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, **Complainant,** **vs.** **THE DILLINGER GROUP, LLC dba THE DILLINGER,** **Respondent.**	**Docket No. LV 21-2061** **Inspection No. 1479796**

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

This case arose out of a referral alleging violations at a bar and restaurant commonly known as "The Dillinger" located at 1224 Arizona Street, Boulder City, Nevada. State's Exhibit C-3. The State's inspection of the premises resulted in the issuance of a complaint consisting of one cause of action as follows:

> Citation 1, Item 1: SERIOUS
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> Nevada Revised Statutes 618.375(2): Duties of employers. Every employer shall furnish and use such safety devices and safeguards, and adopt 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.

Complaint, p. 2.

In the complaint, it is alleged that:

> The Dillinger, located at 1224 Arizona Street, Boulder City, Nevada 89005, did not ensure that practices, means, methods, operations and processes are reasonably adequate to render the place of employment safe from COVID-19 exposure, nor were orders issued by the Division complied with. Effective social distancing protocols

> were not established to ensure staff maintained at least six feet of personal separation from other staff. The Employer also did not require employees to wear face coverings as mandated by the Governor's directives. Two employees, one working at the bar and the other waiting on tables, were not practicing social distancing or wearing face coverings while interacting with each other and customers.

Complaint, p. 2.

The complaint references the Declaration of Emergency Directive #003, 3/20/2020, a letter to Construction Industry from Nevada OSHA, 3/26/2020 and Essential/Non-Essential Business Emergency Regulations, 3/20/2020. Complaint, p. 2.

The matter came before the Nevada Occupational Safety and Health Review Board (the Board) for hearing on Wednesday, August 9, 2023. *See*, Tr., p. 1. The hearing was conducted in furtherance of a duly provided notice. *See*, Notice of Hearing, filed July 17, 2023. In attendance to hear the matter were Board Chairman, Rodd Weber, Board Secretary, William Spielberg, and Board members, Frank Milligan, Jorge Macias and Scott Fullerton. *See,* Tr., p. 1.

Sallie Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety and Health Administration of the Division of Industrial Relations of the Department of Business and Industry (the State), appeared on behalf of the complainant (the State). The Dillinger (hereinafter Respondent or Dillinger) was represented by Grant Turner, Tr. p. 13. Mr. Turner is not an attorney. He was the lay advocate for Dillinger. Tr. p. 13. The Dillinger is a small bar and restaurant. State's Exhibit C-4. The Dillinger is the name by which The Dillinger Group, LLC, does business. State's Exhibit C-4. Grant Turner is a co-owner and manager of The Dillinger Group, LLC, a domestic limited liability company organized and registered under the laws of the State of Nevada. State's Exhibit p. 1.

Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS 618.315. Jurisdiction was not disputed. As there were five members present to decide the case, with at least one member representing management and one member representing labor in attendance, a quorum was present to conduct the business of the Board.

Nevada has adopted all Federal Occupational Safety and Health Standards which the Secretary of Labor has promulgated, modified or revoked and any amendments thereto. They are then deemed the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8). A

complaint may be prosecuted for circumstances which arise before or during an inspection of the employer's workplace. *See,* NRS 618.435(1).

The State issued its Citation and Notification of Penalty (Citation) on July 20, 2020, Complaint p.2, consisting of the one item listed above. Generally, the State believes:

> The Employer is not complying with governor's directive regarding social distancing and Personal Protective Equipment, despite being informed of the requirements by various local entities (police, code enforcement). State's Exhibit C-3.

In this instance, Respondent's duty to provide a safe place of employment was defined by certain Proclamations and Directives issued in response to the COVID-19 pandemic. Specifically, the creation and maintenance of a safe work environment was set by Governor Sisolak's various Declarations of Emergency including Directives 001, 003, 021 and 024. *See*, State's Exhibits C-40, C-41 through C-45, C-47, C-48, C-59, C-66 through C-81, C-82 through C-88 and the remainder of Exhibit 3. *See also,* Directive 018 of which the Board takes judicial notice.

These Directives and related documents set the standard for the use of Protective Equipment (masks) and the cleaning and sanitization of businesses like that of the Respondent. After giving consideration to the severity of the violation and the possibility of injuries resulting from this alleged violation, the State brought suit seeking a penalty in the amount of $4,858 for Citation 1, Item 1. The State also seeks to require that the violative conditions, if any, remain be abated. *See*, Complaint p. 3.

