United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ARIANA MURRELL-ROSARIO d/b/a LIBERTY TAX SERVICE, Respondent.	OSHRC DOCKET NO. 21-0432

APPEARANCES:

Paul Spanos, Esquire
Department of Labor, Office of the Solicitor
Boston, Massachusetts
For the Secretary

Joseph M. Sano, Esquire
Lynn, Massachusetts
For Respondent

BEFORE:
Covette Rooney
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (the Act).

On March 17, 2021, Compliance Officer (CO) Gilad Gabbay opened an inspection of Liberty Tax Service (LTS) at 175 Lewis St., Lynn, Massachusetts.[1] (Adm. Fact ¶¶ 3, 5). The inspection was in response to a complaint that employees were not allowed to wear face coverings in the office as protection from COVID-19. (Tr. 41, 66-67). As a result of the inspection OSHA issued a Citation and Notification of Penalty (Citation) on April 8, 2021, for an alleged willful violation of section 5(a)(1) (general duty clause) of the OSH Act with a proposed penalty of $136,532. The Citation alleged Respondent had not protected its employees from the recognized hazard of SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), the virus that causes COVID-19. (Citation, 6).

Respondent submitted a timely notice of contest and the case was docketed with the Commission. The Complaint and Answer were subsequently filed.[2] A video hearing using the WebEx platform was held on November 16, 2021. Both parties submitted post-hearing briefs and reply briefs.

At the hearing, the Secretary called five witnesses: CO Gabbay, Dr. Aaron Tustin (Secretary's expert), [redacted] (an LTS customer), Lisa Tobin (inspector for City of Lynn), and Gene Cusack (Sergeant in Lynn Police Department). Respondent called two witnesses: Arianna Murrell-Rosario (owner of LTS) and Ann Nguyen (office supervisor at LTS).[3]

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[1] In the Joint Pre-Hearing Statement, the parties set forth 14 Admitted Facts. These will be referenced as Adm. Fact ¶ in this document.

[2] No affirmative defenses were asserted in the Answer.

[3] LTS did not call an expert witness at the hearing. Prior to the hearing, Secretary filed a Motion in Limine to Exclude the Deficient Report and Inadmissible Opinions of Tammy Blakeslee, Respondent's proposed expert witness. The undersigned granted Secretary's Motion, excluding the opinions set forth in the proposed expert report (Report) and any testimony from Ms. Blakeslee regarding the opinions set forth in the Report. *See* the undersigned's October 19, 2021 Order Granting Complainant's Motion in Limine (October 19 Order). The undersigned found the Report did not satisfy the requirements of the June 1, 2021 Scheduling Order or Federal Rule of Civil Procedure 26(a) in that it did not include qualifications to provide expert testimony, methodology used to support the stated opinions, an indication of the subject matter

The key issues in dispute are whether COVID-19 was a recognized hazard, whether LTS adequately abated the hazard of COVID-19 in its office, and whether LTS acted with plain indifference to employee safety.

For the reasons set forth below, the undersigned affirms the willful violation of the General Duty Clause and assesses a penalty of $95,500.

The Hearing

Initially, this matter was scheduled for hearing at the U.S. Tax Court in Boston, Massachusetts (Courthouse). *See* October 14, 2021 Notice of Precise Location of Hearing. On October 28, 2021, the undersigned issued an Order setting forth the safety protocols for the in-person hearing. *See* Amended Notice of Hearing and Order Regarding Safety Protocols for In-Person Hearing (Order). The Order set forth the COVID-19-related requirements for the hearing and entry to the Courthouse. These requirements included the requirement for everyone to wear a face covering during the hearing, get a temperature check, answer COVID-19 health screening questions to enter the building, and complete a Certification of Vaccination form. *Id.*

In the Joint Pre-Hearing Statement docketed November 3, 2021, Respondent requested an accommodation for the hearing.[4]

> Respondent [Ms. Ariana Murrell-Rosario] will need a medical accommodation to enter the courthouse on November 16th for trial. The Respondent is unable to wear face coverings due to her inability to safely breathe in such. In addition, the Respondent has severe allergic reactions to polypropylene fibers which may depending upon exposure level impact [her] ability to safely breathe and could trigger a medical asthma emergency.
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> If the federal courthouse in Boston does not provide physical accommodations, then the Respondent requests to have a remote zoom hearing on November 16th.

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experience, education, or specialized knowledge of the proposed expert, nor opinions in the report that would assist the undersigned as a fact finder. *See* October 19 Order.

[4] The same accommodation request was sent via email from Ms. Ariana Murrell-Rosario to the undersigned's legal assistant on November 1, 2021.

See J. Pre-H'rg. Statement, 6. The Secretary opposed the request for a remote hearing.

On November 3, 2021, the undersigned moved the hearing location to the WebEx video conferencing platform.[5] *See* November 3, 2021 Order Regarding Video Conference Hearing: Instructions and Protocols. The undersigned noted therein "that videoconferencing is a technology available to mitigate any delay in proceeding and it will overcome the Respondent's enunciated concerns." *Id.*

Jurisdiction

Based upon the record, the undersigned finds Respondent, at all relevant times, was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). *See* Adm. Facts ¶¶ 1-2. The undersigned finds the Commission has jurisdiction over the parties and subject matter in this case.

Findings of Fact

The COVID-19 pandemic[6]

On January 31, 2020, the United States Health and Human Services Secretary declared "a public health emergency for the entire United States to aid the nation's healthcare community in

[5] Mr. Sano, Ms. Murrell-Rosario, and their witness, Ms. Nguyen, participated in the remote hearing from the home of Ms. Murrell-Rosario. Ms. Nguyen was sequestered in another room of the house before providing testimony. (Tr. 10, 12).

[6] The undersigned takes judicial notice of the President's March 13, 2020 declaration of a national emergency related to the coronavirus disease (COVID-19) outbreak. Proclamation 9994, 85 Fed. Reg. 15337 (Mar. 18, 2020). "The court may judicially notice a fact that is not subject to reasonable dispute because it can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. Rule 201(b)(2). This document is an official document published in the Federal Register and thus, its accuracy cannot be reasonably questioned. Neither party offered this document into evidence; however, the Respondent directly refers to the March 13 Emergency Declaration and the Secretary acknowledges that the WHO and United States declared COVID-19 to be a public health emergency. (Resp't's. Br. 1-2).

responding to the 2019 novel Coronavirus (COVID-19)." (GX-1, Governor's Declaration of Emergency).

On March 10, 2020, The Governor of Massachusetts declared a state of emergency in response to COVID-19. (GX-1). The Governor's Declaration stated that the disease caused by COVD-19 is "a contagious, and at times fatal, respiratory disease." (GX-1). Further, the Declaration stated that "the worldwide outbreak of COVID-19 and the effects of its extreme risk of person-to-person transmission throughout the United States and the Commonwealth significantly affect the life and health of our people, as well as the economy, and is a disaster that impacts the health, security, and safety of the public." (GX-1). On March 11, 2020, the World Health Organization (WHO) characterized the COVID-19 outbreak as a pandemic. (GX-2).

On November 6, 2020, the Governor of Massachusetts issued COVID-19 Order No. 55, Revised Order Requiring Face Coverings in Public Places (Order 55).[7] (GX-2). Order 55 stated the CDC (Centers for Disease Control) determined that "COVID-19 is spread mainly by person-to-person contact and that the best means of slowing the spread of the virus is through practicing social distancing and by minimizing personal contact with large groups and environments where the virus may be transmitted." (GX-2). Order 55 urged Massachusetts residents to "limit activities outside of the home and to practice social distancing at all times to limit the spread of this highly contagious and potentially deadly virus" and that COVID-19 can be transmitted by an infected individual even when "the individual does not exhibit symptoms of the virus." (GX-2). Order 55 set forth the requirement for everyone in Massachusetts over 5 years of age to wear "a mask or cloth face covering over their mouth and nose when in a public location" including businesses, whether indoors or outdoors. (GX-2).

[7] Order 55 rescinded Governor's Order No. 31 issued on May 1, 2020. (GX-2).

