

**FILED**  
JUL 27 2023  
OSH REVIEW BOARD  
BY Kennedy

**NEVADA OCCUPATIONAL SAFETY AND HEALTH  
REVIEW BOARD**

\*\*\*\*\*

**CHIEF ADMINISTRATIVE OFFICER OF  
THE OCCUPATIONAL SAFETY AND  
HEALTH ADMINISTRATION OF THE  
DIVISION OF INDUSTRIAL RELATIONS  
OF THE DEPARTMENT OF BUSINESS  
AND INDUSTRY, STATE OF NEVADA,**

**Docket No. LV 21-2060**

**Inspection No. 1477397**

**Complainant,**

**vs.**

**POLE FITNESS STUDIO, LLC, aka  
POLE FITNESS STUDIO**

**Respondent.**

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

This case arose out of a referral alleging safety violations at the employer's place a business, a fitness studio located in Las Vegas, Nevada. *See*, State's Exhibiting 1, p. 4. The State's inspection resulted in the issuance of two citations for violation of Federal regulations and State law. *See*, State's Exhibit 1. pp. 23-36.

The matter came before the Nevada Occupational Safety and Health Review Board (the Board) for hearing on May 13, 2021. *See*, 1Tr., p. 3.<sup>1</sup> The hearing was continued to June 4, 2021, for a special meeting in which the closing arguments were made and the Board deliberated the case.

<sup>1</sup> "1Tr." stands for the transcript of the hearing conducted on May 13, 2020, commencing at 9:00 a.m., followed by the page and line number where the matter cited can be found. "2Tr." stands for the transcript of the deliberations conducted on June 4, 2020, commencing at 9:17 a.m.

1 The hearing was conducted in furtherance of a duly provided notice. *See*, Notice of Hearing dated  
2 September 10, 2020. Further, notice that the hearing would be conducted by electronic means was  
3 provided. *See*, Notice of Hearing by Webex dated April 1, 2021.

4 In attendance to hear the matter were acting Board Chairman Rodd Weber, Board Member  
5 Frank Milligan and Board Member William Spielberg. *See*, 1Tr., p.1. The same Board Members  
6 heard closing arguments and deliberated the case on June 4, 2021. 2Tr., pp. 76-82. Board Member  
7 Jorge Macias heard the closing arguments but was precluded from deliberating thereon because he  
8 had not attended the May 13, 2020, meeting. *See*, 2Tr., pp. 3;23-24, 4;1-9.

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 and  
11 Industry (the State), appeared at both hearings on behalf of the Complainant (the State). *See*, 1Tr.,  
12 pp. 2, 5. The Respondent (hereinafter, Respondent or Pole Fitness) was represented in both hearings  
13 by Lindsay Dibler, Esq., Mueller & Associates, Inc. (Mr. Dibler). *See*, Tr., p. 2.

14 Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS  
15 618.315. Jurisdiction was not disputed. As there were three members of the Board present to decide  
16 the case, with at least one member representing management and one member representing labor in  
17 attendance, a quorum was present to conduct the business of the Board. Nevada has adopted all  
18 Federal Occupational Safety and Health Standards which the Secretary of Labor has promulgated,  
19 modified or revoked and any amendments thereto. They are then deemed the Nevada Occupational  
20 Safety and Health Standards. *See*, NRS 618.295(8). A complaint may be prosecuted for  
21 circumstances which arise before or during an inspection of the employer's workplace. *See*, NRS  
22 618.435(1).

23 The State issued its Citation and Notification of Penalty (Citation) on June 23, 2020,  
24 consisting of two citations for violations of Federal regulations and State law.<sup>2</sup> *See*, State's Exhibit  
25 1. pp. 37-49. Citation 1 alleged that Pole Fitness did not follow Governor Sisolak's Emergency  
26

---

27  
28 <sup>2</sup>The only citation at issue is Citation 1, the alleged violation of NRS 618.375(2) because the  
Respondent waived its contest of Citation 2. *See*, 2Tr., pp. 43;6-24, 44;1-2.

1 Directives for the prevention of the spread of COVID-19. *See*, State's Exhibit 1, p. 46.

2 The Citation further alleged that Pole Fitness did not utilize cleaning products which meet the  
3 EPA's requirements. *See, Id.* Lastly, the Respondent did not provide deep cleaning on a daily basis.  
4 *See, Id.*

5 The Complaint set forth the allegation of the violation of Nevada Revised Statutes  
6 618.375(2), also known as the general duty rule. *See*, State's Exhibit 1, p. 46. Citation 1, Item 1,  
7 charged a serious violation of NRS 618.275, as stated below:

8 Every employer shall furnish and use such safety devices and safeguards, and adopt  
9 and use such practices, means, methods, operations and processes as were reasonably  
adequate to render such employment and places of employment safe and comply with  
all orders issued by the Division.

