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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.** **CGG ENTERPRISES, LLC dba WORLD'S BEST CORNDOGS** **Respondent.**	**Docket No. LV 21-2135** **Inspection No. 1522284**

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

This case arose out of a reference from an unnamed source, *i.e.,* Nevada OSHA was informed of conduct by a business which put its employee(s) at risk. *See,* State's Exhibit 1, p. 4. The State followed up on this information by sending a letter of inquiry (LOI) to that employer. *See,* State's Exhibit 1, pp. 65, 66. The employer's responses did not address the substantive allegations contained in the LOI. *See,* State's Exhibit 1, pp. 51-63. The State then sent an inspector to determine whether the allegation contained in the reference was factual. *See,* Tr., p.

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22;18-23[1]. The State's investigation resulted in the issuance of one citation consisting of one alleged violation of Nevada State law.

The matter came for hearing before the Nevada Occupational Safety and Health Review Board (the Board) on March 9, 2022. *See,* Tr., p. 1. The hearing was conducted in furtherance of a duly provided notice. *See,* Notice of Hearing dated November 10, 2021. Board Chairman Rodd Weber, Board Secretary William Spielberg and Board Members Frank Milligan, Jorge Macias and Scott Fullerton were all in attendance to hear the matter and deliberate thereon. *See,* Tr., p. 11;6-19. As there were five members of the Board 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. Also present was the Board's legal counsel, Charles R. Zeh, Esq. *See Id.* Jurisdiction in this matter is conferred by Chapter 618 of the Nevada Revised Statutes, NRS 618.315. Jurisdiction was not disputed.

Salli 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 or Complainant), appeared at the hearing on behalf of the Complainant (the State). *See,* Tr., pp. 11;24, 12;1-2. CGG Enterprises, LLC, dba World's Best Corndogs (hereinafter CGG or the Respondent) was represented by Cody Graham, a lay person representative. *See,* Tr., p. 12;8-16.

A complaint may be prosecuted for circumstances which arise before or during an inspection of the employer's workplace. *See,* NRS 618.435(1). 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 deemed the Nevada Occupational Safety and Health Standards. *See*, NRS 618.295(8).

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[1]"Tr." stands for the transcript of the hearing conducted on March 9, 2022, followed by the page and line number where the matter cited can be found.

The Notice of Alleged Safety or Health Hazard generally alleged that the facility was violating Governor Steve Sisolak's (Governor Sisolak) directives and policies designed to prevent the transmission of the COVID-19 virus. *See*, State's Exhibit 1, p. 6, *see also,* State's Exhibit 2, pp. 70-84.

On June 15, 2021, the State issued its Citation and Notice of Penalty which recommended a total penalty of $2,926. *See*, State's Exhibit 1, p. 37. On July 14, 2021, the Respondent notified the State of its intent to contest the matter. *See,* State's Exhibit 1, p. 38. Therein, the Respondent did not deny any of the substantive allegations of the LOI. *See, Id.* Instead, CGG alleged that it had entered into an agreement with the State in which the State either agreed not to enforce the alleged violation or waived its right to do so. *See, Id.*

On August 2, 2021, the State filed its formal Complaint for Resolution by the Review Board. *See*, State's Exhibit 1, pp. 39-44. On October 12, 2021, the State received the Respondent's Answer. *See,* State's Exhibit 1, pp. 45-67.

The Complaint sets forth one allegation of the violation of the general duty clause NRS 618.375(2). *See*, State's Exhibit 1, pp. 56-73. Citation 1, Item 1, charged a serious violation of NRS 618.375(2), as stated below:

> Every employer shall furnish and use such safety devices and safeguards, and adopt and use such practices, means, methods, operations and processes as are reasonably adequate to render such employment and places of employment safe and comply with all orders issued by the Division.
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> The employer did not ensure the use of 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 from COVID-19 exposure. Two employees working in a food truck were observed not wearing face coverings and/or interacting with each other and the public within proximity of less than six feet. The observed conditions and practices exposed employees to COVID-19 infection.

After giving consideration to the severity of the violation and the probability of injury resulting from this alleged violation, the State recommended a fine of $2,926. *See,* State's Exhibit 1, p. 22.

At the March 9, 2022, hearing, the State offered for admission Exhibits, Numbers 1 and 2, consisting of pages 1 through 84. *See,* Tr., p. 12;17-23. The State's Exhibits were admitted into evidence without out objection. *See, Id.* CGG did not offer any exhibits. *See,* Tr., p. 13;8-10.