Company background

LTS provides tax preparation and related services from a leased office space in Lynn, Massachusetts. (Tr. 156-57; Adm. Fact ¶ 2). Arianna Murrell-Rosario has been the franchise owner of this LTS office since 2001. (Tr. 156; Adm. Fact ¶ 8). The peak work season for LTS occurs during the tax season, January 8 through April 15. (Tr. 156). During the peak tax season LTS is open 7 days a week and has extended hours. (Tr. 156-57; GX-8, at 1-2). The remainder of the year LTS is not open 7 days a week and is only open 8 hours a day. (Tr. 156-57)

Massachusetts DLS actions

On February 23, 2021, the Massachusetts Department of Labor and Standards (DLS) sent a Cease-and-Desist Order (DLS Order) to LTS, noting a violation of the local health code. (Tr. 195-96; GX-3). Under the description of violation, the DLS Order stated that "the local Board of Health has had multiple contact with [LTS] for its repeated failure to implement and provide proof of compliance with COVID-19 safety rules." (GX-3). Ms. Murrell-Rosario acknowledged that LTS had received the February 23 DLS Order. (Tr. 195-96; GX-3).

The DLS Order set forth three violations of Massachusetts COVID-19 safety regulations. (GX-3). The first violation was described as "[e]mployees are instructed by management not to wear a face covering." (GX-3). The second violation was described as "[c]ustomers are instructed by management to remove face coverings" and "[s]ignage for customers contains scientifically inaccurate information and does not comply with Massachusetts COVID-19 standards." (GX-3). The third violation was described as "[p]rocedures are not in place, and layout of the business has not been adjusted, to provide social distancing between employee-to-employee and employee-to-customer." (GX-3).

The DLS Order included a link to a page at the state of Massachusetts website entitled "Sector Specific Workplace Safety Standards for Office Spaces to Address COVID-19," that included instructions for protection against the spread of COVID-19 in general use office spaces.[8] (GX-3). The DLS Order stated that LTS was to remain closed "until proof of COVID-19 compliance is provided to DLS and re-opening is approved by DLS." (GX-3).

Ms. Murrell-Rosario responded to the DLS Order by email on February 23, 2021 (LTS Response). (Tr. 199-200; GX-4). In the LTS Response, Ms. Murrell-Rosario acknowledged receipt of the DLS Order and set forth the reason she didn't allow disposable masks in the LTS office. *Id.* Further, she asserted that LTS was not subject to Massachusetts regulations and instead was subject to OSHA regulations and, in particular, referenced section 5 of the OSH Act. *Id.* She also alleged that LTS had been following National Institute of Occupational Health and Safety (NIOSH) standards to eliminate viral pathogen hazards utilizing the "proven model of Hierarchy of Controls." *Id.* She stated that masks are not allowed in the LTS office because of the risk of "contamination and infection with pathogens on these masks." *Id.* Ms. Murrell-Rosario also stated that LTS "provided disposal [*sic*] masks. . . for over a month" until she and another employee seemed to have an allergic reaction to the fibers in the masks. *Id.* After this, no one was allowed to wear this type of disposable mask in the LTS office. *Id.* Finally, the LTS Response included links to two online articles as support for the assertion that Ms. Murrell-Rosario had researched allergic reactions to disposable mask fibers. *Id.*

[8] From the link provided at page 2 of GX-3: "These sector specific COVID-19 workplace safety standards for Office Spaces are issued to provide businesses and other organizations operating within general use office spaces and workers in these office spaces with instructions to help protect against the spread of COVID-19." (GX-3 linking to https://www.mass.gov/doc/sector-specific-workplace-safety-standards-phase-iii-step-1-for-office-spaces-to-address-covid/download).

DLS replied to LTS on February 24, 2021, re-iterating its position that LTS "must not have employees or customers on premises" until DLS approved re-opening upon correction of the three violation items: "face coverings required for employees . . . face coverings required for customers . . . [and] layout adjusted to provide distancing." *Id.* DLS reiterated that LTS was still in violation of Massachusetts COVID-19 Order 55 and advised additional fines would be issued until DLS received proof of compliance. (Tr. 199-200; GX-4). Further, DLS stated that it had read the research articles cited in the LTS Response and determined LTS's conclusions about harm from masks were "incorrect" and that "cloth face coverings are required" at LTS. (GX-4).

Ms. Murrell-Rosario acknowledged that LTS had also received two civil citations from DLS because there had not been proof of correction for the violations set forth in the February 23 DLS Order. (Tr. 201-06; GX-5, GX-6). These citations were issued on March 2, 2021, and March 4, 2021 (DLS Citations). (GX-5, GX-6).

The OSHA inspection

On the early afternoon of March 17, 2021, CO Gabbay went to Liberty Tax Service (LTS) to investigate a complaint that employees were not allowed to wear face coverings. (Adm. Fact ¶ 5; Tr. 66-67). The CO photographed the sign on the entrance door that read, "Masks Are Not Allowed In Office." (Tr. 45; GX-8, at 1-2). The posted operating hours showed that for a portion of the week, Wednesday 8 a.m. through midnight Friday, the office was open 24 hours a day. (Tr. 47, GX-8, at 1-2). Because the entrance door was locked, the CO knocked and asked for a manager. (Tr. 48). Ms. Murrell-Rosario came to the entrance door and introduced herself as the owner. (Adm. Fact ¶ 8; Tr. 48). CO Gabbay entered the office to conduct his inspection, which included taking photographs. (Tr. 44, 48-49). CO Gabbay was at the LTS office sixty to ninety minutes. (Tr. 57).

The front entrance door opened directly into the main office area where LTS employees worked with clients for tax preparation services. (Tr. 49). There were four or five chairs along the front wall of the main office area where two customers were waiting. (Adm. Fact ¶ 6; Tr. 50-51; GX-8, at 3-7, 9). Next to the chairs for the waiting customers was a printed sign reminding customers to "cover your cough and sneeze." (GX-8, at 10).

The CO observed that employees and clients were within six feet of each other, without face coverings or physical barriers. (Tr. 49). The main office area was open, there were no walls or other barriers between desks. (GX-8, at 3-7, 9). The photographs show six desks in the main office area. *Id.* At each desk an employee faced the customer that sat just across the desktop, roughly two to two-and-a-half feet away. (GX-8, at 3-7, 9; Tr. 52). The desks were arranged in three rows, two desks per row, with a center aisle from front to back between the desks. (GX-8 at 3-7, 9). On the back wall of the open office area were two doors; one was closed and marked "restroom" and the other was an open door into what appeared to be a storage room (stacks of boxes and shelving were visible). (GX-8, at 4). Near the very front of the main office area, was a doorway that led to a second adjacent office area that was Ms. Murrell-Rosario's work area. (GX-8, at 7-8). The second office area appeared to be about the same size as the main office area. (GX-8, at 8). This area had two desks and several pieces of office equipment. (GX-8, at 8).

The CO observed four LTS employees working in the main office area assisting five customers. (Adm. Fact ¶ 6, Tr. 50-51; GX-8, at 3-7, 9). The four employees were not staggered across the six desks, instead they were grouped in the front four desks, side-by-side and back-to-back. (GX-8, at 3-7, 9). Due to the arrangement of the desks, an LTS employee had the customer he was assisting across the desk in front of him while another customer was at his back being assisted by the LTS employee behind him. (GX-8, at 3-7, 9).

On one desk, a printed policy had been taped that to the desktop that stated:

> "MASK POLICY Due to biohazard risks to our employees from masks, you must remove your mask upon entering our tax office. 1. We will give you a plastic bag to put your mask into. 2. We will give you hand sanitizer to sterilize your hands after removing your mask. 3. At your discretion, while not mandatory, we will provide you with a clean sterile mask. Thank you for helping to keep []workplace free of pathogens."

(Tr. 51; GX-8, at 5).