At the outset of the hearing, the State offered for admission into evidence Exhibits 1 through 3, consisting of pages C-1 through C-107. They were admitted into evidence without objection by Mr. Turner. Tr. p. 14.

On behalf of Dillinger, Mr. Turner offered into evidence no exhibits at the outset of the hearing. Tr. p. 14. When asked if he had Exhibits he intended to offer later on or in the course of hearing, he stated: "I am not sure how this is going to go so I intend to just state my case and let it stand. And if anything I brought with me is helpful, then I will be happy to present it." Tr. p. 14.

Mr. Turner was also asked to identify at the outset the witnesses he intended to call and if that could include himself as a witness. Mr. Turner stated he brought no witnesses. Tr. p. 13. Ms. Ortiz offered on behalf of the State that she would be calling only one witness, Ralph Poznecki, the

inspector for this referral. Tr. p. 12.

Respondent sent a notice of its intent to contest the Citation on August 4, 2020. *See,*, Grant Turner's email dated August 4, 2022, at 8:33 AM to William Gardner, attached as Exhibit B to the Complaint. The State filed and served its Complaint on August 21, 2022. *See*, Complaint pp. 3-4. Dillinger answered the Complaint by letter addressed to Steve Ingersoll, then Chairman of the Board, c/o of the law offices of Board Counsel, Charles R. Zeh, Esq. *See,* letter form Answer addressing, primarily, an objection to the size of the penalty being sought by the State. In correspondence dated August 4, 2020, from Mr. Turner to William Gardner, Mr. Turner advised the State that a $3,400 penalty would be "devastating for my business." State's Exhibit C-31.

At the duly notice hearing, conducted on August 9, 2023, the State presented the testimony of Ralph Poznecki. Dillinger presented no witnesses other than the contentions and discussion points offered by Mr. Turner. He called no witnesses. No Exhibits were offered by the Dillinger for admission into evidence. As a consequence, the factual underpinnings of this State's Complaint are not in dispute, as explained below.

FINDINGS OF FACT

Ralph Poznecki, the investigator, was the sole individual who testified as a witness in this matter. His findings were summarized in his Inspection Narrative Report, admitted into evidence without objection as State's Exhibit 1, C-9. He stated there:

> The employer did not ensure that practices means, methods, operations and processes were reasonably adequate to render the place of employment safe from COVID-19 exposure, nor were orders issued by the Division complied with. Effective social distancing protocols were not established to ensure staff maintained at least six feet of personal separation for other staff. The employer also did not require employees to wear face covering as mandated by the Governor' directives. Two employees, one working at the bar and the other waiting on tables, were not practicing social distancing or wearing face coverings while interacting with each other and customers.

He also testified on the issue of Dillinger's knowledge of the threat of COVID-19 and requirements of the State to implement measures intended to protect from or mitigate against the effects of COVID-19. His report states:

> The employer has been contacted several times by local authorities including, but not limited to, Boulder City Police, Code Enforcement, the Boulder City Office of Economic Development. On four occasions, the owner was given notices advising [of] ... the March 24, 2020 directive from the Governor's office, on the mandated

requirement for social distancing. Correspondence from the Boulder City Chief of Police personally contacted the employer, regarding compliance with the Governor's directives. The employer was presented by those agencies with copies of the directive and the Roadmap to Recovery for Nevada, pertaining to their establishment. *Id.*, at C-9.

The documents supporting the question of knowledge are located in the State's Exhibits, C-40-57, C-58, C-61, C-102 and C-103.

During the course of the hearing, Mr. Poznecki testified as follow:

> I found that the - - the social distancing wasn't being maintained for the patrons as well as based on observations they had done there. That the employees were not well all informed by management as to what to do. The wearing of face coverings to the majority of employees were that it was up to their choice of what they were going to wear and it wasn't following the correct guidelines that was [sic] established at that time. Tr., p. 27.

Mr. Poznecki also explained: "The basic explanation was is [sic] that they were doing their best. They were trying to comply. They were having a problem with - - with the setup in here to have sufficient tables for guests and customers, trying to schedule it and also to get the employees to comply with the mandates." Tr., p. 28. *See also*, Exhibit 1, photographs of the interior of the site, C-38, C-39.