The State presented a single witness, Elizabeth Meza. *See,* Tr., pp. 13;23-24, 14;1-5. The Respondent sought to present the testimony of Nicolas LaFronz, an OSHA district manager. *See,* Tr., p. 13;13;19-21. The State objected to the Respondent's use of Mr. LaFronz' testimony because CGG did not give notice of its intent to do so and Mr. LaFronz would have had no time to prepare for the hearing. *See,* Tr., p. 14;8-14. In response to the State's objection, CGG withdrew its request to call Mr. LaFronz as a witness. *See,* Tr., p. 14;19-22.

FINDINGS OF FACTS

On February 22, 2021, a referral was received by State OSHA. The referral stated that two employees of a food truck operated by CGG were not wearing face coverings. *See,* State's Exhibit 1, p. 6. When questioned about their non-compliance with the emergency directives, the employees presented a letter saying that the use of face coverings was not mandatory. *See, Id.* While no evidence was provided as to the person who made the complaint, it was generated by a person or entity other than an employee of the Respondent. *See,* Tr., p. 21;15-18.

On March 1, 2021, the State sent its LOI to Connie Graham regarding the alleged failure to comply with Governor Sisolak's COVID-19 mandates. *See,* State's Exhibit 1, pp. 65, 66. The LOI informed the Respondent that the State had not determined that the alleged violation had occurred and that the State did not intend to conduct an inspection, at that time. *See, Id.* The LOI requested that the Respondent investigate the allegation and make any necessary corrections or modifications. *See, Id.* Further, the Respondent was requested to provide a detailed response of its findings and describe any corrective actions the employer has undertaken or it in the process of taking. *See, Id.*

The LOI went on to explain that, regardless of the employer's compliance with the requests, an unannounced inspection may still occur. *See, Id.* The LOI requested that the employer post the document and its response thereto in a place readily accessible to the Respondent's employees. *See, Id.* The Respondent's response was requested to be sent to the State by March 8, 2021, one week from the date of the letter. *See, Id.* The LOI was signed by Nicolas LaFronz, District Manager. *See, Id.*

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On March 5, 2021, Cody Graham sent a letter captioned NOTICE OF CONDITIONAL ACCEPTANCE (NCA). *See,* State's Exhibit 1, p. 52-55. Therein, the Respondent stated that it would "conditionally accept to comply with the Governor's 'COVID-19' mandate" upon the State's agreement to CGG's substantive and procedural demands. *See,* State's Exhibit 1, pp. 57, 58. CGG demanded that the State: (1) provide proof that use of such masks can prevent the inhalation of substances or micro-organisms at the scale of "Viruses;" (2) provide proof that prolonged use of such a mask will NOT cause Hypercapnia, Hypercarbia or Respiratory acidosis in the wearer; (3) indemnify CGG from liability should any workman in our company be subsequently diagnosed with Hypercapnia, Hypercarbia or suffer an Asthmatic attack or any other respiratory or physical and mental health distress resulting from prolonged mask wearing, and; (4) provide a complete list of Mr. LaFronz' medical qualifications. *See, Id.* As if the Respondent's demands were not heavy handed enough, the NCA required that each answer be supported by an affidavit. *See, Id.* The most relevant provision of the NCA was its "drop dead" clause. Therein, the NCA informed the State that the failure to meet the Respondent's demands would result in the State agreeing to finalize the matter and ceasing and desisting from communicating with the Respondent regarding the COVID-19 mandate and CGG's compliance therewith. *See, Id.*

The NCA was sent by first class mail to Nicolas LaFronz at State OSHA's business address and copied the letter to Jess Lankford, former Chief Administrative Officer of Nevada OSHA, and former Governor Sisolak. *See,* State's Exhibit 1, p. 52-55. The NCA provided a deadline of March 19, 2021, or the "drop dead" provision would become applicable. *See,* State's Exhibit 1, p. 53.

On March 22, 2021, two days after the "drop dead" date, Mr. Graham sent a second NCA. *See,* State's Exhibit 1, pp. 57-59. This NCA differed slightly from the letter of March 5th in that it referenced the earlier NCA and informed the State that CGG knew that the NCA was received on March 8, 2021. *See, Id. See also,* State's Exhibit 1, pp. 57-59. Otherwise, the second NCA contained all of the same demands as the one sent on March 5, 2021. *See,* State's Exhibit 1,

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pp. 57-59. This second NCA set a new "drop dead" date of April 5, 2021. *See,* State's Exhibit 1, p. 58.