CO Gabbay discussed the Respondent's measures to protect employees from respiratory illnesses with Ms. Murrell-Rosario. She told the CO that Lysol was used as a disinfectant on surfaces and in the air. (Tr. 54). She confirmed that it was the office policy that no one was allowed to wear a mask in the office, including customers. (Tr. 46-47). CO Gabbay noticed that the heating and ventilation (HVAC) ducts did not appear to be modified and there were no special ventilation measures in place; Ms. Murrell-Rosario confirmed no modifications had been made to the HVAC system. (Tr. 52, 54). The LTS office had no open windows. (Tr. 53, Tr. GX-8, at 4, 7-8). Ms. Murrell-Rosario informed the CO that a rear door was periodically opened to improve air flow in the main office area. (Tr. 54). However, the CO observed that the rear door did not lead directly to the main office area; it was inside the storage closet that was at the back of the main office area. Additionally, the rear door was not open when the CO arrived at the LTS office.[9] (Tr. 55). After the CO mentioned ventilation, Ms. Murrell-Rosario then opened the rear door that was inside the storage closet—the front entrance door remained closed. (Tr. 53, 57).

The CO explained that ventilation measures can change the air flow in an office to move contaminants away from an employee. (Tr. 55-56). For example, at welding shops a mobile

[9] As discussed further below, it is disputed whether this rear door was open when the CO arrived. The door in dispute is the door inside the storage closet that led to the outside, not the door from the main office area into the storage closet. (Tr. 53-55, 159-60, 173). Ms. Murrell-Rosario referred to the door in dispute as the outer rear door. (Tr. 159-60, 173).

ventilation device with an "elephant trunk" hose can be used to capture fumes. (Tr. 53). The CO further explained that simply opening the rear door every hour or so does not provide sufficient air flow to remove COVID particles from the air. (Tr. 55-56).

In the CO's discussion with Ms. Murrell-Rosario, she told him that she knew of the hazards of COVID-19, she knew that it was serious, and then she described the measures taken to protect employees in the LTS office policy. (Tr. 56). She did not provide the written office policy during the onsite visit. (Tr. 57). Five days after the CO's visit, Ms. Murrell-Rosario emailed the LTS office policy on respiratory viruses to the CO.[10] (Tr. 57; RX-1).

The CO attempted to follow-up with Ms. Murrell-Rosario with questions about the office policy and a request to interview employees. (Tr. 84). However, Ms. Murrell-Rosario informed the CO that OSHA was not allowed to contact her or her employees for any additional information. (Tr. 65, 85).

[redacted]

On March 5, 2021, [redacted] went to the LTS office to have his taxes prepared. (Tr. 20-21). Before [redacted] went to the LTS office, he had called and exchanged emails about the possibility of LTS preparing his taxes. (Tr. 21-22). He told Ms. Murrell-Rosario that he would bring his information to the office because he was not comfortable sending tax information by email. (Tr. 22-23). When Mr. [redacted] arrived at the LTS office, he found the entrance door was locked. (Tr. 20-21). An employee then came to the door, handed him a plastic bag, told him to take the face mask he was wearing off and put it in the bag before entering the office. (Tr. 21-22). When Mr. [redacted] asked "why," the employee shrugged and stated that he could not come in with a face mask on. (Tr. 22). Mr. [redacted] could see other employees inside the office. (Tr.

[10] The document was titled, "Office OSHA Policy." (RX-1).

22). Neither the employee at the door nor those inside wore a face covering. (Tr. 22). Mr. [redacted] did not enter the LTS office because he was unwilling to remove his mask "in the middle of COVID." (Tr. 21). When he returned home, he emailed Ms. Murrell-Rosario to tell her he would not use LTS for his taxes since he could not wear a mask inside. [11] (Tr. 23).

Lisa Tobin

Lisa Tobin is a sanitarian in the City of Lynn Health Department's Inspectional Services Division, which enforces city ordinances, state sanitary codes, and the state's COVID-19 related requirements. (Tr. 25). The Lynn Health Department was responsible for recording and verifying community complaints related to COVID-19. (Tr. 25, 32). It was Ms. Tobin's job to inspect and verify complaints of possible violations. (Tr. 25).

On March 6, 2021, Ms. Tobin went to the LTS office to investigate a COVID-19 related complaint. (Tr. 25-26). She photographed the sign on the entrance door that stated, "Masks Are Not Allowed In Office." (Tr. 30, GX-12, at 1). Through the window, she took a photograph that showed a woman sitting at a desk inside the LTS office not wearing a face covering. (Tr. 26-27, 31; GX-12, at 2). Ms. Tobin could not enter the office because the entrance door was locked. (Tr. 26). When an employee opened the door a bit, Ms. Tobin photographed the employee standing in the doorway, not wearing a face covering. (Tr. 31; GX-12, at 3). She observed the people inside were not wearing face coverings and were closer to each other than six feet. (Tr. 26-27). She also observed there were no protective barriers in place between individuals. (Tr. 27). Ms. Tobin did not enter the office. (Tr. 31).

[11] Respondent did not cross-examine [redacted], Lisa Tobin, or Eugene Cusack.

The Lynn Health Department visited the LTS office eight times to investigate complaints about the lack of face coverings, not being allowed to wear a mask inside, and lack of social distancing. (Tr. 32).

Sergeant Eugene Cusack

On April 19, 2021, Sergeant Eugene Cusack of the Lynn, Massachusetts Police Department was dispatched to assist a patrol officer investigating a complaint of COVID-19 protocol violations at LTS. (Tr. 89-90). When they arrived at the location, they found the entrance door was locked, but through the window Sgt. Cusack could see seven people inside the office. (Tr. 91-92). Sgt. Cusack observed they were all within a few feet of one another and no one was wearing a face covering. (Tr. 92). He knocked at the door and asked the proprietor to allow them to come in to discuss the complaint. (Tr. 91). The proprietor refused to open the door, stated there were customers inside, and didn't allow them in the office. (Tr. 91-92).

The LTS policy for respiratory viruses

In 2006, Ms. Murrell-Rosario developed an office policy for respiratory viruses. (Tr. 157-58, 182, 195). She developed this policy to improve attendance and job performance during the tax season. (Tr. 157-58, 195). The policy was a one-page list of rules to avoid contracting respiratory illnesses, such as the flu. (Tr. 158). The policy set forth requirements for a ventilation plan, air sanitation with Lysol,[12] and surface cleaning at the end of the work shift. (Tr. 158-59, 172, 174-175). The ventilation plan consisted of opening the rear door (inside the storage closet at the back of the main office area) for 15 minutes every hour to hour-and-a-half.[13] (Tr. 160, 173).

[12] Ms. Murrell-Rosario believed that spraying Lysol in the air every 3 hours would have a cumulative effect and kill anything floating in the air. (Tr. 175). There was no evidence to support Ms. Murrell-Rosario's claim.

[13] Ms. Murrell-Rosario claimed that when the CO came into the LTS office, he would have seen her ventilation plan at work because they spoke while standing near the open rear door. (Tr. 184). The undersigned finds the CO's testimony, that the rear door was only opened after he asked about the

Sometimes the rear door of the adjacent second office area was also opened. (Tr. 159-60). Ms. Murrell-Rosario believed cross-ventilation would occur when customers came and went through the front entrance door. (Tr. 159).

In 2021, Ms. Murrell-Rosario updated the LTS office policy with the addition of rules for hand hygiene, respiratory etiquette,[14] and mask restrictions. (Tr. 158, 175-76, 182; RX-1). There was no change to the ventilation schedule; Ms. Murrell-Rosario believed her own system had been effective for 15 years, so she did not have a professional advise her on ways to improve ventilation in the office.[15] (Tr. 194). The hand hygiene rule required employees to wash their hands at the start of a shift and before they ate. (Tr. 176; RX-1). Customers were required to use a hand sanitizer before entering the office. (Tr. 176; RX-1). For respiratory etiquette, signs were posted instructing people to cough into their elbow. (Tr. 180).

Ms. Murrell-Rosario was concerned the masks that customers wore could bring "high loads of pathogens" into the LTS office. (Tr. 163). She felt these outside masks presented a risk due to LTS's small office and the long hours she and the office supervisor worked. (Tr. 191-92). Starting in January 2021, LTS implemented a process to keep customers from wearing an outside mask

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ventilation, to be more credible than Ms. Murrell-Rosario's claim the rear door was open when the CO arrived at the LTS office. To be clear, the door in dispute is the door that was within the storage closet, not the door from the main office area into the storage closet. The CO photographed the open door from the main office area into the storage closet. (GX-8, at 4). The CO testified that the rear door, that Ms. Murrell-Rosario referred to as the outer rear door, was inside this storage closet. (Tr. 53, 55, 159). In light of the extensive photographs the CO took upon his arrival, the undersigned finds that if the rear door inside the storage closet been open, the CO would have photographed it. There was no photograph in evidence of the door inside the storage closet.