None of this was controverted by Dillinger through Mr. Turner. When given the opportunity to cross examine Mr. Poznecki, Mr. Turner declined. "I don't know that I have questions of Mr. Poznecki." Tr., p. 32. Mr. Turner also said: "He [Mr. Poznecki] was super helpful." Tr., p. 32.

When called thereafter to present Dillinger's case through Mr. Turner, he called himself, in effect, and then stated, they were doing everything in following the rules, Tr., p. 37, but

> [y]ou gentlemen up there, [the Board of Review] if you have family, you wouldn't want me making personal health decisions for your children. And that's - - that is that is the feeling I got when my employees were saying I can't sleep. I have a splitting headache. I feel like I'm gong to faint. So to me, I'm all about personal liberty. I'm an American, and it felt like this is a personal health condition that supercedes any mandate [for wearing masks]. Tr., p. 37

Mr. Turner then later stated: "So I did what I think was the most American thing I could do, which was allow my employees to make personal health decisions on their own." Tr., p. 39.[1] Mr.

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[1][Reported as a comment from Chairman Weber but from the context of the dialog, this was clearly Mr. Turner asserting his position.]

Turner went on further to state: "I don't believe the government should be making [decisions like this] for individuals." Tr., p. 40. Then, stating policy, Mr. Turner argued: "And as a matter of fact, I circulated a form that said any employee who has trouble breathing, any employee who is having any ill effects from wearing masks, this is a personal health decision and I will not be enforcing it. I'm recommending masks." Tr., p. 44.

Mr. Turner also asserted: "And by the way, it's not all of my employees took their masks. I would say 80 percent of them kept wearing masks the entire time. They - - because they felt it was protecting them or whether they just wanted to be in compliance." Tr., p. 44.

Capping this philosophy, Mr. Turner then concluded:

> If we look at how, as a country how our experts performed, I would say, you know, if you were going to grade them, there's definitely room for improvement but these are the people that are getting paid to do it. I'm - - I'm a restaurant owner just trying to keep up with the rules. So if they don't get a passing grade, how are we suppose to? Tr., 45.

Mr. Turner also provided in the form for employees to sign: "and when I noticed the health consequences of wearing them, that's - - at that time I made the decision, everybody fill out this form, sign it. If you have any breathing, if you are feeling sick after wearing these, that's a personal health decision if you choose not to wear them." Tr., p. 50, 11-16.

Mr. Poznecki concluded that while failing to comply, the basic explanation was the conclusion that they were doing their best. Tr., p. 28.

Mr. Turner explained Dillinger's philosophy in response to the COVID situation. "So to me, I am all about personal liberty. I am an American, and it felt like this is a personal health condition that supercedes any mandate." Tr. p. 37, 15-17. He continued: "So I did what I think was the most American thing I could do, which was allow my employees to make personal health decisions on their own." Tr., 39.

He also said:"[I]t's a personal health decision that I don't believe the government should be making for individuals. To me that felt - - that was the point at which it felt we had crossed the line and it had become un-American and that's - - that's following the very first piece of advice that we got was do not wear masks." Tr., pp. 39-40.

Thus, revealed, it was Mr. Turner's belief on behalf of Dillinger that a policy, mandate or

regulation issued by the Government, if un-American in his opinion, need not be followed or at least would deserve clemency. Tr., p. 41. In furtherance of that view, he "...circulated a form that said any employee who had trouble breathing, any employee who was having any ill effects from wearing the mask, this is a personal health decision and I will not be enforcing it. I'm recommending masks." Tr., p. 44. As a result of his policy, he "... would say 80 percent of them [employees] kept wearing masks the entire time." Tr., p. 44. In other words 20 percent did not wear facial covering/masks as conceded by Mr. Turner.

As a result,

> ...it felt un-American to be fining a business owner for having to make a decision between employees' personal health and complying with a rule that to me seemed at the time and, in fact, we learned later was not a sound policy.
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> So I - - even if they would have reduced [the fine] to a dollar, it just felt at my core un-American to pay a fine for something I just didn't believe I did anything - - I just didn't believe I did anything wrong. Tr., p. 47. *See also*, Tr., p. 50.

Mr. Turner, however, was pressed on his position when asked "... was it personal health risks to these individuals, how many of your employees brought in medical evidence from their doctors stating that wearing a mask was a hazard to their health?" To this question Mr. Turner answered: "zero." He also said, he took his "observations that they were - - like I said, when I saw with my own eyes one employee come out of the bathroom and it actually looked like a cartoon, like whoa, whoa. And I said sit down. Go outside. Take your mask off. Get some air." Tr., p. 53.

