



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant

v.

the Broken iPhone, LLC,  
Respondent.

OSHRC Docket No. **21-0289**

Appearances:

Daniel Miller, Esq. and Jeremy Fisher, Esq.  
U.S. Department of Labor, Office of the Solicitor, Atlanta, GA  
For Complainant

Mark Bodiford, Pro se, Mobile, AL  
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

**DECISION AND ORDER**

The Broken iPhone, LLC, (Respondent) operates a storefront retail establishment in Mobile, Alabama, where it repairs cell phones. Respondent contests a one-item Citation and Notification of Penalty issued to it by the Secretary on March 8, 2021, alleging a serious violation of § 5(a)(1) of the Occupational Safety and Health Act of 1970 (Act). The Citation alleges Respondent potentially exposed its employees (owner Mark Bodiford and a cell phone technician) to the hazard of COVID-19 by failing to develop and implement safety protocols to mitigate the spread of the virus among Respondent's employees working in proximity to Respondent's customers. The Secretary proposes a penalty of \$2,926 for Item 1.

The Court held a hearing in this matter on May 11, 2022, in Mobile, Alabama. Mark Bodiford represented Respondent at the hearing. The parties filed post-hearing briefs. For the reasons that follow, the Court finds the Secretary established Respondent violated § 5(a) of the Act, as cited. Accordingly, the Court **AFFIRMS** Item 1 of the Citation and assesses a penalty of \$2,926.

**JURISDICTION AND COVERAGE**

Respondent timely contested the Citation. The parties stipulate the Commission has jurisdiction over this action and Respondent is a covered employer under the Act (Exh. J-1, ¶¶

A.2-3 & B.1-3; Tr. 25-26). Based on the stipulations and the record evidence, the Court finds the Commission has jurisdiction over this proceeding under § 10(c) of the Act, and Respondent is a covered employer under § 3(5) of the Act.

### **BACKGROUND**

Respondent repairs cell phones at a storefront retail establishment in Mobile, Alabama (Exh. J-1, ¶¶ A.1 & 3). At the time of the OSHA inspection, two employees worked at the store—owner Mark Bodiford and a technician. The store is 18 to 20 feet wide and comprises waiting areas with chairs on either side of the store, desks where the employees work, and a cash register area (Exh. C-5, pp. 3 & 6; Tr. 49-50). No partitions or barriers designed to prevent face-to-face exposure separated the waiting areas from the employees’ desks or the cash register (Exh. J-1, ¶ A.41; Tr. 50).

On September 10, 2020, compliance safety and health officer (CSHO) William Kitchen and OSHA assistant area director Scott Tisdale arrived at the store in response to a referral to OSHA from the Mobile County Health Department. The Mobile County Health Department had been notified Respondent was refusing admittance to its store to customers wearing face coverings or masks unless they removed them (Tr. 38, 43-44).<sup>1</sup>

The OSHA representatives met with Bodiford, who told them he and his employee were not available to be interviewed that day (Tr. 47). CSHO Kitchen responded he would return to the store at a more convenient time to speak with Bodiford and his employee. Before he left, CSHO Kitchen observed a customer enter the store without a mask (Tr. 48). He also observed Respondent’s unmasked technician working at the cash register, interacting with unmasked customers. The customers were within 2 to 2½ feet of the technician during these interactions (Tr. 55-56, 60-61).

CSHO Kitchen returned to the store the next day and waited there for three hours until Bodiford was ready to speak with him. During that time, he observed “a constant influx of customers.” (Tr. 50) The customers did not wear masks or physically distance themselves from Bodiford and other customers (Tr. 51-52). When Bodiford finally spoke with him, it was to inform the CSHO he had not yet met with his legal counsel and would have to arrange a meeting later (Tr. 53). CSHO Kitchen provided his contact information and left the store. After waiting to

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<sup>1</sup> Alabama Governor Kay Ivey issued a mask mandate for the State of Alabama effective July 16, 2020, which was still applicable at the time of the OSHA inspection. Vaccines for COVID-19 were not available to the public in 2020 (Exh. C-21, pp. 8-9).

hear from Bodiford for two weeks, CSHO Kitchen attempted several times to speak to him by phone, but Bodiford kept hanging up on him (Tr. 54). Eventually OSHA issued subpoenas to Bodiford and his employee to obtain their statements (Tr. 55).