[14] Ms. Murrell-Rosario described respiratory etiquette as having "people cough into their elbow" so they would not "expel a lot of pathogens in the environment." (Tr. 180).

[15] Respondent listed its sources for the office policy in an interrogatory response to the Secretary. (Tr. 35). "Identify each document that contains any recommendation or guideline pertaining to COVID-19 that you relied on to develop or implement precautionary measures at the Job Site between March 17, 2020 and March 17, 2021. Answer: NIOSH Hierarchy of Controls, OSHA regulations as pertains to workplace safety, and Hierarchy of Susceptibility for pathogens." (GX-7, at 15 ¶ 10).

into the office. (Tr. 163-64, 176). Ms. Murrell-Rosario created and posted a sign on the entrance door to notify clients that masks were not allowed inside. (Tr. 190-91). At the office entrance, customers were required to put their masks or face coverings into a sealed bag and to sanitize their hands before entering the office. (Tr. 21-22, 176). For about a month LTS provided blue, disposable masks to anyone that wanted a mask. (Tr. 177). LTS then banned the use of the disposable masks as well. (Tr. 163, 176-77).

LTS implemented the policy of no masks in the office after Ms. Murrell-Rosario believed that she and others had an allergic reaction to the blue, disposable masks. (Tr. 161-63, 185). After doing some research she believed polypropylene fibers in the disposable masks had caused an allergic reaction and decided these masks could no longer be worn in the office. (Tr. 176-77). She was concerned that pathogens and fibers from masks would be floating around. (Tr. 192). Customers who did not want to be unmasked in the office could drop off the paperwork and do their taxes remotely. (Tr. 165).

Ms. Murrell-Rosario testified that she knew about the COVID-19 virus and that LTS was a small office that could easily get contaminated with "any high load" of COVID-19. (Tr. 191-92). She knew that a "segment of the population was at high risk for serious disease and illness." (Tr. 182, 193). She knew that people over the age of 65 and those with two or more comorbidities had a higher risk of severe illness from COVID-19. (Tr. 193). Because she only had one employee over 65 and the rest of her staff was in their thirties, she did not believe it represented a serious hazard to the employees at LTS. (Tr. 182).

Ms. Murrell-Rosario believed her office rules had stopped respiratory illness outbreaks in the office for 15 years. (Tr. 172). Ms. Murrell-Rosario did not believe any further protocols were needed due to the COVID-19 pandemic. (Tr. 182, 194-95). Ms. Murrell-Rosario believed that

opening the rear door for ventilation and periodically spraying Lysol provided adequate protection to employees.[16] (Tr. 159, 172).

Ms. Murrell-Rosario stated that she had done "extensive research" for many years to develop the "Office OSHA Policy" for respiratory viruses like "influenza or coronavirus." (Tr. 160, 170-71; RX-1). And she believed her system must work because "not one single case has been traced back to my office." (Tr. 180-81). She also stated that she had done her own research into allergic reactions to the polypropylene fiber in certain face masks. (Tr. 179).

Ann Nguyen

Ann Nguyen, the office supervisor, had worked at LTS for 15 years and worked 60-65 hours per week during tax season. (Tr. 144, 150). She claimed that when she arrived at the office on March 17 at 1:00 pm, about an hour before the CO's inspection, that both of the rear office doors were open. (Tr. 147-48).[17] She told the CO they did not need to wear masks in the office because there was plenty of ventilation. (Tr. 149-50). She confirmed that Lysol was sprayed in the air and that the desks were disinfected. (Tr. 149).

Generally, Ms. Nguyen's testimony was not helpful to the undersigned. It was clear that Ms. Nguyen was affected by the presence of Ms. Murrell-Rosario; during cross-examination she agreed that she wanted to please her boss. (Tr. 151-52). The following excerpt is an example of the effect on Ms. Nguyen's testimony during direct examination. (Tr. 145).

Q: And is there anything in particular that you do every year at the beginning of the tax season?

[16] Ms. Murrell-Rosario's theory was that if Lysol was used "on a continual basis, you will create an atmosphere of positive charged ions that, if somebody is coming in, if they have some little virus, it will bind, immediately, within seconds, to the outer envelope of the virus and destroy it." (Tr. 172). Secretary's expert rejected this theory. (Tr. 134).

[17] CO Gabby testified that the rear door was not open when he arrived at LTS. He testified that the rear door was not in the main tax preparation area. It was actually "in a back storage closet-type of thing" (Tr. 55). I find that based upon the photographs taken during his inspection, CO Gabby's description of his inspection was consistent and credible. (GX-8).

A: We have, in January, we usually have the, like we say, the employee policy, like with the policies and policy.

Female Voice: Policy and procedure.

The Witness: Policy and procedure.

Mr. Spanos: I'm going to object.

Female Voice: I'm sorry. I'm sorry. She was having a hard time.

(Tr. 145). Ms. Nguyen is the person identified as "The Witness" and Ms. Murrell-Rosario is the person identified as "Female Voice" in the above transcript excerpt.

Further, during cross-examination, when Ms. Nguyen was asked whether Ms. Murrell-Rosario was sitting next to [Ms. Nguyen] during her testimony, a "female voice" said "uh-huh." (Tr. 152). Ms. Murrell-Rosario interjected that she was sitting across from Ms. Nguyen. (Tr. 152-53). The undersigned then stated on the record, "in response to the questions, there was, in the background an "Uh-huh" at the conclusion of [Ms. Nguyen's] testimony, and I'm certain that the recording of this record will, in fact, verify that. And I would ask the Court Reporter that, in her transcriptions, as the record is being transcribed, that "uh-huh" to be transcribed into the record." (Tr. 153-54).[18]

There was no evidence to support Ms. Nguyen's testimony that both rear doors were open just before the CO arrived at the LTS office. She provided testimony from the home of her boss, Ms. Murrell-Rosario, and sat across the table from her boss during her testimony. (Tr. 152-54). The undersigned observed that Ms. Nguyen appeared uneasy and uncomfortable as she responded to questions posed during cross-examination. Because of these circumstances, the undersigned

[18] The undersigned notes that the transcript reflects numerous times throughout the hearing when a "Female Voice" is transcribed. (Tr. 43, 68, 76-77, 80-82, 85-86, 95, 122-23, 129, 135, 139-40, 145, 152, 161). For example, the "Female Voice" coaches Attorney Sano on how to operate Webex and make arguments. (Tr. 75-76, 80, 86, 122-23, 139-40).

finds Ms. Nguyen's testimony was dissembling and heavily predisposed to benefit LTS and is given little weight.

Expert testimony

Dr. Aaron Tustin was the Secretary's expert witness regarding the risk of COVID-19 to LTS employees. (Tr. 95-96). Dr. Tustin received his Doctor of Medicine from Vanderbilt University Medical School and a Master of Public Health Degree from Johns Hopkins School of Public Health. Dr. Tustin is board certified in Occupational Medicine. (Tr. 97-98). His prior work experience includes research on infectious disease epidemiology in Peru. (Tr. 99). Dr. Tustin is a Medical Officer with OSHA's Office of Occupational Medicine and Nursing (OOMN). (Tr. 98). As Medical Officer his role is primarily that of a consultant for medical questions for various OSHA offices. (Tr. 98). The Court accepted Mr. Tustin as an expert in the subject areas of COVID-19 hazards, transmission, and prevention in an occupational setting. (Tr. 102-03).

Dr. Tustin testified that COVID-19 is a virus that is primarily transmitted by airborne respiratory droplets and aerosols, so breathing is a means for individuals to contract the virus. (Tr. 108, 114-15). And COVID-19 is one of the more transmissible respiratory viruses. (Tr. 125). Because both symptomatic and asymptomatic people can transmit the virus, COVID-19 cannot be identified by looking at a person. (Tr. 115-16).