On March 30, 2021, OSHA Inspector Elizabeth Meza, went to a location at 2627 Nature Park Drive, North Las Vegas, where the food truck was then located. *See*, State's Exhibit 1, pp. 7-10, *see also,* Tr., p. 21;1-5. Upon arrival, Ms. Meza conducted the opening conference with Mr. Graham. *See,* State's Exhibit 1, p. 7. At that time, CGG requested that OSHA's inspection be postponed until April 7, 2021. *See*, Tr., 23;8-19. Ms. Meza then photographed two of CGG's employees from the public street. *See,* State's Exhibit 1, pp. 68, 69. Ms. Meza informed Mr. Graham that she would be taking photographs before doing so. *See,* State's Exhibit 1, p. 8.

On April 6, 2021, CGG sent a third version of the NCA. *See*, State's Exhibit 1, pp. 61-63. This version was characterized as a third and final notice. *See, Id.* This third version stated that the inspector's visit to the location at Nature Park Drive did not constitute a response to the requests contained in the NCA. *See, Id.* Further, CGG did not accept the terms of the State's offer unless it addressed the points set forth above. *See, Id.* This final NCA provided a "drop dead" date of April 16, 2021. *See,* State's Exhibit 1, p. 62. The State never provided any written responses to the three NCAs, thus, allowing the three consecutive deadlines to pass without any reaction. *See,* Tr., pp. 17;2-24, 18;1-18.

On April 7, 2021, at 5:00 p.m. Ms. Meza conducted the walk around as previously agreed. *See*, Tr., 23;17-19. At that time, statements were taken from Mr. Graham and two of CGG's employees. *See,* State's Exhibit 1, pp. 18 - 20. Mr. Graham told the inspector that employees are not required to wear face masks.[2] However, the employees are allowed to wear them if they choose. *See,* State's Exhibit 1, p. 18, *see also,* Tr., 24;10-16. CGG does not supply face coverings. *See,* State's Exhibit 1, p. 18, *see also,* Tr., 24;17-19. Mr. Graham stated, "[t]he employees do not wear a face mask because of the commercial liability caused by the face mask." *See,* State's Exhibit 1, p. 18. Ms. Meza did not recall whether Mr. Graham explained what he meant by commercial liability. *See,* Tr., p. 24;20-22. Both of the employees

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[2]The term face masks is used generically for any face covering which encloses the employee to prevent the spread of COVID-19. *See,* Tr., p. 37;6-18.

interviewed, Luke Dillard and Jayce Chan concurred that they were not required to wear face masks while working. *See,* State's Exhibit 1, pp. 19, 20, *see also,* Tr., 25;2-24, 25;1.

At the March 9, 2022, hearing the Respondent raised its affirmative defenses of equitable estoppel, failure of condition precedent and default by Complainant. *See,* Tr., p. 16;11-14. Mr. Graham gave an opening statement wherein he outlined his view of the effect of the exchange of correspondence between the State and CGG.

> In this notice [NCA], we clearly outlined to the addressed party our conditions, our desired response method, a date that a response must be given and the agreed upon result if the addressed party fails to reply.
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> The addressed party, Nicholas LaFronz and Nevada OSHA, had 14 days to respond to this first notice. (State's Exhibit 1, pp. 53-56). To the best of my knowledge no response was ever given in the appropriate stipulated manner in that first notice of conditional acceptance.
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> After the given response time frame from the first notice had passed[,] we proceeded to send Nicholas LaFronz and Nevada OSHA a second notice of conditional acceptance. The second notice is Exhibit B (State's Exhibit 1, pp. 57-59). Again, in this second notice we listed our conditions, our desired response method, a date that a response must be given and an agreed upon result if the addressed party had failed to reply. Again, 14 days had passed and to the best of my knowledge no response was given to me or anyone at CCG Enterprises.
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> A third and final notice of conditional acceptance was sent to Nicholas LaFronz and Nevada OSHA. This is Exhibit C of the evidence. (State's Exhibit 1, pp. 61-63). In this final notice we, again, addressed our conditions, our desired response method, a date that a response must be given and an agreed upon result if the addressed party had failed to reply. Still after this third notice was sent, no response was given to me or anyone at CCG Enterprises. *See,* Tr., pp. 17-19.