During his interview, Bodiford informed CSHO Kitchen he was aware of COVID-19 but believed it was a hoax and he disagreed with the guidelines issued by the Centers for Disease Control and Prevention (CDC) to mitigate the spread of the virus by using face coverings and physical distancing (Exh. C-3; Tr. 56). Bodiford initiated confrontations with customers “where he had requested that they remove their masks before entering the store and conducting business.” (Exh. C-3; Tr. 57) Bodiford had not implemented extra cleaning protocols, physical partitions, physical distancing, or occupancy limits (Exh. C-3; Tr. 58-59). Bodiford told CSHO Kitchen he had purchased surgical masks and CBRN masks with P-3 filters “[j]ust in case Bill Gates released the second virus and just because I was bored.” (Exh. C-3, p. 3; Tr. 58) Bodiford did not wear a mask in the workplace nor did he require the technician to wear one (Tr. 57-58).

During her interview with CSHO Kitchen, the technician confirmed Bodiford had several confrontations with customers when he insisted they remove their face masks before entering the store. She stated she had received no training or instructions regarding safety protocols to mitigate the spread of COVID-19 (Exh. C-4; Tr. 59-60).

Based on his inspection, CSHO Kitchen recommended the Secretary cite Respondent for committing a serious violation of § 5(a)(1) of the Act (Tr. 66). He stated Bodiford and the technician were “potentially exposed to the general public and COVID-19. They were working in close proximity with the general public and [Bodiford] had amplified that exposure in that he was actively requiring that people remove face coverings before entering the store[.]” (Tr. 66)

At the hearing held May 11, 2022, the Secretary called two witnesses: CSHO Kitchen and Dr. Michael Hodgson, OSHA’s director of technical support and emergency management, who testified as an expert in the hazards posed by COVID-19 and the means of abating or mitigating the hazards. Respondent presented no witnesses and Bodiford did not testify.<sup>2</sup>

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<sup>2</sup> Respondent makes a number of extraneous arguments in its brief, unsupported by evidence. It contends OSHA has broken “multiple established State and Federal Laws” by issuing the Citation to Respondent but does not specify which laws OSHA violated (Respondent’ Brief, p. 2). Respondent contends requiring customers and employees to wear face coverings violates the Americans with Disabilities Act, but fails to cite to any section of that act in support of its claim (*Id.* at p. 4). Respondent, through Bodiford, also claims it is “legally obligated to respect religious rights defined by the Civil Rights Act that do not allow covering of the face, including my religion.” (*Id.*) Respondent’s brief does not identify Bodiford’s religion or the section of the Civil Rights Act it would be violating if it allowed customers and employees to wear face coverings. Respondent presented no evidence of Bodiford’s religious

## THE CITATION

### Section 5(a)(1) and the Secretary's Burden of Proof

Section 5(a)(1), known as the general duty clause, provides: "Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]" 29 U.S.C. § 654(a)(1). For violations alleged under § 5(a)(1), the Secretary must establish that:

(1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to eliminate or materially reduce the hazard. . . . The Secretary must also show that the employer knew or, with the exercise of reasonable diligence, could have known of the hazardous condition. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1537(No.86-0469,1992).

*UHS of Westwood Pembroke, Inc.*, No. 17-0737, 2022 WL 774272, at \*2 (OSHRC Mar. 3, 2022).

#### Item 1: Alleged Serious Violation of § 5(a)(1)

Item 1 alleges,

OSH Act of 1970 Section 5(a)(1): The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were working in close proximity to each other and customers, potentially exposing them to the hazard of SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), the cause of the COVID-19 disease.

a) On or about September 10, 2020, and continuing thereafter, the employer did not develop and implement timely and effective measures to mitigate the spread of SARS-CoV-2, the virus that causes Coronavirus Disease 2019 (COVID-19). The employee working at [Respondent's store] works in close proximity to the owner and customers during the COVID-19 pandemic.

#### Analysis

##### ***(1) Potential Exposure to COVID-19 Presented a Hazard in Respondent's Workplace***

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restrictions regarding face coverings at the hearing, nor did it assert it as a defense in its answer. (Respondent did present a hypothetical in its Answer as to why customers may not wear masks. "Perhaps a **severe religious conviction** protected by the Civil Rights Act of 1964 Title II against Discrimination does not allow them to wear a cloth face covering." (Answer, p. 9) (emphasis in original)). The Court finds these arguments are unsubstantiated or immaterial, or both.

The Secretary must establish a condition or activity in the workplace presented a hazard. “The term ‘hazard’ is not defined in the Act, but its commonly understood meaning is ‘[s]omething causing danger,’ ‘peril, risk, or difficulty.’ Random House Dictionary of the English Language 652 (1971)[.]” *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at \*5 (OSHRC Mar. 4, 2019).