10 The Employer did not follow the requirements set forth in Declaration of Emergency  
11 Directive:

- 12 1. The Employer does not provide or require employees to wear a  
13 face covering. The Employer allows the employees to wear a  
face cover if they want, but it's not required.
- 14 2. Cleaning products provided do not meet the requirements of  
15 EPA List N for disinfecting equipment before and after use by  
16 clients, set by the Local Empowerment Advisory Panel  
(LEAP). The Employer provides a spray bottle containing half  
17 alcohol and half water to wipe the poles down and Clorox  
Disinfecting wipes are also used to clean the front desk and  
areas.

18 In this instance, Respondent's duty to provide a safe place of employment was defined by  
19 certain governmental proclamations and directives issued in response to the COVID-19 pandemic.  
20 Specifically, the creation and maintenance of a safe working environment was set by Governor  
21 Sisolak's Declaration of Emergency (Directive 021 Phase Two Reopening)(hereinafter referred to as  
22 Directive 21), the Nevada OSHA Memorandum dated May 29, 2020, and the Roadmap to Recovery  
23 for Nevada: Boutique Gyms, *et al.* *See*, State's Exhibit 2, pp. 86-104. These Directives and related  
24 documents, taken together, set the standard for use of protective equipment (masks) and the cleaning  
25 and sanitization in businesses like that of the Respondent. After giving consideration to the severity  
26 of the violation and the probability of injury resulting from this alleged violation, the State  
27 recommended a fine of \$4,858. *See*, State's Exhibit 1, p. 46.

28 ///

1 Respondent sent a notice of its intent to contest the Citation on July 27, 2020. *See*, State's  
2 Exhibit 1, pp. 53-54. The State filed and served its complaint on August 14, 2020. Pole Fitness  
3 through counsel, Craig A. Mueller, Esq., Mueller & Associates, Inc., answered the Complaint on  
4 August 24, 2020. *See*, State's Exhibit 1, pp. 63-69.

5 The first paragraph of the Answer alleged that the matter was resolved through an informal  
6 conference. *See*, State's Exhibit 1, p. 63;15-20. This turned out to be untrue. Pole Fitness had  
7 received another Citation. *See*, 2Tr., pp. 7;19-14, 8;1-11.

8 The Answer also alleged that Pole Fitness had remediated the causes of the violations and  
9 had documentation for the same. *See*, State's Exhibit 1, p. 65;14-18. However, the State did not  
10 conduct any subsequent inspections, *i.e.*, there was no follow up to determine whether the violations  
11 were cured. *See*, 1Tr., p. 62;8-18. This is because the matter was contested and it is not Nevada  
12 OSHA's policy to reinspect after an alleged violation is contested. *See, Id.*

13 The gravamen of the Answer consisted of arguments against the face covering requirements  
14 of Directive 21 and the related documents. *See*, State's Exhibit 1, pp. 63-69. Specifically, Pole  
15 Fitness argued that the employee, as opposed to the employer, is responsible for providing a mask  
16 and determining when to use it. *See*, State's Exhibit 1 p. 66. Additionally, Pole Fitness argued that  
17 Governor Sisolak's Directive is too vague to provide guidance on when a patron or employee is  
18 required to wear a mask, particularly in the context of vigorous workouts. *See*, State's Exhibit 1, pp.  
19 67-68.

20 At the hearing on the matter, the State offered for admission its Exhibits 1 - 2, consisting of  
21 121 pages and a CD video clip of Respondent Security Camera footage of 10:27 to 10:34 on May  
22 29, 2020. *See*, 1Tr., p. 5;7-14. These exhibits were admitted without objection. *See*, 1Tr., p. 6;14-  
23 22. The Respondent offered no exhibits for admission. *See*, 1Tr., p. 5;2-6.

24 Late in the May 13<sup>th</sup> hearing, Nevada OSHA offered for admission a podcast, a document  
25 and video, for impeachment purposes only. *See*, 1Tr., pp. 172-174; 2Tr., pp. 11;19-24, 12;1-6.  
26 Respondent objected to the admission of the evidence and questions posited to Fawnia Monday  
27 (Ms. Monday), based thereon. *See, Id.* Ms. Monday is the Respondent's owner. *See*, 1Tr., p.

28 ///

1 138;12. Respondent's objection to the evidence was overruled. *See*, 1Tr., pp. 174;1-6. However,  
2 the Board required the State to offer and submit the items into evidence. *See, Id.* 1Tr., p. 174;1-6.

3 At the duly noticed hearing conducted on May 13, 2021, the State presented the testimony of  
4 Crystal Rodriguez and John Hutchinson. *See*, 1Tr., p. 3. Pole Fitness presented the testimony of  
5 Ms. Mondey. *See, Id.*

## 6 FINDINGS OF FACTS

7 Pole Fitness is a Nevada limited liability company. *See*, State's Exhibit 1, p. 1. Its business  
8 address is 4265 S. Arville Street, Suite A., Las Vegas, Nevada 89103. *See*, State's Exhibit 1, p. 2.  
9 The business is an aerobic dance and exercise center. *See*, State's Exhibit 1, p. 4.