A COVID-19 infection can cause severe acute illness that requires hospital care. (Tr. 104-05). A primary target of the virus is the respiratory system, which develops into serious difficulty in breathing. (Tr. 104-05). A COVID-19 infection can also result in cardiac inflammation and blood clotting issues. (Tr. 105). In addition to short-term acute medical issues, a COVID-19 infection can result in significant long-term health effects such as continuing symptoms of fatigue,

anxiety, and depression. (Tr. 105). At the time of Dr. Tustin's testimony, over 3 million people in the United States had been hospitalized due to serious illness from COVID-19. (Tr. 105).

COVID-19 infection is also a significant cause of death. In 2020, there were 500,000 deaths attributed to COVID-19—it was the third leading cause of death in the United States after heart disease and cancer. (Tr. 104). As of Mr. Tustin's testimony in November 2021, over 700,000 deaths had occurred in the United States since the beginning of the pandemic. (Tr. 104).

When the COVID-19 virus circulates in a community anyone can be exposed to the virus. (Tr. 114-15). During February and March of 2021 there were over 8,000 confirmed cases of COVID-19 in adults in Essex County, where LTS is located. (Tr. 115). This represented more than one percent of the population, which as Dr. Tustin explained, meant there was widespread community transmission. (Tr. 115). Large outbreaks of COVID-19 infection tend to occur where a lot of people are indoors in close proximity to each other. (Tr. 112).

Because COVID-19 is transmitted by breathing, LTS employees were exposed both from their coworkers and from the customers. (Tr. 116). Community transmission in the Lynn area meant there was potential exposure to the COVID-19 virus anytime people were together. (Tr. 117). Dr. Tustin considered this a significant risk for LTS employees because they worked in a "fairly small room," closer than six feet to each other, and two to three feet from the customers they assisted face-to-face. (Tr. 117-18; GX-8, at 3-6).

Dr. Tustin stated that elimination of the transmission hazard to LTS employees could be achieved through telework. (Tr. 133). Dr. Tustin stated it was unlikely the hazard could be eliminated altogether when people work in the same room. (Tr. 133). Administrative controls, such as testing for the virus, are useful but cannot eliminate transmission. (Tr. 133-34). LTS's

practice of spraying Lysol in the air does not eliminate the COVID-19 hazard. (Tr. 134). Sanitizing, cleaning, and disinfection do not eliminate the hazard. (Tr. 134).

Dr. Tustin explained there were several ways to reduce the risk of contracting COVID-19 infection, among them are face coverings, physical distancing, and physical barriers. The general consensus of public health experts is that a face covering materially reduces the transmission of the virus in the population—a meta-analysis of multiple studies found that a face covering reduced the odds of COVID-19 infection by 85%.[19] (Tr. 107-08). Laboratory studies found that depending on its material, a face covering blocks 40 to 99 percent of droplets and aerosols. (Tr. 108).

Physical distancing is another means to reduce the transmission of COVID-19. (Tr. 111-13). Studies show that outbreaks tend to occur in places where people are in close proximity to each other. (Tr. 112). The consensus among public health experts is that the more distance between people, the better. (Tr. 111, 113). A WHO meta-analysis found that COVID-19 transmission was reduced by a factor of two for every two meters (approximately 6 feet) of distance between individuals. (Tr. 111-13). Further, clear plexiglass partitions between people are recommended and can help reduce the risk of virus transmission. (Tr. 120).

With respect to the LTS workplace, based on his review of the scientific literature, Dr. Tustin believed that LTS could have materially reduced the hazard of COVID-19 with face coverings, by placing employees at a greater distance from each other, and installing plexiglass barriers. (Tr. 119-20).

[19] Dr. Tustin reviewed information from WHO, CDC, and peer-reviewed articles regarding the effectiveness of face coverings. (Tr. 106). Dr. Tustin's assessment of the information published in the scientific community is that a consensus of public health experts found that face coverings are beneficial in reducing the risk of COVID-19 transmission. (Tr. 108-10).

Citation

General Duty Clause Violation

To prove a violation of section 5(a)(1) of the Act, also known as the general duty clause, the Secretary must demonstrate by a preponderance of the evidence that: (1) a condition or activity in the workplace presented a hazard to employees; (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause death or serious physical harm, and (4) a feasible and effective means existed to eliminate or materially reduce the hazard." *Arcadian Corp*., 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004) (citation omitted). The Secretary must also show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *Otis Elevator Co*., 21 BNA OSHC 2204, 2206 (No. 03-1344, 2007).

Here, OSHA's citation alleged:

> The employer does not furnish employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to employees, in that employees are working in close proximity to each other and customers and are exposed to SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), the virus that causes COVID-19.

See Complaint, Exhibit A, 6. OSHA's citation listed twelve possible means of abatement; however, only four of those were pursued at the hearing and in post-hearing briefing. *See Id.*

The Secretary asserts LTS employees were exposed to the hazard of unnecessary exposure to COVID-19 and proposes four feasible means of abatement that could materially reduce the hazard: face coverings, physical distancing, physical barriers, and improved ventilation. (Sec'y. Br. 12, 17-18).

LTS asserts the COVID-19 virus was not a serious hazard for its employees, the tax preparation industry does not recognize the workplace hazard of COVID-19, the Secretary has not

shown that the proposed abatement is feasible, and Respondent had a respiratory virus policy, which had been in place for 15 years, that fully protected its employees. (Resp't's. Br. 16-18).

For the reasons that follow, the undersigned rejects Respondent's arguments and finds that the Secretary has proved a violation of the general duty clause.

Hazard recognition

For a general duty clause violation, "the Secretary must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices over which the employer can reasonably be expected to exercise control." *Otis Elevator Co.*, 21 BNA OSHC at 2207 (citation omitted); *see also, Arcadian Corp*., 20 BNA OSHC at 2007. 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 at 2207 (citation omitted); s*ee generally, SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1216 (D.C. Cir. 2014) ("Courts have long accommodated possible constitutional problems with fair notice in this context by interpreting recognized hazard only to include preventable hazards.")

The Secretary asserts that LTS recognized that COVID-19 transmission was a hazard and that it was generally recognized as a hazard for employees working in an office environment. (Sec'y. Br. 15-16).

Here the hazard is identified as unnecessary exposure to the COVID-19 virus. LTS's recognition of the COVID-19 hazard is shown through its owner's statements, notices from the state of Massachusetts, and the no-mask rule it implemented. The owner of LTS, Ms. Murrell-Rosario, testified that she knew about the COVID-19 virus and that a "segment of the population was at high risk for serious disease and illness." (Tr. 182, 193). She also stated that she knew that LTS employees were at risk of exposure because the office space was small, and some employees

worked very long hours. (Tr. 191-92). Further, LTS's office rule for masks shows recognition of the COVID-19 hazard. Ms. Murrell-Rosario was concerned that "pathogens" would be brought into the office on a mask, so LTS established a rule and process to keep all masks out of the office. (Tr. 163, 176). Finally, recognition of the hazard was evident from the DLS Order and DLS Citations issued to LTS. The DLS Order and DLS Citations specifically address the hazard of COVID-19 transmission in the LTS office. Ms. Murrell-Rosario also acknowledged that the Governor had implemented the COVID-19 Workplace Safety Standards. (Tr. 195-96, 199-200; GX-3, GX-5, GX-6).

With respect to industry recognition, Respondent simply asserts the tax preparation industry does not recognize the hazard of COVID-19. (R. Br. 17). However, this argument misses the mark. Here, the nature of the COVID-19 hazard relates not to the type of work performed, instead it relates to the employees' physical work environment. There is no dispute that LTS is a tax preparation company that conducts its business in an office space. (GX-8). The general recognition of the COVID-19 hazard in an office environment is shown through the guidance provided by the state of Massachusetts specifically for office workplaces. (GX- 3, at 2). Further, the DLS Order and DLS Citations for non-compliance also show there was a general recognition of the risk of COVID-19 exposure in an office environment; the DLS Order directed LTS to a website page dedicated to the hazard of COVID-19 in an office workplace.[20] (GX-3, GX-5, GX-6).