Here, the Secretary must prove proximity to customers at Respondent’s store potentially exposed the employees to the hazard of COVID-19 transmission. The Secretary is not required to establish an actual transmission of COVID-19 to an employee of Respondent occurred.

“Proof that a cited activity actually caused harm or necessarily could have caused harm under the precise physical conditions that happened to be present at the time of the violation, or at any other specific time, is not required.” *Quick Transport of Ark., LLC*, 27 BNA OSHC 1947, 1949 (No. 14-0844, 2019). Instead, the Secretary must show that harm could result “upon other than a freakish or utterly implausible concurrence of circumstances.” *Titanium Metals Corp. of Am. v. Usery*, 579 F.2d 536, 541 (9th Cir. 1978).

*Sci. Applications Int’l Corp.*, No. 14-1668, 2020 WL 1941193, at \*4 (OSHRC Apr. 16, 2020).

Dr. Michael Hodgson testified regarding the hazard presented by exposure to the COVID-19 virus.<sup>3</sup> He stated COVID-19 is an infectious disease that had, at the time of the OSHA inspection, created a pandemic in the entirety of the United States, including Mobile, Alabama (Tr. 161, 165). COVID-19 is spread through airborne transmission from person to person (Tr. 180). It “mutates rapidly, and it does not confer life-long immunity.” (Tr. 167) The virus became more transmissible as it evolved and was more than twice as transmissible at the

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<sup>3</sup> Dr. Hodgson is the director of technical support and emergency management for OSHA (Tr. 130). He is a medical doctor and received a Master of Public Health and a Master in Epidemiology from the University of Pittsburgh (Tr. 133-36). He became board certified in internal medicine in the treatment of diseases in adults in 1981 and in occupational and environmental medicine in 1986 (Tr. 134). He is a member of the American College of Occupational and Environmental Medicine and of the Epidemic Intelligence Service Alumni Association (Tr. 142). He is the author of over 150 peer-reviewed papers and the coeditor of two books (Tr. 142-43).

Dr. Hodgson worked for two years as an epidemic intelligence officer investigating outbreaks for the CDC (Tr. 135). He was a member of the faculty at the University of Pittsburgh from 1983 to 1991, then moved to the University of Connecticut where he directed the residency training program in occupational and environmental medicine from 1991 to 1998. Dr. Hodgson returned to the CDC in 1998 and worked in the office of the director of the National Institute for Occupational Safety and Health (NIOSH) as a senior scientist (Tr. 135-37). He then went to work for the Veterans Health Administration, where he directed a program “in response to the recognition of influenza infections and the potential for a pandemic.” (Tr. 137) In 2013, Dr. Hodgson became the director of the Office of Occupational Medicine and Nursing (Tr. 138). He has done extensive work on pandemic issues, including severe acute respiratory syndrome (SARS), avian influenza (A(H5)), and H5N1 (Tr. 138-41).

The Secretary tendered Dr. Hodgson as an expert witness in public health and infectious disease. Respondent did not object to his qualification as an expert (Tr. 157-58). The Court qualified Dr. Hodgson as an expert “regarding the hazards posed by COVID and the extent to which means to abate those hazards exist.” (Tr. 158-59)

time of OSHA's inspection than when it first arose (Tr. 176).<sup>4</sup> Asymptomatic people infected with COVID-19 can transmit the virus (Tr. 175-76).

The COVID-19 virus primarily targets the lungs and causes "deep pulmonary infection." (Tr. 175) Dr. Hodgson described the progress of the disease.

Typically, it first makes people feel short of breath and then over a few days, it leads to traditional pneumonia symptoms, but, in fact, people can die in that first phase when there's just blood vessel inflammation within the lung without the actual pneumonia. So once you have the COVID virus in the initial presentation mode, you get lung disease, it affects your blood vessels, it can cause heart arrhythmias, it can cause heart failure, it can cause brain dysfunction, something that's of deep interest now because we don't really understand why it does that or why that seems to be the thing that lasts the longest. In addition, it triggers autoimmune responses somehow.

(Tr. 174)

In September of 2020, COVID-19, a highly infectious disease, existed in Mobile, Alabama. Members of the general public infected with COVID-19 could enter Respondent's store each workday. Nothing prevented infected customers from positioning themselves in proximity to Respondent's employees as they discussed their defective cell phones, waited as the employees worked on the cell phones, and paid for the cell phone repairs at the cash register. Infected members of the public could transmit the virus to Respondent's unprotected employees. The Secretary has established COVID-19 presented a hazard in Respondent's workplace.