As the result of the Respondent's communication and the State's refusal to address CGG's requirements, Mr. Graham concluded that the State had agreed to either not enforce the Governor's COVID-19 mandates against CGG or had waived its right to enforce them. *See, Id.*

Ms. Meza was the State's only witness. She testified regarding her initial encounter with Mr. Graham wherein he requested that Ms. Meza return in two weeks. *See,* Tr., p. 23;8-16. Ms. Meza testified that she took two photographs of the employees of the food truck on March 30, 2021. *See,* State's Exhibit 1, pp. 68, 69, *see also,* Tr., p. 23;12-16. These photographs showed two or possibly three of CGG's employees working without face coverings. *See,* State's Exhibit 1, pp. 68, 69. Ms. Meza testified that she returned on April 7, 2021, and inspected the Respondent's food truck and obtained the employees statements. *See,* Tr., p. 23;18-23.

Ms. Meza also testified regarding the State's calculation of the penalty. *See,* Tr., pp. 20-36. She explained that the preliminary penalty amount was $9,753. *See,* State's Exhibit 1, p. 22. The penalty was subject to a 70% reduction as the result of the size of the employer. *See, Id.* Accordingly, the final penalty recommended was $2,926. *See, Id.*

The Respondent did not object to any of Ms. Meza's testimony, either in general or specific to the penalty calculation. Further, CGG did not pose any substantive questions during its cross-examination of Ms. Meza. *See,* Tr., pp. 34;15-25, 35;1-21. Instead, the Respondent's defense was based entirely upon the concept that the State had agreed to some set of duties to CGG. *See,* Tr., pp. 46;1-24, 47;1-4.

The Respondent argued that a contract was created by both parties signing of LOI and the Respondent's multiple NCAs. *See,* Tr., pp. 46;1-24, 47;1-4. Mr. Graham explained his understanding as follows:

> I work a lot in real estate. And when you go to buy a home, you send in your offer with your signature. And if they like it they will countersign it and you guys can go back and forth. Because he signed it, it was a contract. *See,* Tr., p. 46;20-23.

The Respondent also believed that CGG's response to the State's purported offer would be integrated into the terms of the Parties' agreement. This was because the LOI did not expressly state that its terms were non-negotiable. *See,* Tr., p. 18;4-7. Taking these two principals together, the Respondent alleged that it had entered into a contract with the State with the terms contained in the NCAs. *See,* Tr., pp. 46;1-24, 47;1-4. The Respondent summarized its position as follows:

> So in closing, we believe that a contract has been informed (sic) through the assent of Nevada OSHA and its offers. In commerce, a silence is considered an agreement through assent.... *See,* Tr., p. 47;1-5.

Accordingly, CGG's legal theory was that the State's refusal to comply with the NCA's terms resulted in its waiver of the right to enforce the State's COVID-19 mandates against CGG.

CONCLUSIONS OF LAW

To the extent that any of the above findings of fact constitute conclusions of law or mixed findings of fact and conclusions of law, they are incorporated herein.

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In Citation 1, Item 1, State OSHA alleges a violation of NRS 618.375(2), one of Nevada's analogs to Section 5(a) of the Occupational Safety and Health Act of 1970 (the Act)[3], 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, *see*, NRS 618.295(8), the Board is aided in the interpretation of NRS 618.375(1) by the interpretation and application given to Section 5(a) of the Act.

As an initial proposition, 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 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). It was intended to apply where a statute or regulation exists but is inadequate to provide the level of safety which 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 inadequacy or absence of a specific 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." *See, 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) there exists a feasible means 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.

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[3]29 U.S.C. § 654(a)(1).

Analysis begins with the question of whether the "general duty clause" applies in this case. The Board concludes it applies because this a COVID-19 exposure violation similar to Pole Fitness which the Board had reviewed previously.[4] In that previous matter, the Board concluded that a manifest and continuous failure and refusal to follow Governor Sisolak's directives and related materials constituted a violation of subsection 2 of NRS 618.375.

The burden is upon the State to prove each element of the *prima facie* case. *See, Original Roofing Company, LLC. v. Chief Administrative Officer of the Occupational, Safety and Health Administration,* 442 P.3d 146, 149 (Nev., 2019). *See also,* NAC 618.788(1). The burden of proof is by a preponderance of the evidence. *See, Armor Elevator Co.*, 1 OSHC 1409 1973-1974, OSHD ¶ 16,958 (1973). As is evident from the foregoing analysis, proof that the general duty clause has been violated also satisfies the test for proving a *prima facie* case. The general duty clause is the *prima facie* case. Proof of its violation meets the *prima facie* burden.