[20] The February 23, 2021 Cease-and-Desist Order directed LTS to "Sector Specific Workplace Safety Standards for Office Spaces to Address COVID-19" at https://www.mass.gov/doc/sector-specific-workplace-safety-standards-phase-iii-step-1-for-office-spaces-to-address-covid/download). (GX-3, at 2).

Additionally, Respondent relies on *Pelron* to assert that the Secretary cannot designate customary activities at the LTS office as hazardous. (Resp't's. Br. 12; citing *Pelron Corp*., 12 BNA OSHC 1833, 1835 (No. 82-388, 1986)). Respondent's reliance on *Pelron* is inapt.

As the D.C. Circuit pointed out in *SeaWorld*, the relevant point of *Pelron* was "the requirement that recognized hazards be "preventable" and "be defined in a way that . . . identifies conditions or practices over which the employer can reasonably be expected to exercise control." *SeaWorld*, 748 F.3d at 1210 (citations omitted). Further, the D.C. Circuit went on to state that nothing in the *Pelron* decision "immunizes a workplace's dangerous 'normal activities' from oversight." *Id.* at 1211 *citing Nat'l Realty & Constr. Co*., 489 F.2d 1257, 1266 (D.C. Cir. 1973). Respondent's argument is rejected.

The undersigned finds the hazard of COVID-19 in the workplace was recognized both by LTS and generally for employees working in an office environment. Recognition of the hazard is established.

Exposure to a serious hazard

The Secretary must prove employees were exposed to the asserted hazard and the hazard was "likely to cause death or serious physical harm." *Peacock Eng'g, Inc*., 26 BNA OSHC 1588, 1589 (No. 11-2780, 2017). The test is whether "if an accident occurs, the results are likely to cause death or serious harm" not whether an accident is likely to occur. *Id.* Exposure is established through actual or reasonably predictable access to the cited condition. *Phoenix Roofing Inc.*, 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995), *aff'd*, 79 F.3d 1146 (5th Cir. 1996) (unpublished). Exposure can occur "while in the course of assigned working duties, personal comfort activities while on the job or their normal means of ingress-egress to their assigned workplaces." *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976).

For the reasons that follow, the undersigned finds the Secretary has proved employees of LTS were exposed to the hazard of COVID-19, which can cause the death or serious harm.

COVID-19 is contracted through breathing in airborne respiratory droplets and aerosols. (Tr. 108, 114-15). Because there was widespread community spread of the virus where LTS is located, anytime people were together there was the risk of transmission of the virus. (Tr. 108, 114-15, 117). The LTS office space was small, with workspaces close to each other and close contact with customers. (Tr. 117-18; GX-8, at 4-6). Thus, LTS employees were exposed to transmission of COVID-19 from customers and coworkers. [21]

Respondent asserts the harm from COVID-19 was not serious because its employees were mostly young and healthy. (Resp't's. Br. 18). On the other hand, LTS admits it had one employee over 65 and Ms. Murrell-Rosario knew that people over the age of 65 and those with two or more comorbidities had a higher risk of severe illness from COVID-19. (Tr. 182, 193). Secretary's expert credibly testified that a COVID-19 infection could result in serious illness or death. (Tr. 104-05). Respondent's assertion that its employees were not at risk of serious illness is rejected.

Respondent also asserts that the Secretary must present "a body of reputable scientific thought" to prove there was a significant risk of harm in its workplace. (Resp'y's. Br. 14). Respondent relies on the Commission's *Kastalon* decision to support this assertion. *Kastalon, Inc.,* 12 BNA OSHC 1928, 1935 (No. 79-3561, 1986) (consolidated). Respondent's reliance on *Kastalon* is inapt. In *Kastalon* the issue was the risk of carcinogens to employees handling a manufacturing chemical. *Id.* There, the Commission stated that a "body of reputable scientific

[21] Respondent argues that because the CO took no air samples at the LTS office there is no proof employees were exposed to COVID-19 hazards. (Resp't's. Br. 16). Respondent's argument is inapt. Here, the hazard was the potential for exposure at the LTS office. The amount of virus present at a particular moment is not relevant. As the expert testified, any encounter with an individual posed the risk of virus transmission. (Tr. 114-15). Further, there was no know means available for such a measurement. (Tr. 73).

thought" was necessary to show that the animal studies being relied upon as evidence of risk could be extrapolated to demonstrate a risk of carcinogens to employees in the workplace. *Id.* Here there is no reliance on animal studies to establish the risk of harm; instead, COVID-19 infection is a communicable disease known to cause serious illness in humans.

The evidence shows that COVID-19 infection was a serious illness that can result in death or serious harm. COVID-19 was recognized as an international public health emergency by the WHO and a public health emergency in the United States. (Tr. 104-05; GX-1). As of November 2021, over 3 million people had been hospitalized for serious illness and 700,000 had died since the beginning of the pandemic in 2020. (Tr. 104-05). The Secretary has proved that exposure to COVID-19 could result in serious illness or death and LTS's employees were exposed.

Abatement

The Secretary must set forth proposed abatement measures that are feasible and will materially reduce the hazard. *Arcadian Corp*., 20 BNA OSHC at 2011 (citations omitted). The "Secretary has the burden of coming forward with evidence on the feasibility issue." *Whirlpool Corp. v. OSHRC*, 645 F. 2d 1096, 1098 (D. C. Cir. 1981). Where an employer has measures in place, the Secretary must set forth additional measures that would materially reduce the hazard beyond what an employer already had in place. *See Pepperidge Farm, Inc.,* 17 BNA OSHC 1993, 2040-41 (No. 89-265, 1997) (citation vacated where Secretary did not identify additional steps that were feasible and reduced the hazard).

The Secretary asserts the following measures are feasible and effective means to materially reduce the hazard at the LTS workplace: wearing a face covering, physical distancing, physical barriers, and improving ventilation. (Sec'y Br. 17-18).

First, Dr. Tustin testified the general consensus among public health experts was that a face covering materially reduces the transmission of the COVID-19 virus. (Tr. 107-08). A face covering is a feasible abatement measure as shown by LTS's prior distribution of masks and a supply of disposable face masks in the LTS storage room.

Respondent's assertion that face coverings could not be worn in the office because some employees had an allergic reaction to the fibers in disposable masks is rejected. Ms. Murrell-Rosario's belief that she and other employees experienced an allergic reaction to fibers in the mask has no evidentiary support.[22] This belief was not substantiated by any corroborating evidence. Further, Respondent did not claim that face coverings generally, other than the blue, disposable masks, could not be used at the office. The Secretary has established face coverings were feasible and could have materially reduced the hazard of COVID-19 in the LTS office.

Second, the Secretary asserts that LTS could have reduced the hazard by rearranging individual workspaces to create greater physical distance between employees. For example, the desks could be arranged into a checkerboard spacing pattern. (Sec'y Br. 17-18). Respondent offered no rebuttal to the Secretary's assertion. LTS occupied two storefront spaces. There were six desks in the main area and two desks in the adjoining space, thus LTS had the space to reconfigure the placement of office equipment and desks to create more distance between workspaces. (GX-8, at 3, 8). Further, Dr. Tustin testified that for every two meters the transmission of COVID-19 is reduced by a factor of two. (Tr. 111-13). Physical distancing was a feasible and effective means to materially reduce COVID-19 transmission.

Third, the Secretary asserts that physical barriers could be erected to reduce transmission. (Sec'y Br. 17-18). Dr. Tustin confirmed that physical barriers, such as a clear plexiglass partitions,

[22] As noted earlier, no expert testified to support Ms. Murrell-Rosario's claims.

could have been erected between employees and customers to reduce COVID-19 transmission at the LTS office. (Tr. 120).

Finally, LTS could have improved the ventilation in the office.[23] (Sec'y Br. 17-18). Ms. Murrell-Rosario made no changes to the office ventilation for the COVID-19 hazard. Instead, she relied on what she believed to be adequate ventilation. Further, she chose to not get advice on how to improve ventilation at the LTS office. (Tr. 193-94).

As the CO explained, simply opening the rear door inside the storage closet every hour or so, with no open windows, does not provide sufficient air flow to remove COVID particles from the air and move the contaminants away from an employee. (Tr. 53, 55-56). For example, a mobile ventilation device with an "elephant trunk" hose can be used to move air. (Tr. 53). Improved ventilation was feasible and a means to reduce virus transmission.