***(2) Respondent Recognized the Hazard Presented by Exposure to COVID-19***

The Secretary must establish Respondent or Respondent's industry recognized COVID-19 as a workplace hazard.

Hazard recognition "may be shown by proof that 'a hazard ... is recognized as such by the employer' or by 'general understanding in the [employer's] industry. *Otis Elevator Co.*, 21 BNA OSHC 2204, 2207 (No. 03-1344, 2007) . . . [I]t is well established that recognition of a hazard is not dependent on an accident having previously occurred "because the purpose of the [OSH] Act is to prevent the first injury." *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2119 (No. 07-1578, 2012)[.]

*Sci. Applications Int'l Corp.*, 2020 WL 1941193, at \*6.

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<sup>4</sup> Dr. Hodgson explained that epidemiologists calculate the *R Naught* factor to determine the extent to which a disease spreads. *R Naught* represents the average number of people to which one infected person can be expected to transmit a disease. In March through May of 2020, epidemiologists calculated the *R Naught* factor of COVID-19 to be "in the range of two and a half to three." At the time of OSHA's inspection of Respondent's store in September of 2020, "the *R Naught* had changed to between six and eight, so it was more than twice as infectious." (Tr. 175-76)

The Secretary contends Respondent had actual knowledge of the hazard presented by the COVID-19 epidemic in the workplace. Both the national and Alabama state news media extensively covered the pandemic, and Governor Ivey declared a state public health emergency due to COVID-19 on March 13, 2020 (Exh. C-21, p. 8). She subsequently renewed the declaration on March 18, 20, 23, and 26; April 2, 3, and 13; May 8 and 21; June 9 and 30; July 2, 15, and 29; and August 21, 2020 (three weeks before the OSHA inspection at issue) (*Id.* at p. 9).

Owner Mark Bodiford did not testify at the hearing, but his position on the issue of Respondent's recognition of the hazard presented by COVID-19 can be inferred from his cross-examination of CSHO Kitchen. Bodiford asked the CSHO, "Am I legally required to watch television?" and "Am I legally required to read the newspaper?" (Tr. 79). His implication is that the widespread coverage of the hazard presented by COVID-19 in national and state news media does not prove that Bodiford himself was aware of the severity of the pandemic. His position is belied by his own actions on two counts.

First, Respondent came to OSHA's attention after the Mobile County Health Department received a video of Bodiford confronting a masked customer and refusing admittance to the store (Tr. 45). When CSHO Kitchen arrived at Respondent's store, he noted the door was covered with printed copies of news stories, internet memes, and tweets related to COVID-19 (Exhs. C-9 & C-10), as well as the prohibition sign (red circle with a backslash) overlaid on a face mask (Exh. C-12; Tr. 63-66). The presence of the signs on the front door of the business owned and operated by Bodiford indicates Respondent was aware of the spread of COVID-19.

Second, Respondent stipulates it was aware of the COVID-19 pandemic in § A of Exhibit J-1 (*Statement of Admitted Facts*), which is binding on Respondent.<sup>5</sup> Respondent stipulates the following facts:

43. On and prior to September 10, 2020, Respondent was aware of the COVID-19 pandemic.
44. On and prior to September 10, 2020, Respondent was aware that the Centers for Disease Control, World Health Organization, and other public health and medical institutions had attributed deaths to COVID-19.
45. On and prior to September 10, 2020, Respondent was aware of public health guidelines indicating that employers should take steps such as requiring the use of

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<sup>5</sup>"See *Fed. Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032, 1038 (6th Cir. 1991) ("Stipulations voluntarily entered by the parties are binding, both [on the trial court and on the appeals court].")" *Armstrong Utilities, Inc.*, No. 18-0034, 2021 WL 4592200, at \*17 (OSHR Sept. 24, 2021) (brackets in original).

facemasks and social distancing to protect their employees from the hazard of COVID-19.

(Exh. J-1)

The stipulations establish Respondent's acknowledgement that it recognized COVID-19 presented a hazard in the workplace. The Court finds the Secretary has established the hazard presented by COVID-19 was recognized by Respondent.

***(3) Exposure to COVID-19 Caused or Was Likely to Cause Death or Serious Physical Harm to Employees***

Dr. Hodgson testified Covid-19 had caused deaths and serious physical harm at the time of the OSHA inspection, and it was likely to continue to cause them.