10 On May 28, 2020, Governor Sisolak issued the Declaration of Emergency (Directive 021  
11 Phase Two Reopening). *See*, State's Exhibit 2, pp. 86-97. On June 3, 2020, a Notice of Alleged  
12 Safety or Health Hazards was filed. *See*, State's Exhibit 1, p. 4. The State's investigator conducted  
13 an inspection of the facility on June 4, 2020. *See*, State's Exhibit 1, p. 4.

14 Upon arrival, the State's inspector found that none of Pole Fitness' employees were wearing  
15 face masks. *See*, State's Exhibit 1, pp. 13, *see also*, 1Tr., pp. 17;23-24, 18;1. Further, Ms. Mondey  
16 informed the inspector that Pole Fitness neither provides face masks to its employees nor requires  
17 them to wear face masks. *See, Id.* Further, Ms. Mondey also told the inspector that no hazard  
18 analysis had been conducted to explain why any of the employees could circumvent the requirement  
19 to wear a face covering. *See*, 1Tr., pp. 18;-12. Ms. Mondey provided no explanation for this  
20 omission. *See, Id.* Lastly, the inspector discovered, that Pole Fitness used isopropyl alcohol to  
21 sanitize the poles and other surfaces which was diluted with water at a 1 to 1 ratio. This was not  
22 sufficient. The dilution of 30% water to 70% isopropyl alcohol is mandated. *See*, 1Tr., p. 19;1-27.  
23 In conversation, Ms. Mondey informed the State's inspector that a deep cleaning of the facility is  
24 done twice a week. *See*, State's Exhibit 1, p. 17.

25 At the hearing conducted on May 13, 2021, OSHA inspector Crystal Rodriguez testified to  
26 the matters set forth above. *See*, 1Tr., pp. 12-94. The State's second witness was John Hutchison  
27 (Mr. Hutchison), an industrial hygiene supervisor. *See*, 1Tr., p. 97. Mr. Hutchison explained that  
28 NRS 618.375(2) is an offshoot of the general duty clause which requires employers to provide

1 safety devices, safeguards and other things to protect its employees. *See*, 1Tr., p. 100;4-12. In this  
2 instance, COVID-19 was the hazard to which 14 of Pole Fitness' employees were potentially  
3 exposed. *See*, 1Tr., p. 100;15-24, 101;1-17.

4 Mr. Hutchison testified regarding the Respondent's actual knowledge of the violation and  
5 required knowledge of State law.

6 Ms. Ortiz: Was anyone in the position of authority at Pole Fitness aware that  
7 the standard [of NRS 618.375(2) and the government's directives] wasn't  
being followed?

8 Mr. Hutchison: I don't know if they were specifically aware of it.

9 Ms. Ortiz: Should anybody in authority at Pole Fitness have been aware of it?

10 Mr. Hutchison: Yes.

11 Ms. Ortiz: And how did OSHA determine that Pole Fitness should have been  
12 aware of this?

13 Mr. Hutchison: By essentially looking at the dates of the different orders and  
14 the directives, the road map, *et cetera*, in determining that you were in  
compliance with the latest guidance from the governor, the help response, and  
the LEAP I think they called it.

15 Ms. Ortiz: Let's turn to page 26, please. Under section 23 titled employer  
16 knowledge it gives specific information the inspector gathered regarding this  
particular citation item; is that correct?

17 Mr. Hutchison: Yes.

18 Ms. Ortiz: Can you tell us for the record what it says there?

19 Mr. Hutchison: The owner, Fawnia, stated that she read the governor's  
20 directive to open.<sup>3</sup> She also stated that employees can wear face coverings if  
they want but it's not required. 1Tr., pp. 102;2-24, 103;1.

21 Mr. Hutchison testified about calculating the amount of the proposed penalty. The alleged  
22 violation was rated as a serious violation. *See*, State's Exhibit 1, p. 23, *see also*, 1Tr., p. 114;16-21.  
23 The violation was rated at this level because exposure to COVID-19 could lead to chronic,  
24 irreversible illness up to, and including, death. *See*, 1Tr., pp. 114;20-24, 115;1. The probability of  
25 injury or accident was determined to be "greater." *See*, 1Tr., p. 115;7-23. Nevada OSHA rated the  
26

---

27  
28 <sup>3</sup>Ms. Monday testified that she had read Directive 21 and that she had paid particular attention to the  
section devoted to fitness clubs. *See*, 1Tr., p. 151;17-24.