In this matter, the hazard was the spread of COVID-19. Accordingly, the analysis must take into consideration the statutes, directives and guidance of Federal and State governmental bodies, as set forth below.

On March 13, 2020, Donald J. Trump, then, 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, subsection 3 of NRS 414.060 allows the Governor "to make, amend or rescind the necessary orders or regulations to carry out the provision of [Chapter 414] within the limits of the authority conferred upon the Governor in this chapter." Further, NRS 414.060(3)(f) provides that the Governor may delegate administrative authority in the performance of his duties under Chapter 414. Throughout the crisis, Governor Sisolak, as the State's Chief Executive, and certain

[4] Pole Fitness Studio, LLC, Docket No. LV 21-2060.

State agencies provided directives intended to mitigate the spread of COVID-19. Specifically, applicable here is Directive Number 21, dated May 28, 2020.

Section 12 of Directive 21 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 25 of Directive 21 deals specifically with restaurants and food establishments. *See,* State's Exhibit 2, p. 77. Section 25 states, "[e]stablishments shall require employees to wear face coverings." *See, Id.* The State also provided the pertinent parts of the Roadmap to Recovery for Nevada: Phase One and Phase Two. *See,* State's Exhibit 2, pp. 82-83. Both documents mandated that employers must require their employees to wear face coverings. *See, Id.* The Roadmap to Recovery for Nevada provided a one page set of instructions for Food Establishments. *See,* State's Exhibit 2, p. 84. The Food Establishment instructions also mandated that employees of these companies wear face coverings. *See, Id.*

The first element of a violation of the general duty clause requires that the State show that an activity or a condition in the workplace presents a hazard. Here, COVID-19 was declared to be a pandemic on March 11, 2020. *See*, State's Exhibit 2, p. 70. The State of Nevada created a medical advisory team to provide guidance on this problem. *See*, State's Exhibit 2, p. 71. However, the mere showing of a generalized hazard, even one of the magnitude of the COVID-19 pandemic, is not enough. Any alleged violation of NRS 618.375(2) must occur within the employment relationship. *See, Id.* Employers must protect employees and their places of employment from unsafe conditions. *See, Id.*

The State provided evidence that the Respondent was not protecting its employees from unsafe conditions in their workplace. First, the state provided photographs of two of the Respondent's employees in or near the Respondent's food truck without any face coverings. *See*, State's Exhibit 1, pp. 68, 69. Further, Mr. Graham and two of CGG's employees stated that face coverings were not required while working. *See,* State's Exhibit 1, pp. 18-20.

Another element of the general duty clause requires a showing that the condition or activity is recognized as a hazard. As set forth above, COVID-19 was recognized as a hazard at the State, Federal and international level. *See,* State's Exhibit 2, pp. 70-81. Declaration 21 set forth that on February 11, 2020, the World Health Organization advised that the novel coronarius that causes COVID-19 virus is highly contagious, and spreads through respiratory transmission, and direct and indirect contact with infected persons and surfaces. *See, Id.* The World Health Organization advised that respiratory transmission occurs through both droplet and airborne transmission. Droplet transmission occurs when a person is within 6 feet of someone who has respiratory symptoms like coughing or sneezing, and airborne transmission may occur when aerosolized particles remain suspended in the air and are inhaled. *See, Id.* On March 11, 2020, the World Health Organization declared COVID-19 a pandemic. *See, Id.*, Also on March 11, 2020, Governor Steve Sisolak issued a Declaration of Emergency to facilitate the State's response to the COV1D-19 pandemic. Accordingly, the State showed the COVID-19 was a recognized hazard.

The State is also required to show that the hazard is causing or likely to cause serious injury or death. In this instance, the State alleged that exposure to COVID-19 could result in a serious injury up to the death of the infected person. *See,* Tr., p. 28;6-8. The severity assessment contained in the State's Violation Worksheet stated that a substantial probability of death or serious physical harm could result should an employee become infected with COVID-19. The illness was categorized as highly severe, *i.e.*, death from illness, injuries involving permanent disability or chronic, irreversible conditions. *See,* State's Exhibit 1, p. 23. The State also provided the State of Nevada: Declaration of Emergency which said that COVID-19 was a pandemic and the virus could be transmitted directly or through surfaces. *See,* State's Exhibit 2, pp. 70-83.