With regard to deaths, Dr. Hodgson testified the *case fatality ratio* is the proportion of people diagnosed with a specific disease who eventually die of that disease (Tr. 181). He stated that at the time of the OSHA inspection, the case fatality ratio for COVID-19 "was in the range of three to four [percent]." (Tr. 181) Dr. Hodgson found that by September 10, 2020, COVID-19 had caused 191,583 deaths in the United States; 3,618 deaths in Alabama; and 366 deaths in Mobile (Exh. C-21, p. 4).

In 2020, COVID-19 was the third leading cause of death in the United States. Prior to 2020, there were no deaths from the virus in the United States (Tr. 293). Dr. Hodgson testified the disease's sudden appearance as a cause of death is unprecedented:

Q.: Has there ever before in recorded history been a disease that went from not appearing on the list of causes of death to being third in one year?

Dr. Hodgson: Nowhere in the world since we've kept organized statistics on causing of death[.]

(Tr. 293)

With regard to serious physical harm, Dr. Hodgson stated that for infected people who do not die from COVID-19, the physical damage they sustain can be severe and long-lasting: "lung disease, pneumonia-type things, heart disease, both heart failure and heart arrhythmia, kidney failure could occur, the brain dysfunction stuff, long COVID as the prototypical long consequential effect[.]" (Tr. 183-84) By September 10, 2020, COVID-19 had resulted in 8,553,348 hospitalizations in the United States (Exh, C-21, p. 4).

Respondent argues, without evidence, that “COVID-19 is not likely to cause death or serious physical harm.” (Respondent’s Brief, p. 2)<sup>6</sup> Respondent’s argument is analogous to the respondent’s argument regarding this element in *Waldon Health Care Center*, No. 89-3097, 1993 WL 119662 (OSHRC April 2, 1993). In that case, the Secretary cited a nursing home, Waldon Health Care Center (Waldon), for a violation of § 5(a)(1) on the ground “that nurses and nursing assistants throughout the facilities were exposed to the hazard of transmission of the Hepatitis B virus (“HBV”) through possible direct contact with blood or other bodily fluids.” *Id.* at \*1. Waldon contested the citation and an administrative law judge subsequently vacated the citation on the ground that the risk of contracting HBV was not a recognized hazard in the nursing home industry. On review, the Commission ruled the judge erred in finding HBV transmission was not a recognized hazard.<sup>7</sup>

With regard to the third element of the Secretary’s burden under § 5(a)(1), Waldon argued that “due to the unlikelihood of employee contact with the blood of the residents and the prophylactic measures already taken, it is not likely that HBV transmission would occur, and, therefore, the hazard is not likely to cause death or serious physical harm.” *Id.* at 11. The Commission disagreed.

The argument fails because, as the Commission has made clear, the criteria for determining whether a hazard is “causing or likely to cause death or serious physical harm” is not the likelihood of an accident or injury, but whether, if an accident occurs, the results are likely to cause death or serious harm. *R.L. Sanders Roofing Co.*, 7 BNA OSHC 1566, 1569, 1979 CCH OSHD ¶ 23,756, p. 28,805, *rev’d on other grounds*, 620 F.2d 97 (5th Cir.1980).

[Waldon’s] claim that 90 to 95 percent of all HBV victims recover fully and that the disease is fatal only 1 percent of the time is self-defeating. The record establishes that two-thirds of those people who contract the HBV virus will develop symptoms. Moreover, by [Waldon’s] own numbers, up to 10 percent of all HBV patients do not fully recover. Individuals who do not fully recover are at high risk of developing chronic persistent hepatitis (a mild form of hepatitis), chronic active hepatitis (a progressively debilitating form of hepatitis that leads eventually to cirrhosis of the liver), cirrhosis of the liver, and primary liver cancer.

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<sup>6</sup> As the Secretary notes, “Respondent’s position is difficult to discern, but at various points, [it] . . . seems to suggest that COVID-19 is not deadly *enough* for it to recognize COVID-19 as a hazard.” (Secretary’s Brief, p. 11) (emphasis in original) This appears to be the crux of Respondent’s defense. Bodiford told CSHO Kitchen that he believed COVID-19 to be a hoax (Tr. 56). In his opening statement, Bodiford clarified, “The definition of hoax doesn’t mean it’s not real. . . . I don’t deny that [COVID-19 does] exist, just that it’s not, as the citation alleges, serious.” (Tr. 32)

<sup>7</sup> The Commission vacated the citation because it found the Secretary failed to establish a feasible and effective means of abatement existed to eliminate or materially reduce the hazard of HBV transmission. *Id.* at \*1.