1 violation as greater based upon a calculation which considers the number of employees exposed,  
2 frequency of exposure, use of appropriate personal protective equipment and medical surveillance,  
3 if applicable. *See, Id.* The severity of injury or illness and the probability of those events are then  
4 combined to determine the gravity of the alleged violation. *See, 1Tr., pp. 115;24, 116;1-4.* The  
5 basis of the penalty is then the gravity of the alleged violation. *See, Id.* In this instance, the gravity  
6 based penalty for the alleged violation of NRS. 618.375(2) was \$13,494. *See, 1Tr., p. 116;9-11.*  
7 This penalty was then reduced to \$4,858 because Pole Fitness is a small employer and it does not  
8 have any history of other serious violations. *See, 1Tr., p. 116;12-22.*

9 Respondent called Ms. Mondey as a witness. Ms. Mondey testified that she had never told  
10 an employee or a client that they could not wear face masks while working out in or otherwise being  
11 at the Pole Fitness facility. *See, 1Tr., pp. 143;16-19, 144;14-21.* Mr. Dibler then asked Ms. Mondey  
12 about the video (State's Exhibit 1, p. 73) wherein she was not wearing a mask at the front desk  
13 when a client arrived at Pole Fitness. Her response was that she had a religious exemption from  
14 wearing a face covering. *See, 1Tr., p. 145;5-15.* When cross examined regarding her religious  
15 exemption, Ms. Mondey was unable to provide any official documentation creating or allowing a  
16 religious exemption to face coverings.<sup>4</sup> *See, 1Tr., p. 165;4-15.*

17 Ms. Mondey testified that she does not require her instructors to wear face masks for two  
18 reasons. The first was her belief that face coverings interfere with proper breathing. She stated that  
19 face coverings prevent her instructors from breathing sufficiently and from projecting their voices.  
20 *See, 1Tr., pp. 145;24, 146;1-11.* Second, Ms. Mondey said that there was a risk that the face mask  
21 might shift and cover the instructor's eyes. This would create an unsafe condition for both the  
22 instructor(s) and the clients. *See, 1Tr., pp. 146;6-24, 147;1.* Ms. Mondey testified that she does not  
23 require Pole Fitness' clients to wear masks because it was not her duty. *See, 1Tr., p. 147;2-7.* Ms.  
24 Mondey further explained that she does not require clients to wear masks and has no intention to  
25 ever do so, as follows:

26 \_\_\_\_\_  
27 <sup>4</sup>Later in the proceeding, Ms. Mondey claimed that she possessed an exemption letter from her  
28 pastor in California. *1Tr., p. 189;15-24, 190;1-8.* However, the document was not part of the evidence  
before the Board.

1 Mr. Dibler: So let me ask you why do you feel or believe that it's not your duty of  
2 care to force customers to wear a face covering?

3 Ms. Mondey: I feel that way because I'm not insured if something does happen  
4 and I'm not able to get insurance if someone hurts themselves while wearing a  
5 face covering. And I'm also not a medical practitioner. I haven't been trained on  
6 how to administer emergency medical devices and personal protective equipment.  
7 It's not within my jurisdiction.

8 Mr. Dibler: You don't prevent any customers from wearing masks in a class, do  
9 you?

10 Ms. Mondey: I never have and I never will.

11 Mr. Dibler: You've never told a customer -- Have you ever told a customer not to  
12 wear a mask in a class?

13 Ms. Mondey: No, I have not. *See*, 1Tr., p. 148;8-22

14 Ms. Mondey explained that she had several concerns regarding the use of face masks. First,  
15 she testified that two of Pole Fitness' clients had fainted in the studio as the result of oxygen  
16 deprivation from exercising while wearing masks. *See*, 1Tr., pp. 149;2-17, 150;8-15. Ms. Mondey  
17 also testified that Pole Fitness was subject to an injunction from a client who had been compelled to  
18 wear a face mask at the facility<sup>5</sup>. *See*, 1Tr., p. 150;16-24. Lastly, Ms. Mondey testified that she had  
19 no coverage for injury or illness resulting from clients' use of face masks in the studio. *See*, 1Tr., p.  
20 151;2-16. Based upon these experiences and Ms. Mondey's understanding of Directive 21, she  
21 determined that face masks should be viewed as optional for both employees and clients. *See*, 1Tr.,  
22 p. 152;1-19.

23 Mr. Dibler then obtained testimony from Ms. Mondey regarding the specifics of the Notice  
24 of Alleged Safety or Health Hazards. Specific to Citation 1, Ms. Mondey testified that she had  
25 never said that COVID-19 was fake and that she had never refused to allow employees to wear face  
26 masks. *See*, 1Tr., pp. 153;20-24, 154;1-3.

27 Ms. Mondey testified that she had safety concerns regarding anyone wearing masks in any of  
28 classes offered by Pole Finesses. *See*, 1Tr., pp. 145;24, 146;1-24. On cross examination, Ms.