Generally, the undersigned finds the owner's opinion on what constitutes adequate control for a respiratory illness unhelpful. Respondent asserts that in over 15 years no one had contracted a respiratory virus at the office but provides no means to validate this sweeping claim. (Tr. 172). Respondent did not provide an expert witness to support its argument that it had adequate procedures for protection against COVID-19. It appears that her opinion is based on her own research rather than consultation with a professional. Little weight is given to Ms. Murrell-Rosarios's testimony about effective ways to protect against respiratory illness.

[23] Respondent asserted the CO did not follow OSHA inspection procedures for ventilation deficiencies. (Tr. 70-71). This argument is rejected. OSHA's technical inspection manual is a guide for OSHA's compliance officers and does not establish any rights or defenses for employers. *See Andrew Catapano Enters., Inc*., 17 BNA OSHC 1776, 1780 (No. 90-0050, 1996) (consolidated) (OSHA's Manual "is not binding on the Secretary and does not create any substantive rights for employers.").

The Secretary's proposed abatement measures are feasible and would materially reduce the transmission of COVID-19 at the LTS workplace. This element of the general duty clause is proved.

Knowledge

The Secretary must show that the employer knew or with the exercise of reasonable diligence could have known of the hazardous condition. *Peacock Eng'g, Inc.,* 26 BNA OSHC 1588, 1589 (citations omitted). "The actual or constructive knowledge of a supervisor is imputable to the employer." *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015) (citations omitted). The employer's knowledge is directed to the physical condition that constitutes a violation. *Phoenix Roofing, Inc.,* 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995) (citations omitted) *aff'd*, 79 F.3d 1146 (5th Cir. 1996). It is not necessary to show the employer knew or understood the condition was hazardous. *Id.*

Respondent had actual knowledge of possible COVID-19 exposure at the LTS office. Ms. Murrell-Rosario admitted that she knew COVID-19 was a transmissible respiratory virus and her knowledge is imputed to LTS. (Tr. 182, 193). Ms. Murrell-Rosario knew that people over the age of 65 and those with two or more comorbidities, had a higher risk of severe illness from COVID-19. (Tr. 193). Ms. Murrell-Rosario admitted that she knew LTS was a small office space that could get contaminated easily. (Tr. 191-92). Further, Ms. Murrell-Rosario's concern that customers' masks could bring the virus into the office also shows knowledge of the exposure hazard to employees. (Tr. 163, 176). Finally, LTS knew of the COVID-19 transmission hazard from the DLS Order and DLS Citations. (Tr. 195-96, 201-05).

Respondent asserts the Secretary cannot use the actions by the state of Massachusetts to prove Respondent's knowledge of the COVID-19 hazard because they were not applicable to the

LTS office and not enforceable by OSHA. (Resp't's Reply 4). This assertion is rejected. The content of the DLS Orders and DLS Citations are evidence of information known by the Respondent at the time of the OSHA inspection. Whether the DLS Order and DLS Citations are enforceable is not at issue here.

Respondent also asserts that any actions by the state of Massachusetts cannot be relied on because LTS is subject only to OSHA jurisdiction for workplace safety. (Resp't's. Reply 4-6). As stated above, the relevance of the Massachusetts actions (declarations, DLS Order, DLS Citations) in the instant case is to the Respondent's awareness and knowledge of the COVID-19 virus hazard generally.[24]

Actual knowledge of the hazardous condition of COVID-19 transmission is proved.

Willful Classification

The Secretary asserts a willful classification is supported because LTS was indifferent to the hazard COVID-19 transmission posed to its employees. (Sec'y Br. 20-22). "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference." *Angel Bros. Enters., Ltd*., No. 16-0940, 2020 WL 4514841, at *8 (July 28, 2020) (citations omitted) *vacated on procedural grounds*, 18 F.4th 827 (5th Cir 2021) ; *see also A.E. Staley Mfg. Co. v. Sec'y of Labor,* 295 F.3d 1341, 1351 (D.C. Cir. 2002) (upholding Commission's determination that employer's plain indifference

[24] While not specifically at issue here, and not relevant to the outcome of this case, the undersigned notes state mandates that are "dual impact" regulations are not generally preempted by the OSH Act. *See Steel Inst. of New York v. City of New York*, 716 F.3d 31, 38 (2d Cir. 2013) (City's crane regulations saved from pre-emption by federal OSHA because they applied everywhere, not just workplaces, and affected "both public safety and worker conduct"); *see also, Gade v. Natl. Solid Wastes Mgmt. Ass'n,* 505 U.S. 88, 107 (1992) ("On the other hand, state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be pre-empted.").

justified a willful violation); *Brock v. Morello Bros. Constr*., 809 F.2d 161, 164 (1st Cir. 1987) ("an act many be willful if the offender shows indifference to the rules").

The Secretary is not required to show the employer had a malicious motive to prove a willful violation. *Kaspar Wire Works, Inc.,* 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000) (citation omitted), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001). ("An employer's motive for failing to comply with the Act's requirements, however, need not be evil or malicious in order to find a violation willful."). "Secretary can establish intentional disregard for the Act's requirements by showing that "the employer was actually aware, at the time of the violative act, that the act was unlawful. . . ." *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (citation omitted). Alternatively, the Secretary can prove plain indifference by showing that the employer "possessed a state of mind such that if it were informed of the standard, it would not care." *Id*. (emphasis and citation omitted). *Home Rubber Co.*, No. 17-0138, 2021 WL 3929735, at *2 (O.S.H.R.C., Aug. 26, 2021).

Respondent admits that it knew of the COVID-19 virus and that infection could result in serious illness or death. (Tr. 182, 193). Respondent admitted that it knew the virus was a respiratory illness that spread through the air. (Tr. 56, 182, 191-92). The owner, Ms. Murrell-Rosario, testified that she knew that people over 65 or "had two or more comorbidities" were at a higher risk for serious illness and fatalities from COVID-19. (Tr. 182, 193). And, the owner knew that one LTS employee was over 65. (Tr. 182). Even so, she did not believe it was serious because "the office staff is mostly in their 30s." (Tr. 182). Despite knowing that COVID-19 was a respiratory virus that spread through the air and could result in serious illness or death, the only measures the Respondent took were to address what she classified as a "respiratory virus" and not "specifically" geared to COVID-19. (Tr. 182). In prior years her protocols were ventilation and

cleaning surfaces. She added to the office policy, washing hands and not allowing masks to be worn in the office. This state of mind demonstrates plain indifference to the hazard.

LTS had a heightened awareness of the need to protect its employees from COVID-19 due to the DLS Order and DLS Citations. The DLS Order and DLS Citations emphasized the need to protect both employees and customers from exposure to COVID-19 through the use of face coverings and physical distancing in the office setting. (GX-3, GX-5, GX-6).

The Secretary proved Respondent had a willful state of mind as it was plainly indifferent to the hazard of unnecessary COVID-19 exposure to its employees and had a heightened awareness of the conditions in its office.

Other Arguments

Respondent also asserted Secretary's case fails because the general duty clause was pre-empted and that a recent Supreme Court decision precludes COVID-19 hazards from OSHA jurisdiction.