Approximately 25 percent of all chronic carriers develop chronic persistent hepatitis while another 25 percent develop chronic active hepatitis. And, of course, the disease is fatal to 1 percent of all HBV patients. This evidence amply demonstrates that a person who contracts the HBV virus is likely to suffer death or serious physical harm.

*Id.* at \*11.

The Commission found a fatality rate of 1 percent for people infected with HBV was sufficient to establish it is likely to cause death or serious physical harm. Dr. Hodgson testified the fatality rate for COVID-19 at the time of OSHA’s inspection was three or four times that of HBV. “Three to four percent of people who get SARS-CoV-2 and developed COVID-19 became not just sick, but died.” (Tr. 176)<sup>8</sup>

Here, the testimony of Dr. Hodgson establishes that if (in the days before COVID-19 vaccines were available) an employee contracted COVID-19, death or serious physical harm would likely result. Although the effects of the virus can be long lasting, the physical harm need not be permanent to be characterized as serious. As the Commission stated,

[Waldon’s] argument implies that an injury or illness cannot cause serious physical harm unless the harm is permanent. We find no basis to support such a position and we do not accept it. For example, an employee who has suffered broken bones in a fall has incurred serious physical harm even though he or she may recover with no permanent side effects.

*Id.* at \*16, n. 6.

The Court credits Dr. Hodgson’s unrebutted testimony that COVID-19 is a highly infectious disease that may cause death, serious harm, or lasting serious illness in the form of long COVID or post-COVID conditions. The Secretary has established COVID-19 had caused death and serious physical harm at the time of the OSHA inspection and was likely to continue to do so.

***(4) Feasible and Effective Means Existed to Materially Reduce the Hazard of Exposure to COVID-19***

The Secretary must establish a feasible and effective means existed to eliminate or materially reduce the hazard of COVID-19 exposure.

To establish the feasibility and efficacy of a proposed abatement measure, the Secretary must “demonstrate both that the measure[] [is] capable of being put into

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<sup>8</sup> During his cross-examination of Dr. Hodgson, Bodiford stated that the survival rate for COVID-19 is “99.9 percent or higher.” (Tr. 237) Dr. Hodgson explained survivability is based on the percentage of people who have a specific disease who survive for a designated time period, not, as Bodiford seems to think, on the percentage of people out of the general population who do not die of a specific disease (Tr. 237).

effect and that [it] would be effective in materially reducing the incidence of the hazard.” *Arcadian Corp.*, 20 BNA OSHC at 2011 (citing *Beverly Enters.*, 19 BNA OSHC at 1190). The Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard.

*Sci. Applications Int'l Corp.*, 2020 WL 1941193, at \*7.

In the Citation, the Secretary listed nine protocols he contends would, if implemented, materially reduce the cited hazard. The Citation provides,

Among other methods, a feasible and acceptable means of abatement would be to develop, implement, and train employee(s) on a COVID-19 Prevention Program that includes, at a minimum, the following protocols:

- 1) Establish, implement, and enforce a program requiring anyone in the workplace to wear face coverings (e.g. cloth face coverings, surgical masks);
- 2) Establish and implement social distancing measures to ensure that anyone in the workplace maintains at least a six-foot distance between other employees, customers, and visitors (e.g. floor demarcations, occupancy limits). Install transparent, impermeable barriers at customer-facing stations if social distancing is not possible;
- 3) Provide a place to wash hands or alcohol-based hand sanitizer containing at least 60% alcohol. Encourage employees and customers to frequently use appropriate hand sanitizing and/or hand-washing procedures throughout the workday and/or after coming into close contact with another individual, objects or other high contact surfaces (e.g. devices, doors, counters);
- 4) Perform routine cleaning and disinfection, especially high contact surfaces, and provide cleaning supplies and no-touch trash cans;
- 5) Implement curbside service to avoid close contact between employees, customers, and visitors in interior space;
- 6) Provide training on the sources of exposure to COVID-19, the hazards associated with exposure, and the workplace protocols in place to prevent or reduce the likelihood of exposure. Train on the use of face coverings, how to maintain a safe distance, and the appropriate workplace methods and procedures in place to prevent and reduce exposure;
- 7) Instruct workers who are sick to stay home. Screen employee(s) for COVID-19 symptoms. If they have symptoms before or during work, immediately send them home and encourage them to seek medical attention;
- 8) Ensure anyone working near someone who has tested positive for COVID-19 and/or has developed symptoms of COVID-19 is informed, tested and temporarily excluded from the facility and encouraged to quarantine; and
- 9) Follow federal, state, and local mandates, guidance, and recommendations to ensure public safety and health related to COVID-19.