Mr. Turner was questioned by the Chairman: "That you were familiar with the regulations and you had been provided - - you said Mr. Poznecki was very helpful and provided you that information? Answer: Yes, sir." Tr., p. 54. He was then asked by the Chairman: "Were you aware that within those - - that guidance that there was a health exemption if somebody was having health issues and it would just require a doctor's note and you would be legal to then not have to wear those? Answer: I was not aware of that." Tr., p. 54. This was unfortunate for Mr. Turner. Governor Sisolak's Declaration of Emergency Directive 024 states:

> Individuals who cannot wear a face covering due to a medical condition or disability, or who are unable to remove a mask without assistance. Persons exempted under this provision should wear a non-restrictive alternative, such as a face shield. Persons exempted under this provision shall not be required to produce documentation verifying the condition.

Mr. Turner failed to avail himself of this option for wearing a face covering. This option undercuts most of his concerns regarding face mask protection. Directive 024 was in effect as of June 24, 2020 and, therefore, at all times pertinent to this matter.

The State also presented evidence, unchallenged in the record, regarding the factors that makeup the conclusions that the violation in this case was considered to be serious. *See*, Tr., pp. 30-32. Mr. Poznecki testified and explained how the State determined the amount of the fine for Citation 1, Item 1. The calculation of the fine amount is inextricably tied to the seriousness of the offense and the potential threat posed to safety and health by the violative conditions in the work place.

The fine was determined using objective criterion. The fine is a gravity based penalty, a combination of the severity and the probability of the alleged violation causing injury, calculated prior to any penalty adjustments or discounts.

Mr. Poznnecki testified to the severity of the alleged violation of NRS 618.375(1), the Nevada general duty clause. There are three levels of severity, high, medium and low. The violation, here was considered high because the degree of the threat posed by COVID-19, clearly included death. The threat was not the product of idle speculation. The threat according to Mr. Poznecki was real. There was a substantial probability that death or serious illness could result should an employee contract COVID-19.

Given the pandemic of epic portions, the likelihood of contracting COVID-19 was considered to be a greater probability of illness. Factored in with severity, gravity is a combination of severity and the probability of illness or death. Here, given the severity and high likelihood of illness, the gravity based determination was the sum of $15,494. Tr., p. 31. Due to the small size of the business and its prior clean record with State OSHA, a 60% plus reduction in the gravity based fine was applied, leaving the levy of $4,858 fine. *See*, Poznecki testimony at Tr., p 32.

Mr. Poznecki laid out his damages assessment and calculations, more succinctly and coherently in the State's Exhibit 1, pp. C-16 through C-19. These pages were admitted into evidence without objection. Additionally, the Dillinger did not cross examine Mr. Poznecki when he testified. His assessment of damages and their cause, therefore, are also unchallenged in the record. The point

being, here, also is that the gravity of the fine the State seeks to levy, is directly related to and helps establish the threat posed to employees when they go to work at The Dillinger under conditions in derogation of the general duty clause. *See also*, Exhibit 2, pages C-40 through C-97, provide further, overwhelming support for the concern that exposure with COVID-19, might have severe repercussions and lead to serious medical condition and even death. These Exhibits were admitted into evidence without objection.

This factual recitation is, therefore, un-controverted in the record before the Board and in support of its disposition of this matter herein.

CONCLUSIONS OF LAW

The State is obligated to establish the alleged violation by a preponderance of the reliable evidence in the record. That is a simple matter, here, as the facts which underlie the Complaint in this case have not been challenged. Dillinger's opposition to the action taken by the State rests more upon Mr. Turner's philosophy that it is un-American for him to make medical decisions for his employees which he claims he would be making if he required his employees to wear face masks and to maintain social distancing. That is, he need not follow a rule or regulation that he believed is un-American and a statute or regulation is un-American if it is invasive of employee personal choice concerning individual health such as the wearing of face masks or the observance of social distancing.

He believed and argued that the State has no business legislating regarding matters of personal health. He, therefore, believed that if he determined the state action was un-American, it was within his purview to decide whether or not to abide by it.

