

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UHS OF WESTWOOD PEMBROKE, INC.,
UHS OF DELAWARE, INC.,

Petitioners,

v.

SECRETARY OF LABOR,

Respondent.

OSHRC Docket No. 17-0737

PETITION FOR REVIEW

UHS of Westwood Pembroke, Inc. and UHS of Delaware, Inc. hereby petition for review of the Order of the Occupational Safety and Health Review Commission (OSHRC No. 17-0737) entered on March 3, 2022.

Dated: May 2, 2022

KRAMER LEVIN ROBBINS RUSSELL

By: /s/ Gary A. Orseck

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2022, I served the foregoing Petition for Review on each of the following by U.S. Mail:

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NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on the date below. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION MUST FILE A PETITION FOR REVIEW WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §660; Fed. R. App. P. 15.

FOR THE COMMISSION,

Dated: March 3, 2022



John X. Cerveny
Executive Secretary

DOCKET NO. 17-0737

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UHS OF WESTWOOD PEMBROKE, INC.,
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Respondent.

ON BRIEFS:

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For the Respondent, UHS of Delaware, Inc.

DECISION

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

UHS of Westwood Pembroke, Inc. (UHS-WP) owns and operates Pembroke Hospital, a psychiatric hospital located in Pembroke, Massachusetts. UHS of Delaware, Inc. (UHS-DE) serves as the management company for UHS-WP pursuant to a management agreement between the two entities. Following an employee complaint of workplace violence due to patient aggression at Pembroke Hospital, OSHA inspected the hospital on October 11, 2016, and subsequently issued a single citation to UHS-WP and UHS-DE alleging a repeat violation of the

Occupational Safety and Health Act's general duty clause, 29 U.S.C. § 654(a)(1), for exposing hospital employees to physical assaults by patients.¹

Administrative Law Judge Keith E. Bell affirmed the citation as to UHS-WP only, rejecting the Secretary's claim that the two companies should be treated as a single employer, and recharacterized the general duty clause violation from repeat to serious. Both the Secretary and UHS-WP petitioned for review of the judge's decision. For the following reasons, we find UHS-WP and UHS-DE operated as a single employer and affirm the citation as repeat.²

BACKGROUND

Pembroke Hospital (Pembroke) is a 120-bed inpatient psychiatric hospital owned by UHS-WP, which operates three facilities as a single entity under one license: Pembroke, Westwood Lodge, and the Lowell Treatment Center. UHS-WP is in turn ultimately owned by Universal Health Services (UHS). The other cited entity, UHS-DE, which is also owned by UHS, provides Pembroke with management services and budget oversight. Pembroke's Chief Executive Officer (CEO) and Chief Financial Officer (CFO) are both employed and supervised by UHS-DE. Pembroke's Director of Nursing and its Risk Manager also report to UHS-DE employees, including Pembroke's CEO. And UHS-DE's Loss Control Manager handles Pembroke's budget for workers' compensation claims and visits the hospital monthly to participate in aggression reduction team meetings, which are attended by the hospital's CEO.

Pembroke is divided into six patient care units—four for adults, one for adolescents, and one for geriatric patients—that each care for approximately 15-25 patients. Registered nurses and Mental Health Associates (MHAs) provide direct patient care over three shifts and anywhere from one to approximately five MHAs are assigned to each unit.³ MHAs are responsible for providing around the clock care to patients, which includes completing wellness and vital checks for each patient every 15 minutes (even when they are sleeping), assisting with personal hygiene and

¹ The general duty clause provides that “[e]ach 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).

² Throughout our decision, each company is referenced by name when relevant to the discussion and referenced as Respondent when being addressed as a single employer.

³ The number of MHAs increases or decreases in correlation with the number of patients on each unit. For instance, the record reflects that the number of patients on each unit could vary from five to twenty-seven, with the corresponding number of MHAs ranging from one to about five.

housekeeping activities, leading group activities, performing admissions duties for new patients, and escorting patients outside their units for meetings, fresh air breaks, and meals.