---

<sup>5</sup>The actual language of the Order appears to be far less specific, saying only that Pole Fitness must  
comply with Nevada Law. *See*, 2Tr. 37;16-18.



1 Mondey admitted there was a range of exertion in Pole Fitness' classes. It has very physical classes  
2 such as pole dancing, boot camp and belly dancing. However, Pole Fitness also has at least one low  
3 exertion stretching class. *See*, 1Tr., pp. 166;6-24, 167;1-6. Ms. Mondey admitted that she did not  
4 distinguish between these classes in her lack of enforcement of the mask requirements of Directive  
5 21, as shown below:

6 Ms. Ortiz: Okay. Now, do you require masks be worn during the stretching  
7 classes?

8 Ms. Mondey: I don't require people to wear masks, so the answer would  
be no. 1Tr., p. 167;7-10.

9 Ms. Ortiz then followed up on some of Ms. Mondey's previous testimony. Specifically,  
10 whether she had ever, at any time, said that COVID-19 is fake, *i.e.*, some sort of government and/or  
11 media hoax. *See*, 1Tr., p. 171;9-24. This question was posed in light of the podcast and video  
12 previously discussed as being admitted as evidence. Ms. Mondey's response was, "I definitely had  
13 some questions. I don't [] know that COVID-19 is real." *See*, 1Tr., p. 180;12-13. Ms. Mondey also  
14 questioned Governor Sisolak's authority to issue Directive 21 and other COVID-19 related  
15 mandates.

16 Ms. Ortiz: And do you recall what you said in that video regarding the use of  
17 masks?

18 Ms. Mondey: I said that the masks are not required and if they want they  
can leave them in the car.

19 Ms. Ortiz: And is it -- was it your position in June of 2020 that you did not have  
20 to follow the governor's directives?

21 Ms. Mondey: Yeah. As far as I know, a governor doesn't have jurisdiction over  
people and private businesses.

22 Ms. Ortiz: And is that your belief today?

23 Ms. Mondey: It is.

24 Ms. Ortiz: And, in fact, isn't it true that at this point in time, as recently as March  
25 of 2021, you made it clear to a court that you had no intention of complying with  
COVID-19 mandates in your business; isn't that accurate?

26 Ms. Mondey: It sounds pretty harsh when you say that, but yeah. *See*, 1Tr., p.  
27 181;4-19.

28 ///

1 Ms. Ortiz also impeached Ms. Mondey's testimony that she had never told a client not to  
2 wear a mask. See, 1Tr., p. 148;8-22 . However, she made a video where she stated, "if people come  
3 to Pole Fitness, they should leave the masks in the car." See, 1Tr., p. 204;20-24. Thus, all in all,  
4 Ms. Mondey's testimony and the material from the podcast and video made it quite clear that she  
5 actively opposed the State of Nevada's COVID-19 directives and mandates.

#### 6 CONCLUSIONS OF LAW

7 The State is obligated to demonstrate the alleged violation by a preponderance of the reliable  
8 evidence in the record. Mere estimates, assumptions and inferences fail this test. Conjuncture is  
9 also insufficient. Findings must be based upon the kind of the evidence which responsible persons  
10 are accustomed to rely in serious affairs. *William B. Hopke Co., Inc.* 1982 OSHARC LEXIS 302 \*  
11 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). The Board's decision must be based on  
12 consideration of the whole record and shall state all facts officially noticed and relied upon. 29 CFR  
13 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974 OHSD ¶ 16, 958 (1973). *Olin*  
14 *Construction Inc. v. OSHARC and Peter J Brennan, Secretary of Labor*, 525 F. 2d 464 (1975). A  
15 Respondent may then rebut the allegations by showing, 1) the standard was inapplicable to the  
16 situation at issue or 2) the situation was in compliance. *S. Colorado Prestress Co. v. Occupational*  
17 *Safety & Health Rev. Comm'n*, 586 F.2d 1342, 1349-50 (10th Cir. 1978).

18 The burden is on the State to prove by a preponderance of the evidence, a *prima facie* case  
19 against the Respondent. See, NAC 618.788(1), see also, *Original Roofing Company LLC v Chief*  
20 *Administrative Officer of the Nevada OSHA*, 442 P. 3d 146, 149 (Nev. 2019). Thus, in matters  
21 before the Board of Review, the State must establish: (1) the applicability of a standard being  
22 charged; (2) the presence of a non-complying condition; (3) employee exposure or access to the  
23 non-complying condition; and, (4) the actual or constructive knowledge of the employer's violative  
24 conduct. *Id.* at 149, see also, *American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1261  
25 (D.C. Cir., 2003).