The Dillinger defense to the State's complaint fails. Philosophy, like conjecture, is not the kind of the evidence which responsible persons are accustomed to rely upon in serious affairs. *William B. Hopke Co., Inc.* 1982 OSHARC LEXIS 302 * 15, 10 BNA OSHC 1479 (No. 81-206, 19820 (ALJ)). The Board's decision must be based on consideration of the whole record and shall state all facts officially noticed and relied upon. 29 CFR 1905.27(b). *Armor Elevator Co.*, 1 OSHA 1409, 1973-1974 OHSD ¶ 16, 958 (1973). *Olin Construction Inc. v. OSHARC and Peter J Brenan, Secretary of Labor*, 525 F. 2d 464 (1975). A Respondent may then rebut the allegations by showing,

1) the standard was inapplicable to the situation at issue or 2) the situation was in compliance. *S. Colorado Prestress Co. v. Occupational Safety & Health Rev. Comm'n*, 586 F.2d 1342, 1349–50 (10th Cir. 1978).

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

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

The general duty clause was intended to fill in the gaps, *see, Safeway, Inc. v. OSHRC,* 382 F.3d 1189, 1195 (10th Cir., 2004) in the umbrella of protection afforded employees by the Act in order to provide safe employment or a safe place of employment where no vertical or cabined statute or regulation exists. *Reich v. Arcadian Corp.*, 110 F.3d. 1192, 1196 (5th Cir., 1997)(hazardous conditions not covered by agency standards). And, it was intended to apply where a statute or regulation exists but is inadequate to provide the safety the Act was otherwise intended to provide and the employer was aware of the inadequacies. *See, UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir.) *cert. denied*, 484 U.S. 976 (1987).

It is the responsibility of State OSHA to demonstrate the adequacy or absence of a specific

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[2]29 U.S.C. § 654(a)(2).

standard applicable to the condition at hand. *See, Safeway Inc., supra*, at 1194. The bottom line is that though an employer is not an insurer of employee safety, *see, e.g., National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir., 1973), "...an employer's duty to provide a safe working environment extends beyond compliance with specific safety and health standards." *Safeway, supra* at 1194.

The elements of a general duty violation are well established. The Complainant, State OSHA must show: (1) a condition or activity in the workplace presents a hazard to an employee; (2) the condition or activity is recognized as a hazard; (3) the hazard is causing or likely to cause serious injury or death; and (4) a feasible means exists to eliminate or materially reduce the hazard. *See, National Realty, supra* at 1266; *see, e.g., Wiley Organics Inc. v. OSHRC*, 124 F.3d 201 (6th Cir., 1970. A recognized hazard may be shown by an acknowledgment of the existence of a hazard either by the individual employer or by the industry in general. See, *National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir., 1973)(actual knowledge by the cited employer was not necessary for a violation to be sustained and a constructive knowledge of the hazard could be imputed to the cited employer on the basis of knowledge of the hazard in the relevant industry. *Id.*, at 1265 n. 32.).

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

Section 12 of the Directive requires all employers to take proactive measures to ensure compliance with the social distancing and sanitation guidelines and states: "It shall continue to require employees who interact with the public to wear face coverings." Section 13 states that all businesses must adopt measures that meet or exceed the standard promulgated by Nevada OSHA to minimize the risk of the spread of COVID-19. Section 15 states that employers are strongly

encouraged to, amongst other things, encourage customers to wear face coverings and perform frequent, enhanced environmental cleaning of commonly touched surfaces.

The Dillinger, as a bar, restaurant and a place to enjoy music with a work force of bartenders, waiters, cooks and waitresses, falls well within the umbrella of protection which the general duty clause was intended to address, namely safe employment and a safe place to work. Staff were exposed to the public during a pandemic of epic proportions.

The work force was also exposed to each other and the potential exposure to COVID-19, given that employees could work without wearing face masks and because they worked in cramped working conditions. They could not effectively practice social distancing, a situation exacerbated by Dillinger's policy that permitted employees to work with out wearing face masks. At least 20% of the work force declined to wear and were not required to wear face masks.

The general duty clause was intended to protect employees and to provide safe working conditions. The working conditions by reason of the nature of the work, the cramped facilities and the Dillinger philosophy regarding work rules, face masks and health decisions, planted the Dillinger and its workforce squarely within the umbrella of the general duty clause as clearly shown by the undisputed facts of the case such as the philosophy about health protection leaving at least 20% of the work force free to work without face masks intended to protect against the impact of COVID-19.