The general duty clause was not pre-empted by a specific standard

Respondent asserts the general duty clause is not applicable because a more specific standard, 29 C.F.R. § 1910.134, applies.[25] (Resp't's. Br. 9). "The Commission has held that an applicable standard preempts application of the general duty clause" where the standard is "addressed to the particular hazard for which the employer has been cited." *Healy Tibbitts Builders, Inc,* No. 15-1069, 2020 WL 5934209 *2 (Sept. 30, 2020) (citations omitted). However,

[25] The cases LTS relies on for this premise are distinguished from the instant case by the duties of the employees and are inapposite here. *See Amoco Oil Co.,* No. 92-0361, 1993 WL 157689) (O.S.H.R.C.A.L.J., May 10, 1993) (employees performing maintenance on valves containing hydrofluoric acid fumes) and *Columbia Presbyterian Hosp.,* No. 92-298, 1996 WL 18880 (O.S.H.R.C.A.L.J., Jan. 2, 1996) (respirators required for employees providing patient care to tuberculosis patients). Further, in addition to being distinguishable from the case at hand, these cases are also nonprecedential ALJ decisions. *See Pressure Concrete Constr., Co*., 15 BNA OSHC 2011, 2016, n.5 (No. 90-2668, 1992) (An unreviewed ALJ decision does not constitute Commission precedent).

when no specific standard entirely protects against the hazard alleged, citation under the General Duty Clause is proper. *See Peter Cooper Corps*., 10 BNA OSHC 1203, 1211 (No. 76-596, 1981) citing *Ted Wilkerson, Inc.,* 9 BNA OSHC 2012 (No. 13390, 1981) (finding specific standard does not cover vaccination for anthrax exposure); *see also, U.S. v. Sturm, Ruger & Co., Inc.,* 84 F.3d 1, 5 (1st Cir. 1996) (the Act imposes on employers a general duty to provide "employment and a place of employment which are free from recognized hazards" to fill gaps that exist in the specific promulgated standards); *Armstrong Cork Co*., 8 BNA OSHC 1070, 1073 (No. 76-2777, 1980), *aff'd*, 636 F.2d 1207 (3d Cir. 1980) ("The Commission has held that an applicable standard preempts application of the general duty clause" only where the standard is "addressed to the particular hazard for which the employer has been cited."). Respondent's argument is rejected.

29 C.F.R. § 1910.134 applies to a "workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer . . . ." *See* 29 C.F.R. § 1910.134(c)(1). The requirements of 29 C.F.R. § 1910.134 are not applicable here because respirators are not required for LTS employees. Respondent appears to conflate a respirator requirement with the face coverings recommended as an abatement for COVID-19 exposure. The type of face coverings discussed as an abatement in this case are not respirators as contemplated by 29 C.F.R. § 1910.134. *See generally* OSHA's December 20, 2017, interpretive letter to John Boren (a "surgical mask" is not considered to be a respirator)[26]; *see also,* Hospital Respiratory Protection Program Toolkit, p. 4-5, (May 2015) (a facemask does not seal tightly to the wearer's face and are not "respiratory protection;" a respirator is designed to seal tightly to the face). [27]

[26] At https://www.osha.gov/laws-regs/standardinterpretations/2017-12-20 (accessed April 25, 2022).

[27] At https://www.osha.gov/Publications/OSHA3767.pdf (accessed April 25, 2022).

Thus, 29 C.F.R. § 1910.134 does not address the particular hazard at issue here and does not pre-empt application of the general duty clause.

NFIB decision does not prohibit OSHA jurisdiction

Respondent asserts that a COVID-19 hazard is outside OSHA's expertise and jurisdiction because it is not an occupational hazard. (Resp't's. Br. 18; Resp't's. Reply 2, 7, 11). To support this assertion, Respondent relies on *Natl. Fed'n. of Indep. Bus. v. OSHA,* 142 S. Ct. 661 (2022) (*per curium) (NFIB*).[28] Respondent's reliance on *NFIB* is misplaced.

At issue in *NFIB* was OSHA's authority to promulgate a rule related to COVID-19 vaccines issued as an emergency temporary standard (ETS). *See* COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402 (Nov. 5, 2021) (to be codified at 29 C.F.R. parts 1910, 1915, 1917, 1918, 1926 and 1928. Specifically, Respondent relies on the Court's statement, that the vaccine "mandate takes on the character of a general public health measure, rather than an 'occupational safety or health standard.' " *NFIB,* 142 S.Ct. at 666.

However, *NFIB* is not applicable to the issues here. At issue in *NFIB* was OSHA's authority to promulgate the ETS, which set forth requirements for certain employers to develop a COVID-19 vaccination policy. *Id.* at 664. The Applicants in *NFIB* sought "emergency relief" from the Court regarding OSHA's enforcement of the ETS. *NFIB,* 142 S.Ct. at 664. *NFIB* did not address whether OSHA could, under the general duty clause, cite an employer for exposing its employees to transmission of COVID-19. Neither the issue of vaccines nor the promulgation of

[28] "OSHA's COVID–19 Vaccination and Testing; Emergency Temporary Standard, 86 Fed. Reg. 61402, is stayed pending disposition of the applicants' petitions for review in the United States Court of Appeals for the Sixth Circuit and disposition of the applicants' petitions for writs of certiorari, if such writs are timely sought. Should the petitions for writs of certiorari be denied, this order shall terminate automatically. In the event the petitions for writs of certiorari are granted, the order shall terminate upon the sending down of the judgment of this Court." *Natl. Fedn. of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 666–67 (2022) (per curium).

the ETS are at issue in the instant case. At issue here is whether the Secretary has proved the elements of the general duty clause.

Even though *NFIB* has no application to the instant case, the undersigned notes that in its dicta the Court did not rule out OSHA's authority to regulate the workplace hazards affiliated with COVID-19.[29] *Id.* at 665-66 (commenting that "targeted regulations are plainly permissible" and a workplace may have particular features that pose a special danger, such as those that were "crowded or cramped").

Respondent's assertion that *NFIB* deprives the Secretary of the authority to cite LTS under the general duty clause for unnecessary employee exposure to COVID-19 is rejected.

Penalty

The maximum penalty for a willful violation is $136,532.[30] Section 17(j) of the Act requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations.[31] *Compass Envtl., Inc*., 23 BNA OSHC 1132, 1137 (No. 06-1036, 2010) *aff'd*, 663 F.3d 1164 (10th Cir. 2011). The gravity of the violation is generally accorded greater weight. *See J. A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993).

With respect to gravity, OSHA classified the severity as high because the risks associated with COVID-19 are hospitalization and death. (Tr. 63-64). The probability was assessed as greater

[29] *See generally, Alaska Trawl Fisheries, Inc.,* 15 BNA OSHC 1699, 1704-05 (No. 89-1192, 1992) ("To the extent that the discussion in *Dillingham* went beyond what was strictly necessary to adjudicate the issues presented by that case, it constituted *obiter dictum* (remarks not necessary to decide the case) and therefore is not controlling here.")

[30] The penalty in the instant case was assessed after January 15, 2021, thus the statutory maximum of $136,532 and statutory minimum of $9,753 applies. 86 Fed. Reg. 2964, 2969-70 (Jan 14, 2021).

[31] The Commission is not bound to follow the Secretary's penalty and owes no deference to the Secretary's proposed penalty. *Hern Iron Works, Inc.,* 16 BNA OSHC 1619, 1621-23 (No. 88-1962, 1994).

because LTS had long operating hours and there was a lack of meaningful protective measures. (Tr. 64). There was no reduction for good faith because LTS did not have a robust safety program and the owner did not cooperate during the inspection. The owner denied entry to the CO after the initial visit and did not allow the CO to interview any employees thereafter. (Tr. 65).

Respondent asserts it should have a penalty reduction because it had no prior OSHA citations. (Resp't's. Reply 2). There is no evidence in the record of a history of prior violations.

LTS was a small employer with 15 employees. (Adm. Fact ¶ 12). The CO stated that the standard reduction for an employer of this size was considered but offered no explanation why no reduction for size had been applied to the proposed penalty. (Tr. 64-65).

On balance, the undersigned finds that an adjustment would be appropriate given the fact that the record contains no evidence of a history of violations and the employer was small. As the Commission stated in *Quality Stamping Prods. Co,*, 16 BNA OSHC 1927, 1929, (No. 91-414, 1994), "[t]he purpose of a penalty is to achieve a safe workplace, and penalty assessments, if they are not to become simply another cost of doing business, are keyed to the amount an employer appears to require before it will comply." Thus, a reduction is applied due to the size of the company and a penalty of $95,500 is assessed.

As set forth above, the Secretary has proved Respondent violated section 5(a)(1) of the Act and a penalty of $ 95,500 is assessed.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

Citation 1, Item 1, alleging a Willful violation of section 5 (a)(1) of the OSH Act is AFFIRMED and a penalty of $95,500 is ASSESSED.

/s/Covette Rooney
COVETTE ROONEY
Chief Judge, OSHRC

Dated: June 6, 2022
Washington, D.C.