26 ///

27 ///

28 ///

1 In Citation 1, Item 1, State OSHA alleges a violation of NRS 618.375(1), Nevada's analog  
2 to Section 5(a) of the Occupational Safety and Health Act of 1970 (the Act)<sup>6</sup>, the Federal general  
3 duty clause. As Nevada has adopted all Federal Occupational Safety and Health Standards which  
4 the Secretary of Labor has promulgated, modified or revoked and any amendments thereto, *see*,  
5 NRS 618.295(8), the Board is aided in the interpretation of NRS 618.375(1) by the interpretation  
6 and application given to Section 5(a) of the Act.

7 As an initial proposition, the general duty clause was intended to fill in the gaps, *see*,  
8 *Safeway, Inc. v. OSHRC*, 382 F.3d 1189, 1195 (10<sup>th</sup> Cir., 2004) in the umbrella of protection  
9 afforded by the Act in order to provide safe employment or a safe place of employment where no  
10 vertical or cabined statute or regulation exists. *Reich v. Arcadian Corp.*, 110 F.3d. 1192, 1196 (5<sup>th</sup>  
11 Cir., 1997)(hazardous conditions not covered by agency standards). And, it was intended to apply  
12 where a statute or regulation exists but is inadequate to provide the safety the Act was otherwise  
13 intended to provide and the employer was aware of the inadequacies. *See, UAW v. General*  
14 *Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir.) *cert. denied*, 484 U.S. 976 (1987). It is  
15 the responsibility of State OSHA to demonstrate the adequacy or absence of a specific standard  
16 applicable to the condition at hand. *See, Safeway Inc., supra*, at 1194. The bottom line is that  
17 though an employer is not an insurer of employee safety, *see, e.g., National Realty and Constr. Co.*  
18 *v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir., 1973), "...an employer's duty to provide a safe  
19 working environment extends beyond compliance with specific safety and health standards."  
20 *Safeway, supra* at 1194.

21 The elements of a general duty violation are well established. The Complainant, State OSH  
22 must show: (1) a condition or activity in the workplace presents a hazard to an employee; (2) the  
23 condition or activity is recognized as a hazard; (3) the hazard is causing or likely to cause serious  
24 injury or death; and (4) a feasible means exists to eliminate or materially reduce the hazard. *See,*  
25 *National Realty, supra* at 1266; *see, e.g., Wiley Organics Inc. v. OSHRC*, 124 F.3d 201 (6<sup>th</sup> Cir.,  
26 1970.

---

27  
28 <sup>6</sup>29 U.S.C. § 654(a)(1)

1           Analysis begins with the question of whether the general duty clause applies in this case. The  
2 general duty clause requires employers to comply with measures which are reasonably adequate to  
3 render such employment and places of employment safe. It is applicable, here, because COVID-19  
4 is a globally recognized hazard, and as such, Nevada employers have the responsibility via the  
5 OSHA act to address those hazards. Through the emergency directives, Governor Sisolak provided  
6 measures required to help mitigate the spread of COVID-19. Specifically, applicable here is the  
7 May 28, 2020, Directive Number 21.

8           Section 12 of the Directive requires all employers to take proactive measures to ensure  
9 compliance with the social distancing and sanitation guidelines and states: "It shall continue to  
10 require employees who interact with the public to wear face coverings." Section 13 states that all  
11 businesses must adopt measures that meet or exceed the standard promulgated by Nevada OSHA to  
12 minimize the risk of the spread of COVID-19. Section 15 states that employers are strongly  
13 encouraged to, among other things, encourage customers to wear face coverings and perform  
14 frequent, enhanced environmental cleaning of commonly touched surfaces. Section 28 deals  
15 specifically with, among others, fitness studios. It says that studios must, without exception, abide  
16 by all protocols promulgated by Nevada OSHA and LEAP. They must still have all employees wear  
17 face coverings to the maximum extent practicable and should encourage patrons to wear face  
18 coverings to the maximum extent practicable.

19           On May 29, 2020, Nevada OSHA issued a memorandum in relation to Directive 21. The  
20 memorandum specifies: "All employers must provide face coverings for employees assigned to  
21 serve the public and must require those employees to wear them." The Nevada OSHA  
22 memorandum further requires routine cleaning and disinfecting of surfaces and equipment with  
23 EPA approved cleaning chemicals. Thus, the Standard of the general duty clause as applied to the  
24 COVID-19 pandemic in general, and specifically Directive 21, is clearly set. These documents  
25 mandate the use of face coverings in all but the most exceptional circumstances.

26 ///  
27 ///  
28 ///

1 Ms. Mondey argues that Governor Sisolak had no authority to enact the regime of  
2 regulations in response to the pandemic. She is mistaken. Governor Sisolak acted within his  
3 authority when he issued the Declaration of Emergency Directives as set forth herein. *See*, 2Tr., p.  
4 78;15-20.

