

FILED
AUG 25 2023
O S H REVIEW BOARD
BY B. Kennedy

**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,**

Docket No. LV 21-2102

Inspection No. 1493469

Complainant,

vs.

**TARKANIAN BASKETBALL
ACADEMY, INC.**

Respondent.

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

This case arose out of an investigation of an anonymous Notice of Alleged Safety or Health Hazard. *See*, State's Exhibit 1, p. 4. The State's investigation of that Notice resulted in the issuance of two citations consisting of one alleged violation of Nevada State law and three alleged violations of Federal regulations.

The matter came for hearing before the Nevada Occupational Safety and Health Review Board (the Board) on Thursday, September 9, 2021, and October 13, 2021. *See*, 1Tr., p. 20 and

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1 2Tr., pp. 4, 5.¹ The hearing was conducted in furtherance of a duly provided notice. *See*, Notice
2 of Hearing dated January 27, 2021.

3 The Board Members in attendance to hear the matter were Board Chairman Rodd Weber,
4 Board Secretary William Spielberg, Board Member Frank Milligan, Board Member Jorge
5 Macias and Board Member Scott Fullerton. *See*, 1Tr., p. 1. On October 13, 2021, the same
6 Board Members heard the continuation of the case and conducted the deliberations thereon. *See*,
7 2Tr., p. 1.

8 Salli Ortiz, Esq., counsel for the Chief Administrative Officer of the Occupational Safety
9 and Health Administration of the Division of Industrial Relations of the Department of Business
10 and Industry (the State), appeared at the first hearing on behalf of the Complainant (the State).
11 *See*, 1Tr., p. 2. The Tarkanian Basketball Academy (hereinafter TBA or the Respondent) was
12 represented by Danny Tarkanian, (Mr. Tarkanian) an active attorney in the State of Nevada as of
13 2018. *See*, 1Tr., p. 20;7-11.

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

18 A complaint may be prosecuted for circumstances which arise before or during an
19 inspection of the employer's workplace. *See*, NRS 618.435(1). Nevada has adopted all Federal
20 Occupational Safety and Health Standards which the Secretary of Labor has promulgated,
21 modified or revoked and any amendments thereto. They are deemed the Nevada Occupational
22 Safety and Health Standards. *See*, NRS 618.295(8).

23 The Notice of Alleged Safety or Health Violations generally alleged that the facility was
24 violating Governor Steve Sisolak's (Governor Sisolak) directives and policies designed to
25 prevent the transmission of the COVID-19 virus. *See*, State's Exhibit 1, p. 4. In an effort to
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27 ¹"1Tr." stands for the transcript of the hearing conducted on September 9, 2021, followed by the
28 page and line number where the matter cited can be found. "2Tr." stands for the transcript of
continuation of the hearing and the deliberations conducted on October 13, 2021.

1 resolve the issues in the notice without a formal inspection, the State mailed a letter of inquiry on
2 or about July 29, 2020. *See*, State's Exhibit 2, p. 76, *see also*, 1Tr., pp. 31;22-24, 32;1-10. TBA
3 did not respond to this inquiry. *See*, State's Exhibit 1, p. 10, *see also*, 1Tr., p. 33;5-8. On
4 September 17, 2020, the State inspected the TBA facility. *See*, State's Exhibit 1, p. 5.

5 On November 10, 2020, the State issued its Citation and Notice of Penalty which
6 recommended a total fine of \$3,935. *See*, State's Exhibit 1, pp. 40-54. On December 9, 2020,
7 the Respondent, through its counsel, Mr. Tarkanian, notified the State of TBA's intent to contest
8 the matter. *See*, State's Exhibit 1, p. 55. Mr. Tarkanian elected to eschew the employment of an
9 attorney and represented the business as lay person, albeit with a law degree, throughout the
10 proceedings.

11 On December 23, 2020, the State filed its formal Complaint for Resolution by the Review
12 Board. *See*, State's Exhibit 1, pp. 56-73. On January 14, 2021, the State received Mr.
13 Tarkanian's Answer. *See*, State's Exhibit 1, pp. 64-66.

14 The Complaint sets forth the allegations of the violation of the general duty clause NRS
15 618.375(2) and the violation of three Federal Regulations. *See*, State's Exhibit 1, pp. 56-73.
16 Citation 1, Item 1(a), charged a serious violation of NRS 618.375(2), as stated below:

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

20 After giving consideration to the severity of the violation and the probability of injury resulting
21 from this alleged violation, the State recommended a fine of \$3,643. *See*, State's Exhibit 1, p. 28.