Finally to establish a violation, the State must show that the employer had some feasible means of preventing the hazard. Here, the feasible means of preventing the hazard, the spread of COVID-19 was determined by the Governor and medical experts to be the wearing of face protection. *See,* State's Exhibit 2, pp. 70-81. CGG's vague reference to commercial liability did

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not create any type of showing that the use of face coverings was infeasible. *See,* State's Exhibit 1, p. 18, *see, also,* Tr., p. 24;8-22.

For its part, the Respondent did not offer any documents or testimony to counter the evidence provided by the State's in support of its *prima facie* case. *See,* Tr., pp. 16, 18, 46, 47. Accordingly, the Respondent is deemed to have admitted that sufficient evidence was presented to show the merits of the State's *prima facie* case under NRS 618.375(2). *See, Fernando v. People's Choice Home Loan*, 2013 WL 275883, at *2 (D. Nev. Jan. 24, 2013). However, as the Respondent has proffered affirmative defenses, the burden shifted to CGG to prove the elements of those defenses.

All three of the Respondent's affirmative defenses are based upon the allegation that the State had agreed to one or more duties to CGG, above and beyond those owed to all employers under statute. *See,* Tr., pp. 18;19-14, 19;1. Further CGG believed, that the State's failure or refusal to provide the detailed responses required by the NCA resulting in the State's loss of the ability to enforce the COVID-19 mandates as they relate to CGG. *See, Id.* As set forth below, the Respondent failed to prove that the State entered into a contract with CGG.

Contract creation requires an offer from the offeror and an unconditional acceptance of the offer by the offeree, a meeting of the minds, and consideration. *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012), *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). An offer has been defined as a communication by the offeror of what he or she will give or do in return for some promise or act of the offeree. *See*, 17A Am. Jur. 2d Contracts § 46.

Acceptance, a response to an offer sufficient to fulfill this element, must meet certain criteria. Where essential terms of a proposal are accepted with qualifications, or not at all, an agreement is not made. *Kuzack v. Wells Fargo Bank, NA*, 597 Fed. Appx. 424 (2015) (unpublished case); *Heffern v. Vernarecci*, 92 Nev. 68, 70, 544 P.2d 1197 (1976); *McCall v. Carlson*, 63 Nev. 390, 172 P.2d 171 (1946); *McCone v. Eccles*, 42 Nev. 451, 181 P. 143 (1919). It is not enough that the words of a reply justify a probable inference of assent, and the mere use

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of the word "accept" does not automatically make a communication an acceptance of an offer. 17 C.J.S. Contracts § 75.

Assuming, *arguendo,* the LOI relied upon by the Respondent to form a contract, was intended by the State to be an offer to contract, the Respondent, nevertheless, fails to show a contract was reached between the State and Respondent. The Respondent relies upon its NCA sent in reply to the LOI to establish the meeting of the minds required to form a contract. The Respondent's reliance upon the NCA, therefore, fails to prove a contract because the NCA does not, without qualification or condition, constitute an acceptance of the LOI. It, therefore, amounts to a counteroffer, which is not an acceptance to the purported original offer. Unless the Respondent can show the terms of the "counteroffer" were accepted by the State, there is no contract. *See,* 17 C.J.S. Contracts § 75; *see also, Kuzack* at p. 424.

There is no question, the NCA was a counteroffer, rather than an acceptance of the contents of the LOI. This is seen by the "drop dead" provision of the NCA where Respondent rejected the document, the LOI, which the Respondent considered as the offer by the State. *See,* State's Exhibit 1, pp. 53, 58, 62.

> If there is no reply in the correct manner as outlined above is done by close of business on [one of three successive dates] it will be taken as your assent and agreement to the following:
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> i. The matter is finalized, and
> ii. You will discontinue all communication to us in regard to the Governor's "COVID-19" mandate and our compliance with such matters. *See, Id.*

As can be seen by the plain language of the NCA quoted above, the Respondent told the State or Complainant that it must meet all CGG's exacting procedural and substantive demands before the Respondent/CGG would assent and agree to finalize of the matter. *See,* State's Exhibit 1, pp. 53, 58, 62.