Respondent stipulates it did not implement any of the listed protocols and implementation of each of the protocols was feasible (Exh. J-1, §§ A. 21-37, A.39-42).

Respondent argues, “Abatement suggested are not codified law nor do they ‘eliminate or materially reduce’ contracting COVID-19.” (Respondent’s Brief, p. 2) Respondent misunderstands the significance of the Secretary’s proposed methods of abatement. He is not asserting the proposed methods are “codified law.” It is an element of his burden of proof to show a feasible means existed to mitigate the cited hazard. Respondent may demonstrate it abated the alleged violation by establishing its own method of abatement was equally effective. “[A]n employer may defend against a general duty clause citation by demonstrating that it was using an abatement method that is as effective as the one suggested by the Secretary.” *Waldon*, 1993 WL 119662, at \*14. However, as Respondent has clearly shown, it implemented no abatement methods and prohibited customers from implementing the use of face coverings.

As for Respondent’s unsubstantiated statement that the Secretary’s proposed abatement methods do not eliminate or materially reduce the hazard presented by COVID-19, Dr. Hodgson’s testimony convincingly refutes it. He testified facemasks and face coverings effectively mitigate the hazard of COVID-19 in two ways: “It reduces exposure by preventing people who [are] asymptomatic but already infectious from pushing their infectious particles out, and it blocks stuff coming back in.” (Tr. 189) Surgical masks reduce the risk of infection by COVID-19 “by about 60 to 65 percent.” (Tr. 192)

Bodiford claimed at the hearing and in Respondent’s brief that a document on OSHA’s website titled *COVID-19 Frequently Asked Questions* (Exh. R-2) warns employers that cloth and surgical masks are ineffective because they “will not protect the wearer against airborne transmissible infections agents due to loose fit.” (Respondent’s Brief, p. 2) Bodiford omits the bullet points above this statement in the sections addressing cloth and surgical masks that state,

Cloth face coverings . . . [a]re worn in public over the nose and mouth to contain the wearer’s potentially infectio[us] respiratory droplets produced when an infected person coughs, sneezes, or talks and to limit the spread of . . . COVID-19 . . . to others.

. . .

Surgical masks . . . [a]re used to protect workers against splashes and sprays (i.e., droplets) containing potentially infectious materials [and] . . . [m]ay also be worn to contain the wearer’s respiratory droplets[.]

(Exh. R-2, pp. 2-3)

Cloth and surgical masks worn by infected customers or asymptomatic employees could protect employees from infected persons who wore masks. (Of course, this protection from potentially infected customers was eliminated when Bodiford refused admittance of masked customers to Respondent's store).<sup>9</sup>

Dr. Hodgson also testified that physical distancing and physical barriers mitigate the transmission of COVID-19.

[L]arge physical barriers interrupt in two ways. First, they prevent direct transmission of large particles, and second, they change airflow patterns so that when you breathe out fine aerosols, those fine aerosols will wind up following the thermal drafts in a room, and if you have a, you know, six -- a four-foot plexiglass shield over your window with a little window down here to move stuff back and forth, when you breathe out, the particles will rise just on the thermal drafts, computers, all that hot air rises, and then it will typically, you know, dilute up in higher levels of the room. So physical barriers prevent direct transmission and they prevent -- they dilute the fine aerosols.

(Tr. 196)

Dr. Hodgson testified that implementation of the other protocols recommended by the Secretary, including sanitization, handwashing, screening, testing, and training were effective in mitigating the hazard presented by exposure to COVID-19 (Tr. 200-208).

The Secretary has established effective means existed to materially reduce the hazard of exposure to COVID-19 at the time of OSHA's inspection. The Court finds the Secretary met his burden on this issue.

#### ***(5) Respondent Knew of the Hazardous Condition***

The Secretary must establish Respondent knew of the hazardous condition presented by COVID-19 in the workplace.

It is well established under Commission precedent that the knowledge of a supervisor can be imputed to the employer. *See, e.g., Deep S. Crane & Rigging Co.*, 23 BNA OSHC 2099, 2102 (No. 09-0240, 2012) (supervisor's knowledge is imputable to employer), *aff'd*, 535 F. App'x 386 (5th Cir. 2013) (unpublished); *Caterpillar, Inc.*, 17 BNA OSHC 1731, 1732 (No. 93-373, 1996) (applying agency law's long-standing principle that corporation is charged with knowledge of its agents), *aff'd*, 122 F.3d 437 (7th Cir. 1997).