5 On March 13, 2020, Donald J. Trump, President of the United States declared a nationwide  
6 emergency pursuant to Sec. 501(b) of the Robert T. Stafford Disaster Relief and Emergency  
7 Assistance Act, 42 U.S.C. 5121-5207 (the "Stafford Act"). Chapter 414 of the Nevada Revised  
8 Statutes provides that in times of emergency the Governor may exercise all powers necessary to  
9 promote and secure the safety and protection of the civilian population. Specifically, subsection of  
10 NRS 141.060 to make, amend or rescind the necessary orders or regulations to carry out the  
11 provision of Chapter 414. Further, subsection 3(f) provides that the Governor may delegate  
12 administrative authority that in performing his duties under Chapter 414. In this instance then, the  
13 Governor acted within the authorized limits of his power when issuing Directive 021 and in  
14 authorizing Nevada OSHA to enforce the Directive.

15 The second factor requires a showing that the standard has been violated. Here, Respondent  
16 admits that it does not provide or require employees to wear a face covering leaving it to their  
17 choice. Ms. Mondey confirmed in her testimony that it was her policy that "if a trainer doesn't want  
18 to wear a face mask," they don't have to. *See*, 1Tr., 145;1-4. Ms. Mondey confirmed that she didn't  
19 do any job hazard analysis for any of her employees which would allow them to not wear a face  
20 covering. *See*, 1Tr., p. 167;11-19. Ms. Mondey testified she doesn't feel it was her duty to force her  
21 customers to wear coverings. *See*, 1Tr., p. 147; 2- 6, 148; 8-16. Further, Ms. Mondey told the  
22 inspector that a deep cleaning is only conducted two times per week. *See*, State's Exhibit 1, p. 17.

23 The next factor is the exposure of the employees. In this case, the lack of compliance left all  
24 employees at Pole Fitness exposed to possible exposure to COVID-19. Ms. Mondey testified that  
25 her staff consists of 14 to 18 people. *See*, 1Tr., p. 138;22-24. The video that was admitted as part of  
26 Exhibit 1 is date stamped May 29, 2020, the first day of opening since the shutdown. *See*, 1Tr., p.  
27 140;1-4. The video shows Ms. Mondey maskless, sitting at what appears to be the counter at the  
28 entrance to the facility. *See*, 1Tr., p. 145;5-8. A masked client then entered the facility. The

1 individual was coughing at the time. Ms. Mondey saw that he was coughing yet still told him he  
2 could remove his mask. 1Tr., p. 141;1- 6. Shortly thereafter a maskless employee joins the group.  
3 *See*, 1Tr., 163;20-22. This was again, the day after fitness studios were allowed to re-open.  
4 Additionally, Ms. Mondey testified that she never brought up the question of facial coverings with  
5 any students. 1Tr., p. 202;16-23

6 The last factor showing the employer's knowledge of its requirements. In this case, Ms.  
7 Mondey has admitted that she had read the Directive 21. *See*, 1Tr., p. 151;17-24. She stated that  
8 employees can wear face coverings if they want, but they are not required to. *See*, 1Tr., 145;24,  
9 146;1-11. Ms. Mondey testified that an employee not wanting to wear a face covering for their own  
10 reasons is a valid reason to override the mandate. *See*, 1Tr., p. 164;3-7. Ms. Mondey reiterated and  
11 confirmed that Pole Fitness at no time provided face coverings. She was the one that purchased and  
12 provided the chemicals to clean. She confirmed the bottles used to clean the poles were half  
13 isopropyl alcohol and half water, and that the water diluted the alcohol. Further, she diluted the  
14 alcohol to this level because at this time isopropyl alcohol was hard to come by and the price had  
15 sky rocketed. *See*, 1Tr., p. 157;9-12.

16 The Board accordingly finds and concludes that the preponderance of the evidence reveals  
17 the State met its *prima facie* burden under NRS 618.375. It is clear that Pole Fitness violated its  
18 duty to furnish and use safety devices and safeguards, and adopt and use such practices, means,  
19 methods, operations and processes as are reasonably adequate to render employment and places of  
20 employment safe. The claim and penalty are hereby sustained. The motion did not contain any  
21 language requiring abatement of the condition. Therefore, this Order does not require abatement in  
22 addition to the monetary penalty.

### 23 ORDER

24 It was moved by Board Member Milligan that the citation and fine of \$4,858 be upheld. *See*,  
25 2Tr., p. 76;3-12. The motion was seconded by Board Member Spielberg. *See*, 2Tr., p. 78;7-9. The  
26 motion was approved unanimously upon a vote of three in favor and none in opposition. *See*, 2Tr.,  
27 p. 81;3-12. Accordingly, the State OSHA Board of Review hereby upholds the citation and fine  
28 assessed against Pole Fitness.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

This is the Final Order of the Board.

IT IS SO ORDERED.

On July 12, 2023, the Board convened to consider adoption of this decision, as written or as modified by the Board, as the decision of the Board.