At least one MHA is expected to always remain on the unit, although MHAs are also expected to respond to calls for assistance on other units when incidents relating to patient aggression occur. In addition, MHAs are responsible for monitoring and detecting when verbal de-escalation or other calming techniques are needed to address patient aggression, and to implement those techniques as necessary. Each patient has a personal de-escalation plan that lists their proven or preferred calming measures.

DISCUSSION

To prove a violation of the general duty clause, 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. *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-0628, 2004). 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).

On review, UHS-WP argues that in affirming the violation, the judge erred in finding the Secretary established a feasible and effective means of abatement. The Secretary argues the judge erred in finding that UHS-WP and UHS-DE should not be treated as a single employer and that the violation should not be characterized as repeat.⁴ We turn first to the single-employer issue, then to whether a feasible and effective means of abatement has been proven, and last to the violation's characterization.

I. Single Employer

The three factors relevant to determining whether separate entities operate as a single employer for purposes of liability under the Act are whether the entities (1) share "a common worksite," (2) "are interrelated and integrated with respect to operations and safety and health matters," and (3) "share a common president, management, supervision, or ownership." *S. Scrap Materials Co.*, 23 BNA OSHC 1596, 1627 (No. 94-3393, 2011). The Secretary bears the burden

⁴ Separate review briefs were filed by UHS-WP and UHS-DE. The briefs filed by UHS-WP address the abatement issue and repeat characterization issue. The briefs filed by UHS-DE are limited to the single-employer issue.

of establishing the existence of a single-employer relationship.⁵ *Loretto-Oswego*, 23 BNA OSHC 1356, 1358 n.4 (No. 02-1164, 2011) (consolidated), *aff'd*, 692 F.3d 65 (2d Cir. 2012). The judge found that none of these factors supported finding a single-employer relationship between UHS-WP and UHS-DE.

On review, the parties rely heavily on *Loretto-Oswego* to support their arguments with respect to each factor. 23 BNA OSHC at 1359-61, 692 F.3d at 77-78. In that case, both the Commission and the Second Circuit concluded that the cited nursing home did not operate as a single employer with its management company primarily because the two entities were not interrelated and integrated as to safety matters. 23 BNA OSHC at 1359-60; 692 F.3d at 77. The Secretary argues that *Loretto-Oswego* is distinguishable from this case because “the record [here] shows that UHS-Pembroke and UHS-DE handled policy and other safety matters at Pembroke Hospital as one company.” In response, UHS-DE argues that this case is closely analogous to *Loretto-Oswego* because all three factors weigh against finding a single-employer relationship and therefore the Commission should affirm the judge’s decision dismissing the company from the case. For the reasons set forth below, we agree with the Secretary and find the record establishes that the two cited entities operated as a single employer for purposes of the alleged violation.

Common worksite

There is no dispute that the two cited entities have employees working at the same worksite—Pembroke. Indeed, Pembroke’s CEO is a UHS-DE employee who works onsite full-time at Pembroke supervising the hospital’s employees and overseeing its day-to-day operations. Likewise, a UHS-DE Loss Control Manager is regularly present at the hospital addressing various safety matters including the cited workplace violence hazard. The judge nevertheless found that UHS-WP and UHS-DE do not share a common worksite because neither of these UHS-DE

⁵ After the close of briefing on review, the Secretary filed a letter “direct[ing] the Commission’s attention to relevant [single-employer] findings in a recent decision by Administrative Law Judge Dennis L. Phillips in *Secretary of Labor v. UHS of Delaware, Inc., and Premier Behavioral Health Solutions of Florida d/b/a Suncoast Behavioral Health Center*, OSHRC Docket No. 18-0731.” In that decision, which was issued on April 9, 2021, and is currently pending on review before the Commission, the judge found that UHS-DE and the cited mental health facility operated as a single employer for purposes of liability under the Act as it pertained to the general duty clause violation alleging workplace violence at issue. We do not rely on this unreviewed decision in addressing the inquiry before us here and in any event, the judge’s findings are limited to the record in that case. See *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (“[A] Judge’s opinion . . . lacking full Commission review does not constitute precedent binding upon us.”).

employees were exposed to the cited workplace violence hazard. He also relied on the fact that the two entities have separate business addresses—UHS-DE operates out of Pennsylvania while UHS-WP operates its facilities (including Pembroke) out of Massachusetts.