*TNT Crane & Rigging, Inc.*, No. 16-1587, 2022 WL 2102910, at \*2 (OSHRC June 2, 2022).

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<sup>9</sup> The Court takes judicial notice under Fed. R. Evid. 201(b)(2) that the document on OSHA's website now states that cloth face coverings "[m]ay provide some level of protection for the wearer from others' respiratory particles." United States Department of Labor, <http://osha.gov/coronavirus/faqs> (last visited Aug. 8, 2022).

As noted in the section addressing employer recognition of the hazard, Respondent stipulates it knew its employees could contract COVID-19 from infected customers in proximity to the employees.<sup>10</sup> Bodiford’s personal disagreement regarding the severity of the disease and the efficacy of the use of facemasks, physical distancing, and other safety protocols is immaterial to the Secretary’s burden of proof. “To satisfy his burden, the Secretary must show knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard.” *Cent. Fla. Equip. Rentals, Inc.*, No. 08-1656, 2016 WL 4088876, at \*8 (OSHRC July 26, 2016) (emphasis in original).

The Secretary has established Bodiford had actual knowledge of the hazardous condition presented by COVID-19 in its workplace. Bodiford is Respondent’s owner and operator. His knowledge is imputed to Respondent.

The Court finds the Secretary has established all elements of his burden of proof. Therefore, Item 1 of the Citation is **AFFIRMED**.

#### ***Characterization of the Violation***

The Secretary characterized the violation of § 5(a)(1) as serious. A serious violation is established when there is “a substantial probability that death or serious physical harm could result [from a violative condition] . . . unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.” 29 U.S.C. § 666(k).

The record establishes the exposure of employees to customers potentially infected with COVID-19 could result in the substantial probability of death or serious physical harm to the employees.

The violation is properly characterized as serious.

#### **PENALTY DETERMINATION**

“In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith.” *Burkes Mech., Inc.*, No. 04-475, 2007 WL 2046814 at \*9 (OSHRC July 12, 2007). “Gravity is a principal factor in the penalty determination and is based

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<sup>10</sup> Respondent stipulates that “[o]n and prior to September 10, 2020,” it was aware of the COVID-19 pandemic and the fact that “the Centers for Disease Control, World Health Organization, and other public health and medical institutions had attributed deaths to COVID-19.” Respondent was also aware of “public health guidelines indicating that employers should take steps such as requiring the use of facemasks and social distancing to protect their employees from the hazard of COVID-19.” (Exh. J-1, § A.43-45)

on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury.” *Siemens Energy & Automation, Inc.*, No. 00-1052, 2005 WL 696568, at \*3 (OSHRC Feb. 25, 2005) (citation omitted). "Gravity, unlike good faith, compliance history and size, is relevant only to the violation being considered in a case and therefore is usually of greater significance. The other factors are concerned with the employer generally and are considered as modifying factors." *Natkin & Co. Mech. Contractors*, No. 401, 1973 WL 4007, at \* 2, n. 3 (OSHRC April 27, 1973).

Respondent employed two employees at the time of the OSHA inspection (Exhs. C-3 & C-4; Tr. 46-48). Respondent had no history of OSHA violations in the five years prior to the inspection at issue (Tr. 73). Respondent is not credited with good faith. It not only failed to implement protocols to mitigate exposure to COVID-19, Bodiford actually prohibited masked customers from entering the store (“On or prior to September 10, 2020, Respondent required and/or instructed customers to remove masks from entering the worksite.” (Exh. J-1, § A.38))

Based on Dr. Hodgson’s testimony regarding the transmissibility of COVID-19, its case fatality ratio, and its potentially long-lasting effects on persons infected with it, the Court finds the gravity of the violation is high. The Court assesses a penalty of \$2,926 for the violation of the cited standard.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Fed. R. Civ. P. 52(a).

#### **ORDER**

Based on the foregoing decision, it is hereby **ORDERED** that Item 1 of Citation No. 1, alleging a serious violation of § 5(a)(1), is **AFFIRMED**, and a penalty of \$2,926 is assessed.

**SO ORDERED.**

**Dated: August 22, 2022**  
Atlanta, GA

/s/  
Sharon D. Calhoun  
Administrative Law Judge, OSHRC