

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. 3.¹ 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.

¹ "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.² *See*, State's Exhibit
25 1. pp. 37-49. Citation 1 alleged that Pole Fitness did not follow Governor Sisolak's Emergency
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28 ²The 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
clients, set by the Local Empowerment Advisory Panel
16 (LEAP). The Employer provides a spray bottle containing half
alcohol and half water to wipe the poles down and Clorox
17 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.

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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 13th 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.

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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.³ 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
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28 ³Ms. 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.⁴ *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 ⁴Later 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 facility⁵. *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.

⁵The 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.

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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 Brenan, 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).

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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)⁶, 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 (10th 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 (5th
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 (6th Cir.,
26 1970.

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28 ⁶29 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.

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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.

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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 20th day of July, 2023.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

By: 
Rodd Weber, Chairman

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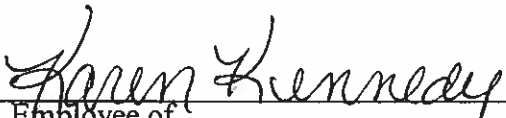
CERTIFICATE OF SERVICE

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 27th day of July, 2023.



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

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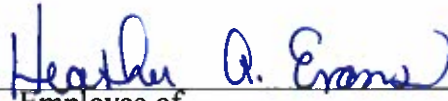
1 **CERTIFICATE OF SERVICE**

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

8 Salli Ortiz, Esq.
9 DIR Legal
400 West King Street, Suite 201
Carson City, NV 89703

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

13 Dated this 8th day of August, 2023.

14
15 
16 _____
Employee of
The Law Offices of Charles R. Zeh, Esq.

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22 S:\Clients\OSHA\LV 21-2060, Pole Fitness Studio, LLC, aka Pole Fitness Studio\Decision\Final Decision.R1.wpd