22 Citation 2, Item 1(a), alleged an other-than-serious violation of 29 CFR §
23 1910.1200(e)(1), which states:

24 Employers shall develop, implement, and maintain at each workplace, a written
25 hazard communication program which at least describes how the criteria specified
26 in paragraphs (f), (g), and (h) of this section for labels and other forms of warning,
safety data sheets, and employee information and training will be met.

27 After giving consideration to the severity of the violation and the probability of injury resulting
28 from this alleged violation, the State recommended a fine of \$292. *See*, State's Exhibit 1, p. 32.

Citation 2, Item 1(b), alleged an other-than -serious violation of 29 CFR § 1910.1200(f)(6), which states:

Workplace labeling. Except as provided in paragraphs (f)(7) and (f)(8) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with either: (i) The information specified under paragraphs (f)(1)(i) through (v) of this section for labels on shipped containers [1910.1200 (f)(6)(I)]; or, (ii) Product identifier and words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical [1900.1200(f)(6)(ii)].

For this alleged violation of a Federal Regulation, the State proposed a penalty of \$0.00 because this violation is related to 29 CFR § 1910.1200(e)(1). *See*, State's Exhibit 1. p. 35.

Citation 2, Item 1(c), alleged an other than serious violation of 29 CFR § 1910.1200(h)(1), which states:

Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and safety data sheets.²

For this alleged violation of a Federal Regulation, the State proposed a penalty of \$0.00 because this violation is related to 29 CFR § 1910.1200(e)(1). *See*, State's Exhibit 1, p. 38.

At the September 9, 2021, hearing, the State offered for admission Exhibits, Numbers 1, 2 and 3, consisting of pages 1 through 127. *See*, 1Tr., p. 24;6-16. These Exhibits were admitted into evidence without out objection. *See, Id.* TBA offered for admission five exhibits numbering A through E. *See*, 1Tr., p. 24;20-23. The State objected to TBA's Exhibit A on relevance grounds. *See*, 1Tr., p. 25;2-6. The Board took Exhibit A under advisement. Admissibility was to be addressed when offered into evidence. The Board admitted into evidence TBA's Exhibits B through E. *See*, 1Tr., p. 26;2-7. The Respondent's Exhibit A was subsequently utilized in the

²The Respondent did not contest Citation 2, Items 1a, 1b and 1c. *See*, 2Tr., p. 47;1-8. Accordingly, a limited amount of evidence supporting the alleged violation was needed, given the stipulation of a violation by TBA of Citation 2.

1 hearing without the State renewing its objection. *See*, 1Tr., pp., 119-120. Thus, Respondent's
2 Exhibit A was subsequently admitted into evidence.

3 During the October 13, 2021, continuation of this hearing, the State offered two
4 additional Exhibits, Exhibit 4, pages 128 through 143, and Exhibit 5, pages 144 through 154.
5 *See*, 2Tr., p. 5;2-11. TBA objected to the admission of the State's Exhibit 5 on the grounds of a
6 lack of foundation. *See*, 2Tr., p. 5;14-24. The Board allowed the admission of the State's
7 Exhibit 4 but sustained TBA's objection to the State's Exhibit 5. *See*, 2Tr., p. 8;18-23.

8 FINDINGS OF FACTS

9 TBA is the employer. TBA is a nonprofit corporation organized under the laws of the
10 State of Nevada. *See*, State's Exhibit 1, pp., 1-3. TBA operates at a single location, 2730 S.
11 Rancho Drive, Las Vegas, Nevada, 89102.

12 On July 27, 2020, the State received a Notice of Alleged Safety or Health Hazards. *See*,
13 State's Exhibit 1, p. 4. The notice contained three allegations, as follows:

14 1. The facility is not following the Governor's COVID-19 Roadmap to Recovery
15 Guidelines regarding indoor venues. Basketball training is not being done in a manner that
16 insures that social distancing guidelines are being followed. Games and drills are being played
17 which allowed the players to come into contact with each other.

18 2. The facility is not following the Governor's Declaration of Emergency Directive
19 023 which states that youth sports are limited to practice only and limited to those that can be
20 done while observing social distancing. Youth teams are playing games and holding normal
21 basketball practice.

22 3. Players and coaches are not wearing masks when required.