This "drop dead" provision could not have been considered anything less than a material addition to the purported offer because it clearly added a condition which the State must accept before the Respondent would agree to the deal. As the Ninth Circuit Court explained, "the addition of material terms that cannot be implied from the original offer transforms the purported

acceptance into a rejection of the original offer and a counter-offer." *See, Kuzack, supra,* at 424. Accordingly, if somehow, the LOI was considered an offer, no contract could have been created because the CGG's three copies of its NCA in response to the LOI rejected the contents of the LOI as a result of the addition of material terms. *See,* State's Exhibit 1, pp. 53, 58, 62. "If there is no reply in the correct manner as outlined... it will be taken as your assent and agreement to... [that] matter is finalized, and [the State] will discontinue all communication to [CGG] in regard to the Governor's "COVID-19" mandate and our compliance with such matters." *See, Id.*

It is black letter law that a counteroffer to an offer does not give rise to a contract. *See,* 17 C.J.S. Contracts § 75. An acceptance must be positive, unequivocal, absolute, and unqualified. If it is conditional or introduces a new term, it constitutes merely an expression of a willingness to negotiate or a counterproposal, and does not complete the contract. *See Id., see also, Heffern v. Vernarecci,* 92 Nev. 68, 70, 544 P.2d 1197 (1976); *McCall v. Carlson,* 63 Nev. 390, 172 P.2d 171 (1946); *McCone v. Eccles,* 42 Nev. 451, 181 P. 143 (1919).

The Respondent, therefore, failed to prove a contract since the Respondent's response to the LOI, which he relies upon as the offer from the State, constituted a counteroffer. The Respondent then fails with its claim that a contract was established with the interaction of the LOI and the NCA. *See, Kuzack, supra,* at 424.

The Respondent's contract defense fails even further in that no one could have ever considered the LOI to be an offer in the first place. The LOI contained no indication that the State was offering anything in exchange for some act of or some forbearance on the part of CGG's part.

CGG could not have reasonably considered the LOI an offer from the State. The LOI contained no indication that the State was offering anything in exchange for some act or forbearance on the CGG's part. *See,* State's Exhibit 1, pp. 65, 66. The LOI was on State letterhead expressly proving that the sender was the Department of Business and Industry, Division of Industrial Relations, Occupational Safety and Health Administration. *See, Id.* The text of the LOI informed the Respondent that the State had received a notice of safety and/or health hazard on February 22, 2021. *See,* State's Exhibit 1, p. 65. The specifics of the allegation

were supplied on a lower line of the correspondence. *See, Id.* The LOI informed the Respondent that no inspection was intended at that time. *See, Id.* The LOI also informed CGG that a response did not necessarily prevent the State from performing an inspection. *See, Id.* Accordingly, the LOI contained no promises or offers of actions on the part of the State.

Instead, the State requested that CGG take certain actions related to the allegation. *See,* State's Exhibit 1, pp. 65, 66. The State requested that CGG investigate the allegation, make any necessary corrections and respond to the State within seven days of the date of letter. *See, Id.* The LOI also informed the CGG that the State offers free consultation services to assist in resolving occupational safety and health issues. *See, Id.* The LOI informed employers that its employees were protected from discriminatory actions as the result of their communication with the State. *See, Id.* The last paragraph of the LOI invited the recipient to contact the District Office with any questions. *See, Id.* As a final matter, the State did not consider the LOI to have been an offer. *See,* Tr., p. 33;22-23. Based on the above, CGG could not have reasonably believed that the LOI was intended as an offer.[5] Clearly, even the Respondent did not believe it had a contract with the State because it continued sending three successive NCAs without any response from the State. *See,* Tr., pp. 17;2-24, 18;1-18.

In this case, the Respondent failed to show that a contract was created because it lost on two of the four elements of contract formation. First, the LOI could not reasonably considered an offer, it lacked any invitation to enter into any sort of exchange. Second, even if the LOI contained an offer, CGG added at least one material term to it, resulting in the rejection of the purported offer.

Turning now to the Respondent's individual affirmative defenses, all are shown to be without merit. "Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." *See, In re Harrison Living Tr.*, 121 Nev. 217, 223, 112 P.3d 1058, 1061–62 (2005). There are four elements to

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[5]The LOI is a form sent out to employers the subject of an investigation. *See,* Tr., p. 21;6-14. It hardly smacks of an individualized document between the State and the Respondent intended to be some form of mutual consent.

equitable estoppel: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) the party must have relied to his detriment on the conduct of the party to be estopped. *See, Id.*

Here, the defense of equitable estoppel failed in its third and fourth elements. CGG failed to present a cogent argument that it was unaware of the COVID-19 pandemic and the mask mandate. In fact, the employees in the food truck possessed a typed letter which purported to excuse them from the mask mandate. *See,* State's Exhibit 1, p. 6, 18. The three NCAs all claimed that CGG would conditionally comply with OSHA's inquiry once its requests were resolved. *See,* State's Exhibit 1, pp. 52-63. In other words, the Respondent did not dispute the existence of the mask mandate, just the State's ability to enforce it on CGG. Thus, the Respondent was not ignorant of the multiple governmental mandates enacted to defend against COVID-19 pandemic, *i.e.,* the true state of facts.

