hazards are present or

likely to be present to its employees. (*See* Ex. R-2). Further, nowhere in Respondent's Work Instruction is the document identified as a certification of a workplace hazard assessment. (*See* Ex. R-2).

Thus, a preponderance of the evidence establishes Sofidel failed to provide or verify the required workplace hazard assessment had been performed through a written certification which was identified as a certification of hazard assessment. (Tr. 353-55, 468-69; Ex. R-2). The Secretary has sufficiently met its burden of establishing Respondent failed to comply with the terms of 29 C.F.R. § 1910.132(d)(2). As such, Citation 2, Item 1 is **AFFIRMED**.

PENALTY DETERMINATION

Under section 17(j) of the OSH Act, the Commission has the authority to assess civil penalties for the violation of citations. 29 U.S.C. § 666(j). In assessing penalties, the Commission is instructed to give due consideration to the size of the employer's business, the gravity of the violation, the employer's good faith, and its history of previous violations. *Compass Envtl., Inc.*, 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally afforded greater weight in assessing an appropriate penalty. *Trinity Indus.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). A violation's gravity is determined by weighing the number of employees exposed, the duration of their hazard exposure, preventative measures taken against injury, and the possibility an injury would occur. *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128, 1132 (No. 76-2644, 1981).

The Secretary proposed a $15,625 penalty for each of the affirmed serious violations in Citation 1, Items 3 and 4. The Secretary proposed no penalty for Citation 2, Item 1. CSHO Eberts testified how the proposed penalty for the Citation was calculated. (T. 349-53). Citation 1, Items 3 and 4 were based on a severity of high and a probability of greater. (T. 350-51). The gravity of the violations was assessed as high severity because of the high likelihood of death and the actual serious physical harm suffered by Respondent's injured employee. (T. 350-52). The record supports finding the gravity of the violations warrants a high penalty, as serious injury from unjamming the R88 Rewinder could, and actually did, occur. (Stip. ¶¶ 5, 6, 7, 11; Ex. J-1 at 1-2). There was no penalty reduction for good faith or Respondent's history. (Tr. 352-53). There was no penalty reduction proposed based on Respondent's large size. (Tr. 352; Ex. C-9 at 6).

Based on the totality of circumstances discussed above, the penalties are maintained as

proposed due to the high probability of serious, if not fatal, injuries from the violative conditions. The penalties for Citation 1, Items 3 and 4 are maintained at $15,625 each. As previously discussed, Citation 2, Item 1 is **AFFIRMED,** and no penalty is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a) and Commission Rule 90(a), 29 C.F.R. § 2200.90(a).

ORDER

Based upon the foregoing decision, it is **ORDERED**:

1. Citation 1, Item 3, alleging a Serious violation of 29 C.F.R. § 1910.147(c)(4)(i), is **AFFIRMED** as Serious, and a penalty of $15,625 is **ASSESSED**.
2. Citation 1, Item 4, alleging a Serious violation of 29 C.F.R. § 1910.147(c)(7)(i)(A), is **AFFIRMED** as Serious, and a penalty of $15,625 is **ASSESSED**.
3. Citation 2, Item 1, alleging an Other- than- Serious violation 29 C.F.R. § 1910.132(d)(2) is **AFFIRMED** as Other-than-Serious, and no penalty is **ASSESSED.**

SO ORDERED.

/s/
Sharon D. Calhoun
Administrative Law Judge, OSHRC

Dated: October 28, 2024
Atlanta, GA