23 On or about July 29, 2020, the State emailed a letter of inquiry which specifically
24 inquired about the allegations of the Notice of Alleged Safety or Health Hazards. *See*, State's
25 Exhibit 2, p. 76. A response from TBA was requested by August 5, 2020. *See, Id.* TBA did not
26 provide a response by the requested date. *See*, 1Tr., p. 33;5-8. On September 17, 2020, at
27 approximately 12:00 p.m., Crystle Rodriguez of Nevada OSHA conducted an inspection of the
28 facility. *See*, State's Exhibit 1, p. 5. As part of that inspection, Ms. Rodriguez conducted the

1 opening conference with Rodney Sargent (Sargent). *See, Id.* Mr. Sargent consented to OSHA's
2 inspection of the premises. *See, State's Exhibit 1, p. 10.* Mr. Sargent also provided general
3 information regarding the operations at TBA, particularly the use of the basketball courts. The
4 courts could be rented by adults for drills or shooting practice but games are not allowed. *See,*
5 *State's Exhibit 1, p. 17.* There was a limit of 15 persons per basketball court and only three
6 courts were available. *See, Id.* In addition to renting time on the basketball courts, TBA allowed
7 one youth league (Knicks Academy) to practice at the facility on Monday and Wednesday nights
8 from 5:00 until 8:00 p.m. *See, State's Exhibit 1, p. 17.*

9 Ms. Rodriguez also interviewed TBA's general manager, Pepsi Porciuncula. *See, State's*
10 *Exhibit 1, pp. 13-16.* Mr. Porciuncula said that he scheduled all of the rentals of the basketball
11 courts. *See, State's Exhibit 1, p. 13.* He also discussed the Knicks Academy basketball
12 practices. *See, State's Exhibit 1, p. 14.* Mr. Porciuncula indicated that the youth team were
13 allowed to train, run drills and scrimmage. *See, Id.* Mr. Porciuncula said that the young player's
14 parents are allowed to watch the practices, provided that they maintain the six foot separation
15 from other parents. *See, State's Exhibit 1, p. 15, see also, 1Tr., p. 41;1-3.* Further, Mr.
16 Porciuncula informed the State that temperature checks are conducted of all players, spectators
17 and employees. *See, State's Exhibit 1, p. 16.* Mr. Porciuncula also stated that face coverings
18 were required of the players but not while actively playing or while recovering from active play.
19 *See, 1Tr., p. 36;7-13.*

20 Mr. Porciuncula stated that the Respondent's janitorial staff cleaned the basketball courts
21 after every rental. *See, State's Exhibit 1, p. 14.* He did not know whether the cleaning chemicals
22 were on the EPA list N. *See, Id., see also, 1Tr., p. 35;15-18.* It was later determined that the
23 chemicals were not on the EPA list N. *See, 1Tr., p. 28;15-17.* Further, the facility did not have a
24 hazard communications program and did not conduct any training regarding the use of the
25 cleaning chemicals which it used. *See, State's Exhibit 1, p. 13, see also, 1Tr., p. 34;19-24.*
26 Finally, Mr. Porciuncula indicated that he was not aware of any employee having a tested
27 positive for COVID-19. *See, State's Exhibit 1, p. 15.*

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1 Ms. Rodriguez also interviewed C. J. Garcia, a TBA supervisor. Mr. Garcia's description
2 of TBA's operation was very consistent with that of Mr. Porciuncula. Mr. Garcia concurred that
3 the basketball courts were cleaned after practices. *See*, State's Exhibit 1, p. 21. Further, only
4 three of the facility's four courts were ever in use at one time and that only 15 people were
5 allowed per court. *See*, State's Exhibit 1, p. 21. Mr. Garcia also informed the State that there
6 was no hazard communications program and that TBA did not conduct any training regarding the
7 use of the cleaning chemicals. *See*, State's Exhibit 1, p. 19.

8 As part of the inspection, Mr. Sargent provided Ms. Rodriguez with a tour of the TBA
9 facility. This tour was of a short duration, approximately ten minutes. *See*, 2Tr., pp. 31;7-9,
10 32;17-22. Ms. Rodriguez took several photographs during this tour. *See*, 1Tr., pp. 45;6-13,
11 97;3-6. Two of Ms. Rodriguez' photographs of the facility were part of the State's exhibits. *See*,
12 State's Exhibit 1, pp. 68-69.³ One photograph showed that two players engaged in playing one-
13 on-one basketball and the other showed a number of players sitting on the sidelines. *See Id.* The
14 photograph of two players showed one shooting a basketball and the other challenging that shot.
15 *See*, State's Exhibit 1, p. 69. Neither of these players were wearing face masks. *See, Id.* None
16 of TBA's employees were in this photograph. *See, Id.* The second of Ms. Rodriguez'
17 photographs showed multiple players sitting or standing on or near the sidelines of one of the
18 basketball courts. *See*, State's Exhibit 1, p. 68. None of the players in this photograph were
19 wearing masks. *See, Id.*