We agree with the Secretary's contention on review that the judge erred in making these findings. Under Commission and relevant circuit court precedent, mutual employee access to a hazard is not a precondition to establishing the common worksite factor. In *A.C. Castle v. Acosta*, 882 F.3d 34, 42 (1st Cir. 2018), the First Circuit rejected the notion that a common business address or headquarters is necessary to find a single-employer relationship or "that workers from each entity must be at the site at the time the violation occurred, or directly exposed to the risk."⁶ 882 F.3d at 42. In addition, as the Secretary points out, and we address below, the facts here are distinguishable from those in *Loretto-Oswego*, where the management company had "no physical presence" at the inspected nursing home, was rarely onsite, and was not involved in its day-to-day operations. *Loretto-Oswego*, 23 BNA OSHC at 1361.

As noted above and discussed in detail below regarding the next single-employer factor, UHS-DE has two employees, Pembroke's CEO and UHS-DE's Loss Control Manager, working onsite at Pembroke who are integrally involved in the hospital's day-to-day operations, including hiring, firing, and managing hospital staff, as well as overseeing patient treatment and care and addressing the cited workplace violence hazard. *C.T. Taylor*, 20 BNA OSHC 1083, 1085 (finding single-employer relationship where one entity's employee directed and supervised the work performed by the other entity's employees). And although the two entities have different principal addresses and perform their primary work at different locations, the central inquiry is whether they share a common worksite. *A.C. Castle*, 882 F.3d at 42 (noting that a while a shared headquarters or business address "generally satisfies the common worksite factor" it is not "necessary" to do so and requiring such would rewrite the test to mean "common business address"). There can be no dispute here that UHS-DE employees work alongside UHS-WP employees on a consistent basis

⁶ The First Circuit is a relevant circuit here, as UHS-WP and Pembroke are located in Massachusetts. See 29 U.S.C. § 660(a) ("Any person adversely affected or aggrieved by an order of the Commission . . . may obtain . . . review . . . in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit . . ."); see *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (Commission generally applies law of the circuit where it is probable a case will be appealed). The Third Circuit is also relevant because UHS-DE is based in Pennsylvania.

at Pembroke. For all these reasons, we find the common worksite factor supports finding a single-employer relationship.

Interrelation and integration

We also find that the two cited entities are interrelated and integrated regarding operations, including safety and health matters. According to the judge, UHS-WP and UHS-DE are distinct businesses, as UHS-WP provides direct patient care at its facilities, while UHS-DE is a management and consulting business. The judge also found that Pembroke primarily develops and sets its own budgets. As to safety matters, the judge merely stated that “[t]here is no evidence that [UHS-WP] lacked sufficient capital or other resources to address worker health and safety.”

Turning first to operations, we find that the record establishes not only UHS-DE’s direct involvement in supervising Pembroke staff and in providing patient care, but also its control of and influence over the hospital’s budget and finances, as well as the clinical and operational aspects of running the hospital, such as regulatory compliance, licensing, quality of clinical care, and clinical programming. The Secretary points to two key undisputed facts demonstrating that UHS-DE manages daily operations at Pembroke: (1) Pembroke’s CEO, a UHS-DE employee, is responsible for hiring, disciplining, and firing hospital staff, and (2) Pembroke’s Director of Nursing and its Risk Manager both report to UHS-DE management. Indeed, at the hearing, Dr. Thomas Hickey, Pembroke’s CEO at the time of OSHA’s inspection,⁷ confirmed the extent of his duties at the hospital, and his testimony in this regard stands unrebutted:

I was responsible for hiring staff, disciplinary actions, firing, maintaining our budget, overseeing the quality of the program, addressing regulatory issues, making sure we were meeting joint commission and [state] standards, working with staff to develop excellent treatment planning and programming for our patients, program development, growing our program, making sure our patient beds were filled, all of the-- both clinical and operational aspects of running the hospital.