Turning to the fourth element of equitable estoppel, the Respondent failed to allege that it relied on anything from the State. The Respondent's policy of optional face coverings existed before the State ever sent the LOI. *See,* State's Exhibit 1, pp. 6, 9, 18, 20. The State's investigation and penalty assessment did not result in any change in policy on the part of CGG, during the relevant time period. Accordingly, the Respondent was unable to show any reliance upon the State's conduct or communication.

The Respondent's second affirmative defense was a condition precedent. A condition precedent to the performance of a contractual duty requires the performance of some act or event upon which the corresponding obligation to perform is dependent. *NGA #2 Liab. Co. v. Rains,* 113 Nev. 1151, 1158–59, 946 P.2d 163, 168 (1997). As set forth above, no contract was created between CGG and the State, so this affirmative defense is inapplicable.

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The Respondent's third affirmative defense was Default by Complainant. No legal theory under this name exists.[6] Thus, the purported defense is analyzed using the Respondent's description of its defense as set forth in its Answer. *See,* State's Exhibit 1, p. 47.

> Once initial contact was made by the Complainant to the Respondent....the Respondent believes they made all efforts to come to an agreement that would be equitable for both parties. Because the Complainant failed to respond to three consecutive notices and agreed through assent to the terms outlined in the notices, it is our belief that a default judgement should be given, and the contract should be upheld.

As set forth above, no contract was created between the State and the Respondent. The State did not make an offer to CGG and, even if it did, CGG rejected it. Accordingly, the State had no duties to the Respondent beyond those granted to any employer under Nevada OSHA's jurisdiction.

In this case, after the State issued the citation, the Respondent contested it, triggering the legal proceeding. The State filed its Complaint. The Stated filed its evidence packet which it presented at the March 9, 2022, hearing along with a witness. Therefore, the State fulfilled all of its obligations in this proceeding. This defense is also inapplicable.

In conclusion, the Respondent's affirmative defenses were shown to be without merit. The State proved all of the elements of the State's *prima facie* case. The Board finds that the Complaint, Citation 1, Item 1, should be affirmed.

FINAL ORDER

Accordingly, the State OSH Board of Review voted to uphold Citation 1, Item 1, in its entirety. It was moved by Member Fullerton to uphold the citation. *See*, Tr., pp. 48;21-24, 49;1-5. The motion was seconded by Member Milligan. *See*, Tr., p. 49;6-12. The motion passed unanimously, five in favor of the motion and no votes against the motion. *See*, Tr., p. 50;11-19.

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[6]A Westlaw search of the term "Default by Complainant" did not yield a single reference to a defense under that name. However, Ms. Ortiz believed that it applies to a party who fails to perform a duty in a legal proceeding. *See,* Tr., p. 45;7-16. Under Ms. Ortiz' interpretation, the Respondent's defense would also fail because it relied on duties owed by the State in the purported contract between CGG and the State. No such contract existed, as set forth above.

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Accordingly, the State OSH Board of Review hereby upholds the citation and fine assessed against CGG Enterprises, LLC, in the amount of $2,926.

This is the Final Order of the Board.

IT IS SO ORDERED.

On, May 8, 2024 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 four current members of the Board, to-wit, Chairman Rodd Weber, Scott Fullerton, Jorge Macias and Tyson Hollis. Tyson Hollis did not participate in the original hearing on this matter but had the transcript and all the documents relating to this matter to review and could, therefore, participate in the decision to determine whether the draft decision was consistent with the action taken by the Board when the matter was heard. *See,* NRS 233B.124. Upon a motion by Scott Fullerton, seconded by Jorge Macias, 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 May 8, 2024 this Decision is, therefore, hereby adopted and approved as the Final Decision of the Board of Review.

Dated this 17th day of June, 2024.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: _____
Rodd Weber, Chairman