20 Ms. Rodriguez provided testimony regarding the calculation of the penalty assessed by
21 the State for Citation 1, Item 1. *See*, 1Tr., pp. 63-64. Ms. Rodriguez explained that it was a
22 gravity based fine, determined through the use of objective evaluations of certain factual
23 information. *See*, State's Exhibit 1, pp. 27-30. Ms. Rodriguez testified that TBA's violation
24 was considered serious because exposure to COVID-19 could lead to irreversible illness or death.
25 *See*, State's Exhibit 1, p. 27, *see also*, 1Tr., p. 63;3-8. The State found probability of injuries
26 from the hazard to be "greater." *See*, State's Exhibit 1, p. 27. The probability of injury is a

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28 ³The State's Exhibit 1 contained 4 photographs of the facility, two of which were merely
enhancements, blowups, of the two photographs discussed herein.

1 function of the number of employees involved or exposed to the condition, how often the
2 employees are exposed and similar factors. *See, Id.* In this instance, four workers were exposed
3 to the hazard. The employee proximity was given a rating of ten because the employees were
4 working with persons who were not wearing face coverings. *See, 1Tr., p. 63;20-23.* The
5 frequency of exposure was given a ten also because the employees were potentially exposed on a
6 daily basis. *See, State's Exhibit 1, pp. 27, 28.* The gravity of the violations is the starting point
7 for the calculation of the penalty. The gravity of the violation is a function of the probability of
8 an injury and the severity of the injury, should one occur. *See, State's Exhibit 1, p. 28.* This was
9 a gravity based penalty with a starting amount of \$13,494. *See, 1Tr., p., 64;8-13.* This gravity
10 based penalty was then reduced to \$3,643, as the result of the Respondent's size and its history.
11 *See, Id.*

12 Regarding the calculation of the penalty for Citation 2, Item 1a, Ms. Rodriguez testified
13 that the alleged violation was classified as other-than-serious. *See, 1Tr., pp. 64;22-24, 65;1-4.*
14 This classification was given because it was an alleged violation of an OSHA rule that would
15 usually not cause death or serious injury but is nevertheless related to job safety and employee
16 health. *See, Id.* The chemicals utilized by TBA were not of a type that would cause serious
17 physical injury or illness. *See, 1Tr., p. 65;5-9.* The gravity based penalty for this alleged
18 violation was calculated in the same manner as for Citation 1. In this instance, the gravity based
19 penalty was \$1,082. *See, 1Tr., p. 66;4-6.* The State reduced the amount of the penalty to \$292,
20 as the result of the size of the business and its history. *See, 1Tr., p. 66;7-10.* No fines were
21 assessed for the alleged violations of Citation 2, Items 1b and 1c because they were grouped with
22 Citation 2, Item 1a. *See, 1Tr., pp. 66;17-24, 67;1-8.*

23 Subsequent to the inspection of TBA, Ms. Rodriguez provided her Inspection Narrative.
24 *See, State's Exhibit 1, pp. 10-11.* Therein, Ms. Rodriguez substantiated the first allegation, in
25 part, because she believed she had witnessed the players scrimmaging. *See, State's Exhibit 1, p.*
26 *10, see also, 1Tr., p. 73;16-22.* Ms. Rodriguez' evidence of players scrimmaging was her
27 photograph of the two players involved in shooting and contesting the shot. *See, State's Exhibit*
28 *1, p. 69.* Ms. Rodriguez substantiated the Inspection Narrative's second allegation because the

1 facility was not using a cleaner from the EPA list N and because TBA allowed the parents of the
2 youth group to stay and watch the practices. *See*, 1Tr., p. 75;4-17. Ms. Rodriguez substantiated
3 the Inspection Narrative's third allegation because players were seen on the sidelines not wearing
4 masks and they were allowed to leave the TBA facility without wearing masks. *See*, State's
5 Exhibit 1, p. 11.

6 In the September 9, 2021, hearing, Mr. Tarkanian challenged the allegations of the
7 Inspection Narrative, as follows:

8 Mr. Tarkanian: The -- this notice of alleged safety violation says that the TBA youth
9 teams were playing games. Did you find any evidence of TBA youth teams playing
games?

10 Ms. Rodriguez: No, sir.

11 Mr. Tarkanian: The statement claims that TBA youth teams were having normal
12 practices. Do you have any evidence that TBA teams were having normal practices?