The State clearly showed the applicability of the general duty clause to the working conditions at the Dillinger and the work force. And, the State clearly showed that these same conditions violated the duty to provide safe working conditions and a safe job. That is to say, exposure to the kind of conditions the general duty clause was intended to protect against according to NRS 618.375 and applicability are clearly shown.

These are three of four elements that must be shown to prove a general duty clause violation, namely, proof of a hazard in the workplace, a recognized danger in the work and proof that the employees fall within the zone of danger from the hazard in the work place. There is, however, more proof in the record. This can be seen further when, on May 29, 2020, Nevada OSHA issued a memorandum in relation to Directive 21. The memorandum specifies: "All employers must provide face coverings for employees assigned to serve the public and must require those employees to wear

them." Thus, the Standard of the general duty clause as applied to the COVID-19 pandemic in general, and specifically Directive 21, is clearly set. These documents mandate the use of face coverings in all but the most exceptional circumstances.

As indicated, Mr. Turner's basic defense was that the administrative reactions to the COVID-19 pandemic were un-American. It forced employers to make medical decisions, according to Mr. Turner, that properly belong to the individual or the individual's family. Mr. Turner is mistaken. Governor Sisolak acted within his authority when he issued the declaration of emergency directives as set forth as a part of the evidence in this case. *See,* State's Exhibit B, pp. C-41 through C-97.

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

In this case, the lack of compliance left all the employees at Dillinger exposed to COVID-19. Mr. Turner, again, conceded that 20 percent of his workforce did not wear a face mask and none of his workforce were required to wear a face mask. Furthermore, employees were interactive with the general public. The general public was not required to wear a face mask, leaving employees exposed to someone with COVID-19 and as employees were not required to wear face masks, they, in turn, could carry COVID-19 to other employees. The potential for the presence of a COVID-19 incubator was the result. *See,* Tr., pp. 22, 25, 26, 30. *See also,* State's Exhibit 1, pp. C-9, C-40, C-19.

The last factor entails proof of the employer's knowledge of the requirements surrounding COVID-19. Given the pandemic, it is not conceivable that a person could exist without knowledge

of the presence of COVID-19 in the community. It is also inconceivable, given the pervasive nature of COVID-19, that employers, employees or both would be unaware of the COVID pandemic or the rules promulgated to contain the spread of COVID-19.

In the case of Dillinger, speculation is not required to prove employer knowledge of the threat posed by COVID-19 and the rules established to mitigate against the spread of the COVID-19 pandemic. The Dillinger was contacted on multiple occasions by local authorities such as the Sheriff and local public health officials seeking to inform Mr. Turner about the perils of COVID-19 and the face mask and space distancing requirements promulgated throughout the State of Nevada. *See*, State's Exhibit 1, pp. C-3, C-9.

This was obviously to no avail, given Mr. Turner's philosophy about governmental intrusion upon personal health decisions. It clearly establishes, however, that Mr. Turner was made well aware, however, of the obligation imposed by the State to require the practice of social distancing and the wearing of face masks. *See,* Tr., pp. 27-29. Because Dillinger's defense was philosophically based, and not based upon the facts, the factual basis for the State's *prima facie* case is beyond dispute.

The Board accordingly finds and concludes that the preponderance of the evidence reveals the State met its *prima facie* burden under NRS 618.375. It is clear that Dillinger violated its duty to furnish and use safety devices and safeguards, and adopt practices, means, methods, operations and process as are reasonably adequate to render employment and place of employment safe within the context of the COVID-19 pandemic. The claim and penalty are hereby sustained. The relief sought by the State in its Complaint is hereby granted.

ORDER

It was moved by Frank Milligan that the citation and fine of $4,858 be upheld. The motion was seconded by Board Member William Spielberg. The motion was approved unanimously upon a vote of five in favor and none in opposition. *See*, Tr., p. 81. Accordingly, State OSHA Board of Review hereby upholds Citation 1, Item 1, and the fine assessed against the Dillinger, Respondent, herein.

On December 13, 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 4 current members of the Board, to-wit, Chairman, Rodd Weber, Secretary William Spielberg, Frank Milligan and Jorge Macias. Upon a motion by Jorge Macias, seconded by Frank Milligan, the Board voted 4-0 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 December 13, 2023 this Decision is, therefore, hereby adopted and approved as the Final Decision of the Board of Review.

Dated this 9th day of January, 2024.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: _____
Rodd Weber, Chairman