Those present and eligible to vote on this question consisted of the three current members of the Board, to-wit, Chairman Rodd Weber, Vice-Chairman William Spielberg and Member Frank Milligan. Upon a motion by Frank Milligan, seconded by William Spielberg, the Board voted 3-2 to approve this Decision of the Board as the action of the Board and to authorize Chairman Rodd Weber, after any grammatical or typographical errors are corrected, to execute, without further Board review this Decision on behalf of the Nevada Occupational Safety and Health Review Board. Those voting in favor of the motion either attended the hearing on the merits or had in their possession the entire record before the Board upon which the decision was based.

On July 12, 2023, this Decision is, therefore, hereby adopted and approved as the Final Decision of the Board of Review.

Dated this 20<sup>th</sup> day of July, 2023.

NEVADA OCCUPATIONAL SAFETY AND  
HEALTH REVIEW BOARD

By:   
Rodd Weber, Chairman

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

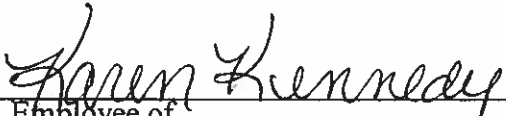
**CERTIFICATE OF SERVICE**

Pursuant to NRC 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  
400 West King Street, Suite 201  
Carson City, NV 89703

Lindsay Dibler, Esq.,  
Craig A. Mueller, Esq.  
Mueller & Associates, Inc.  
723 S. Seventh Street  
Las Vegas NV 89101

Dated this 27<sup>th</sup> day of July, 2023.

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

S:\Clients\OSHALV 21-2060, Pole Fitness Studio, LLC, aka Pole Fitness Studio\Decision\Final Decision.wpd



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

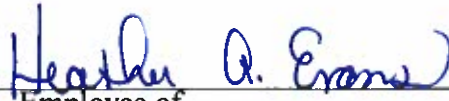
**CERTIFICATE OF SERVICE**

Pursuant to NRCPC 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, for a second time because of a change in the Respondents Council' address, 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  
400 West King Street, Suite 201  
Carson City, NV 89703

Linsay Dibler, Esq.,  
Craig A. Mueller, Esq.  
Mueller & Associates, Inc.  
808 S. Seventh Street  
Las Vegas NV 89101

Dated this 8<sup>th</sup> day of August, 2023.

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

1 NEVADA OCCUPATIONAL SAFETY AND HEALTH  
2 REVIEW BOARD

3 \* \* \* \* \*

4 CHIEF ADMINISTRATIVE OFFICER  
5 OF THE OCCUPATIONAL SAFETY  
6 AND HEALTH ADMINISTRATION OF  
7 THE DIVISION OF INDUSTRIAL  
8 RELATIONS OF THE DEPARTMENT  
9 OF BUSINESS AND INDUSTRY, STATE  
10 OF NEVADA,

11 Complainant,

12 vs.

13 POLE FITNESS STUDIO, LLC, aka  
14 POLE FITNESS STUDIO,

15 Respondent.

Docket No. LV 21-2060

Inspection No. 1477397

FILED  
NOV 23 2024  
O.S.H. REVIEW BOARD  
BY *H. Kennedy*

16 FINAL ORDER CLOSING FILE

17 The Board is in receipt of a stipulation and order, attached hereto, dismissing the  
18 respondent's appeal in the above referenced matter. As the stipulation and order show, the  
19 disposition of this case in favor of the complainant is affirmed. The Board hereby orders that the  
20 file in this matter be and hereby is concluded and closed as of the date of this final Order.

21 This Final Order may be served by e-mail.

22 IT IS SO ORDERED.

23 Dated this 23<sup>rd</sup> day of November, 2024.

NEVADA OCCUPATIONAL SAFETY  
AND HEALTH REVIEW BOARD

24 By: /s/Jorge Macias  
25 Jorge Macias, Chairman

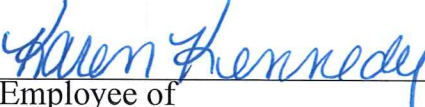
1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**CERTIFICATE OF SERVICE**

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, *Final Order Closing File*, on those parties identified below e-mailing the same to the following e-mail addresses:

Salli Ortiz, Esq. - [sortiz@dir.nv.gov](mailto:sortiz@dir.nv.gov)  
Craig A. Mueller, Esq. - [craig@crmuellerlaw.com](mailto:craig@crmuellerlaw.com)  
Lindsay Dibler, Esq. - [lindsaydibler@gmail.com](mailto:lindsaydibler@gmail.com)

Dated this 23<sup>rd</sup> day of November, 2024.

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

S:\Clients\OSHALV 21-2060, Pole Fitness Studio, LLC, aka Pole Fitness Studio\Order Closing File R2.wpd