13 Ms. Rodriguez: No, sir.

14 Mr. Tarkanian: It states in here that the coaches are not wearing masks when required.
Do you have any evidence to show that the coaches are not wearing masks?

15 Ms. Rodriguez: No, sir.

16 Mr. Tarkanian: Okay. Okay. Let's go to your inspection narrative on page ten. It states
17 players seen scrimmaging. Can you identify with pictures. Can you identify in the
complainant's evidence package any pictures of players scrimmaging?

18 Ms. Rodriguez: Well, the scrimmaging, the photos that are there are just the two players
19 playing at the time.

20 Mr. Tarkanian: Okay. But your statement says that players were seen scrimmaging.

21 Mr. Tarkanian: So basically your statement based upon this was the players, the two
22 players on the court where one was shooting the ball and other guy was running by trying
to contest his shot, correct?

23 Ms. Rodriguez: Actively playing, not social distancing, yes, sir.

24 Mr. Tarkanian: Okay. Okay. So it says valid at the time of the inspection. *See*, 1Tr., pp.
73;4-24, 74;13-21.

25 Mr. Tarkanian further questioned Ms. Rodriguez' allegations that youth teams were holding
26 games, holding normal practices and that players and coaches were not wearing masks. *See*, 1Tr.,
27 p. 75;4-23. In each of these instances, Ms. Rodriguez had only second hand knowledge, she had
28 not witnessed any of these things, except for the players without masks. *See*, *Id.*

1 During the deliberations, Chairman Weber provided his analysis of Governor Sisolak's
2 directives and related documents in relation to the State's evidence. *See*, 2Tr., pp. 98-100.
3 Therein, Chairman Weber showed that TBA was fully or largely compliant with Governor
4 Sisolak's directives. One was that the newly reopened businesses were to encourage the
5 customers to wear face masks. *See*, 2Tr., p. 101;12-17. This was something that TBA appeared to
6 be doing. *See, Id.* Another, obligated businesses to enforce social distancing in areas where
7 people were likely to congregate. *See*, 2Tr., p. 101;18-23. TBA posted signs requiring social
8 distancing, however, it was not clear as to how well it was enforced. *See, Id.* Third, in regards to
9 the photograph of the resting players (State's Exhibit 1, p. 68), Chairman Weber said the
10 following:

11 [F]rom the few pictures that we did have it was hard to determine ...where it
12 showed people it looked like primarily off the court but some of them were
13 walking... towards the camera it looked like, were they just finishing up a drill. We
14 don't know if they were playing a game which was apparently restricted. We don't
15 know if it was a practice. We don't know if it was drills they were running. We
16 don't know what they were doing, but they appeared to be either just off the court
17 or maybe coming off the court the direction that they were walking, right. They
18 certainly weren't engaged in an activity at that time. So it's hard to determine with
19 certainty that ...they were just sitting around talking. They weren't... actively
20 participating in anything recently where they would have an exclusion to be able to
21 have their mask off while they're catching their breaths or their breath. There was
22 nothing that really indicated from those pictures that that was what the case was.
23 So I think that's a big question mark, right? *See*, 2Tr., p. 102;1-20.

19 Other Board Members expressed dissatisfaction with the probative value of the evidence
20 supplied by the State. "I did not think the state did a good job in proving that it was [a violation]."
21 Member Milligan. *See*, 2Tr., p. 89;2-4. "The state lacked some hard points to convince me that
22 - - the Tarkanian facility was operating [with impunity to the COVID-19 directives]" Member
23 Spielberg, *See*, 2Tr., p. 89;18-20. "I'm not sure if I heard anything solid showing any of the
24 employees were exposed to anything." Member Macias. *See*, 2Tr., p. 90;4-11.

25 CONCLUSIONS OF LAW

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

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1 In Citation 1, Item 1, State OSHA alleges a violation of NRS 618.375(2), one of
2 Nevada's analogs to Section 5(a) of the Occupational Safety and Health Act of 1970 (the Act)⁴,
3 the Federal general duty clause. As Nevada has adopted all Federal Occupational Safety and
4 Health Standards which the Secretary of Labor has promulgated, modified or revoked and any
5 amendments thereto, *see*, NRS 618.295(8), the Board is aided in the interpretation of NRS
6 618.375(1) by the interpretation 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
11 (5th Cir., 1997)(hazardous conditions not covered by agency standards). And, it was intended to
12 apply where a statute or regulation exists but is inadequate to provide the level of safety which
13 the Act was otherwise intended to provide and the employer was aware of the inadequacies. *See*,
14 *UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir.) *cert. denied*, 484
15 U.S. 976 (1987). It is the responsibility of State OSHA to demonstrate the inadequacy or
16 absence of a specific standard applicable to the condition at hand. *See, Safeway Inc., supra*, at
17 1194. The bottom line is that though an employer is not an insurer of employee safety, *see, e.g.*,
18 *National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265-66 (D.C. Cir., 1973), "...an
19 employer's duty to provide a safe working environment extends beyond compliance with specific
20 safety and health standards." *Safeway, supra* at 1194.

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

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28 ⁴29 U.S.C. § 654(a)(1)

1 Analysis begins with the question of whether the “general duty clause” applies in this
2 case. The Board concluded it applies because this a COVID-19 exposure violation similar to
3 Pulse Fitness (sic) which they had reviewed previously.⁵ In that previous matter, the Board
4 concluded that a manifest and continuous failure and refusal to follow Governor Sisolak’s
5 directives and related materials constituted a violation of subsection 2 of NRS 618.375. *See*,
6 2Tr., pp. 89;24-20, 104;14-22.

7 The burden is upon the State to prove each element of the *prima facie* case. *See, Original*
8 *Roofing Company, LLC. v. Chief Administrative Officer of the Occupational, Safety and Health*
9 *Administration*, 442 P.3d 146, 149 (Nev., 2019). *See also*, NAC 618.788(1). The burden of
10 proof is by a preponderance of the evidence. *See, Armor Elevator Co.*, 1 OSHC 1409 1973-
11 1974, OSHD ¶ 16,958 (1973). As is evident from the foregoing analysis, proof that the general
12 duty clause has been violated also satisfies the test for proving a *prima facie* case. The general
13 duty clause is the *prima facie* case. Proof of its violation meets the *prima facie* burden.

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

17 On March 13, 2020, Donald J. Trump, then, President of the United States, declared a
18 nationwide emergency pursuant to Sec. 501(b) of the Robert T. Stafford Disaster Relief and
19 Emergency Assistance Act, 42 U.S.C. 5121-5207 (the “Stafford Act”). Chapter 414 of the
20 Nevada Revised Statutes provides that in times of emergency, the Governor may exercise all
21 powers necessary to promote and secure the safety and protection of the civilian population.
22 Specifically, subsection 3 of NRS 414.060 allows the Governor “to make, amend or rescind the
23 necessary orders or regulations to carry out the provision of [Chapter 414] within the limits of the
24 authority conferred upon the Governor in this chapter.” Further, NRS 414.060(3)(f) provides that
25 the Governor may delegate administrative authority in the performance of his duties under
26 Chapter 414. Throughout the crisis, Governor Sisolak, as the State’s Chief Executive, and
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28 ⁵ Pole Fitness Studio, LLC, Docket No. LV 21-2060

1 certain State agencies provided directives intended to mitigate the spread of COVID-19.

2 Specifically, applicable here is Directive Number 21, dated May 28, 2020.

3 Section 12 of Directive 21 requires all employers to take proactive measures to ensure
4 compliance with the social distancing and sanitation guidelines and states: “It shall continue to
5 require employees who interact with the public to wear face coverings.” Section 13 states that all
6 businesses must adopt measures that meet or exceed the standard promulgated by Nevada OSHA
7 to minimize the risk of the spread of COVID-19.

8 Section 28 of Directive 21 deals specifically with, among others, gyms and fitness
9 facilities. The directive says that gyms “may reopen only if they are able to provide services in a
10 manner that does not violate social distancing protocols.” *See, Id.* Further,

11 [e]mployees, trainers, and instructors must wear face coverings to the maximum
12 extent practicable, and facilities should encourage patrons to wear face coverings
13 to the maximum extent practicable. Equipment must be regulated to ensure a
14 minimum of six feet of social distancing between users, and equipment should be
15 moved, designated inoperable, or turned off to ensure that social distancing
standards are maintained. Contact sports, including.... basketball....may only be
offered in a manner where participants do not physically contact other
participants, or activities that require participants to perform within six feet of
each other. *See, Id.*

16 Additional information regarding basketball practices conducted at TBA was provided on
17 the Roadmap to Recovery for Nevada publications entitled, “Indoor Venues” and “Organized
18 Youth Sports PRACTICE ONLY.” *See, State’s Exhibit 2, pp. 96-98.* The Indoor Venues
19 publication required six feet of social distancing between people. *See, State’s Exhibit 2, p. 96.*
20 Provided that a space of six feet should be kept between people and players must wear masks at
21 all times except while actively exercising. *See, Id.* The Youth Sports guidance provided that
22 basketball practices should be limited to conditioning and drills. *See, State’s Exhibit 2, pp.*
23 *97-98.* Further, “[a]ll coaches and managers are required to wear face coverings. Players **should**
24 wear face coverings except while playing or exercising.” *See, State’s Exhibit 2, p. 97 (Emphasis*
25 *added).*

26 The first element of a violation of the general duty clause requires that the State show that
27 an activity or a condition in the workplace presents a hazard. Here, COVID-19 was declared to
28 be a pandemic on March 11, 2020. *See, State’s Exhibit 2, p. 79.* The State of Nevada created a

1 medical advisory team to provide guidance on this problem. *See*, State's Exhibit 2, p. 79.

2 However, the mere showing of a generalized hazard, even one of the magnitude of the COVID-
3 19 pandemic, is not enough. Any alleged violation of NRS 618.375(2) must occur within the
4 employment relationship. *See, Id.* Employers must protect employees and their places of
5 employment from unsafe conditions. *See, Id.*

6 The State provided two pieces of evidence of the presence of one or more hazards at
7 TBA. The first were the photographs of the players not wearing masks. *See*, State's Exhibit 1,
8 pp. 68-69. However, the photographs failed to show any of TBA's staff interacting with players
9 who were not wearing masks. *See*, 2Tr., p.90;4-11. Further, the State was unable to provide any
10 testimony of such interaction.

11 The State also alleged that employees were exposed to a hazard when they took the
12 temperatures of players and guests. *See*, 1Tr., pp. 107;22-24, 108;1-2. This allegation placed
13 TBA on the horns of a dilemma, Governor Sisolak's directives recommended that staff check the
14 temperatures of persons entering the establishment. *See*, 1Tr., p. 108;3-10. However, the act of
15 taking temperatures would bring the personnel taking temperatures close to persons who might
16 be exposed to COVID-19. TBA is left with the untenable quandary, take temperatures and be
17 potentially exposed or avoid exposure in disregard of the "take temperature" rules. *See*, 2Tr., p.
18 95;1-22.

19 Another problem for the State was that it was unable to provide any evidence that any
20 employee or patron of TBA ever contacted COVID-19. The State argued that it was the potential
21 of COVID-19 transmission to employees which invokes employer liability. *See*, 1Tr., p. 84;12-
22 17. However, this was not consistent with the statutory language requiring actual employee
23 exposure to a hazard.

24 Another factor of the general duty clause requires a showing that the condition or activity
25 is recognized as a hazard. As set forth above, COVID-19 was recognized as a hazard at the State,
26 Federal and international level. However, it was also noted that TBA took several actions and
27 changed its operations in several ways in order to comply with the Governor's directives and
28 related guidance. Specifically, TBA posted a website informing its patrons of its COVID-19

1 restrictions. *See*, 1Tr., p. 85;10-12. TBA prohibited live games. *See*, 1Tr., p. 86;2-4. TBA
2 employees took the temperatures of everyone entering the facility. *See*, 1Tr., p. 86;5-7. TBA's
3 bleachers were marked for social distancing. *See*, 1Tr., pp. 85;23-24, 86;1. TBA limited the use
4 of its facility to three courts and only 15 people per court. *See*, 1Tr., p. 85;13-17. TBA banned
5 tournaments, leagues and games in the facility to limit the potential exposure to COVID-19. *See*,
6 1Tr., p. 86;2-4. TBA prohibited all spectators from entering the gym with the exception of
7 parents of young kids participating in youth programs. *See*, 1Tr., p. 85;19-22. Thus, while TBA
8 did not and could not eradicate all risk of its employees contracting COVID-19 at work, it took
9 comprehensive and extraordinary means to protect its personnel and its patrons from exposure to
10 COVID-19 while onsite.

11 State OSHA is also required to show that the hazard is causing or likely to cause serious
12 injury or death. In this instance, the State alleged that its photographs showed conduct that was
13 likely to cause serious injury to or the death of TBA's employees. The photograph of the two
14 players on a court was hardly probative. *See*, State's Exhibit 1, p. 69. The photograph only
15 showed a limited and brief close contact as expressly allowed by the Organized Youth Sports
16 guidance. *See*, State's Exhibit 1, p. 97. The photograph of the players sitting on the sidelines
17 was also of little evidentiary value. *See*, State's Exhibit 1, pp. 68-69. Players are not required to
18 wear masks. Masks were only suggested, but not mandated for players. *See*, State's Exhibit 2, p.
19 97. The Organized Youth Sports guidance made the wearing of face coverings optional for
20 athletes. *See*, State's Exhibit 1, p. 97. The guidance only said that players should wear a face
21 covering. *See, Id.*

22 Regarding the coaches, TBA employees, the State had no evidence that they did not wear
23 masks while coaching a youth team. *See*, 1Tr., p. 73;12-15. The State sought to use the two
24 photographs and the testimony of the inspector to show the likelihood of injury to an employee.
25 The photos purported to show players on the sidelines not wearing face coverings or social
26 distancing. *See*, State's Exhibit 1, pp. 68-68A. An added problem for the State was that the
27 photograph represented only a moment in time. There was no indication as to how long those
28 players had been on the sideline, *i.e.*, whether they were recovering from strenuous exercise

1 which they had very recently completed. Ms. Rodriguez' testimony was of no help here because
2 she was only in the facility for a few minutes. *See*, 2Tr., pp. 32;19-22, 50;15-17.

3 Finally to establish a violation, the State must show that the employer had some feasible
4 means of preventing the hazard. Here, the State did not provide any specific types of feasible
5 means of preventing the hazard. It can be inferred from Ms. Ortiz' closing arguments that strict
6 compliance with Governor Sisolak's Directives and related documents would constitute a
7 reasonable means of preventing the hazard. *See*, 2Tr., p. 44;2-14. However, Ms. Ortiz did not
8 argue or show that strict compliance with all of Governor Sisolak's Directives and related
9 documents was the only means of prevention for the spread of COVID-19. Accordingly, the
10 State's proof of this element failed.⁶

11 The Board accordingly finds and concludes that the preponderance of the evidence
12 reveals the State failed to meet its *prima facie* burden under NRS 618.375(2). Conversely, as the
13 Respondent did not contest Citation 2, the Board found that the State had met its burden of proof
14 regarding those allegations.

15 FINAL ORDER

16 Accordingly, the State OSH Board of Review voted to vacate Citation 1, Item 1, in its
17 entirety. It was moved by Member Mulligan to vacate the citation. *See*, 2Tr., pp. 104;23-24,
18 105;1-7. The motion was seconded by Member Macias. *See*, 2Tr., p. 105;21. The motion
19 passed unanimously, five in favor of the motion and no votes against the motion. *See*, 2Tr., p.
20 112;19-23. The State OSH Board of Review sustained Citation 2, Items 1a, b and c, with a total
21 penalty of \$292. It was moved by Member Fullerton (2Tr., p. 113;16-19), seconded by Member
22 Mulligan to sustain Citation 2, Items 1a, b and c and to assess a total fine of \$292. The motion
23 passed unanimously, five voted in favor of the motion. No votes were cast against the motion.
24 2Tr., p. 114;2-5.

25 This is the Final Order of the Board.

26 IT IS SO ORDERED.

27 _____
28 ⁶It should be noted that TBA's failure to utilize chemicals on the EPA list N was not considered
by the Board.


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

3 Those present and eligible to vote on this question consisted of all the current members of
4 the Board, to-wit, Chairman Rodd Weber, Vice-Chairman, William Spielberg, Members Frank
5 Milligan, Scott Fullerton and Jorge Macias. Upon a motion by Jorge Macias, seconded by
6 William Spielberg, the Board voted 5-0 to approve this Decision of the Board as the action of the
7 Board and to authorize Chairman Rodd Weber, after any grammatical or typographical errors are
8 corrected, to execute, without further Board review this Decision on behalf of the Nevada
9 Occupational Safety and Health Review Board. Those voting in favor of the motion either
10 attended the hearing on the merits or had in their possession the entire record before the Board
11 upon which the decision was based.

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

14 Dated this 25th day of August, 2023.

NEVADA OCCUPATIONAL SAFETY
AND HEALTH REVIEW BOARD

15
16 By: 
17 Rodd Weber, Chairman
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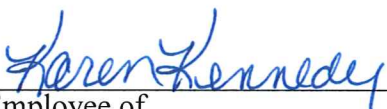
CERTIFICATE OF SERVICE

Pursuant to NRCP 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 Conclusions 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

Danny Tarkanian
Tarkanian Basketball Academy
3008 Campbell Cir.,
Las Vegas, Nevada, 89107

Dated this 25th day of August, 2023.



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

S:\Clients\OSHA\LV 21-2102, Tarkanian Basketball Academy, Inc\Decision R 12.wpd