Dr. Hickey also testified, when asked by the judge about the scope of UHS-DE’s management at the hospital, that:

It involves a number of broad areas. One is regulatory compliance, licensing, it involves quality of clinical care, developing clinical programming, marketing, budget, hiring and firing of staff. I was responsible for hiring medical staff, operating the pharmacy, the whole caboodle of what’s involved in running a free-

⁷ Dr. Hickey served as Pembroke’s CEO until January 31, 2017, approximately three months before OSHA issued the citation.

standing psychiatric facility and out-patient programs as well. Developing new programs, expanding, market share, etc.

Contrary to UHS-DE's assertion that clinical and administrative functions at Pembroke are kept separate, Dr. Hickey testified that even though his "responsibility was not to make the clinical decisions," he nonetheless was responsible for "mak[ing] sure the [clinical] process happened the way it should." In fact, the two Pembroke managers who work on clinical matters—the Director of Nursing and the Risk Manager—both report to Pembroke's CEO (a UHS-DE employee), as well as other UHS-DE management. For instance, Pembroke's Risk Manager, who is tasked with reviewing incidents of patient aggression and coordinating an initiative at the hospital to reduce such aggression, regularly works with a Corporate Clinical Director employed by UHS-DE. And although Pembroke's Medical Director manages patient care and has authority over clinical and staffing decisions, Dr. Hickey had hiring and firing authority over all employees at Pembroke, which would include the Medical Director. Indeed, Dr. Hickey testified that while admitting a patient is a clinical decision made by the Medical Director, he participated as CEO in all decisions regarding admissions capacity. UHS-DE is also involved in establishing hospital policy through Pembroke's Board of Advisors, which includes both Pembroke managers (the Risk Manager and Director of Nursing) and UHS-DE corporate employees (Pembroke's CEO and CFO and UHS-DE Group Director) and is led by UHS-DE's Regional Vice President. Further, UHS-DE drafts the hospital's Strategic Plan, which is submitted to the Department of Mental Health. The plan describes UHS-DE's implementation of patient care improvements, such as staff training and retention.

Finally, as the Secretary asserts, the management agreement between the two entities reflects UHS-DE's authority over the hospital's budget and finances. Contrary to the judge's conclusion and UHS-DE's related arguments, the evidence shows that it is UHS-DE, through its employees who serve as Pembroke's CEO and CFO, that develops the hospital's budget, which is then reviewed and approved by higher-level UHS-DE employees. This is consistent with the management agreement, which confirms that UHS-DE is responsible for central financial systems at Pembroke, including: "(a) the billing system; (b) the collection system; (c) the disbursement system; (d) the payroll system; (e) the insurance claim system; (f) the management information system; and (g) the patient safety improvement system." For all these reasons, we find the Secretary has shown that the cited entities have integrated and interrelated operations.

We also find that the same integration exists regarding safety and health matters. Again, the record shows that UHS-DE directs safety and health matters through its onsite CEO, who participates in Pembroke's committees and meetings related to patient aggression and workplace violence. Pembroke also reports workplace violence incidents to UHS-DE, and UHS-DE provides detailed comparisons between a benchmark created by UHS-DE and various metrics at Pembroke relating to patient aggression, such as the rate of restraints and injury. Additionally, UHS-DE identifies opportunities to address workplace violence at Pembroke and makes recommendations in that regard to the hospital.

Moreover, UHS-DE's Loss Control Manager, Gina Gilmore, visits Pembroke monthly and attends "aggression reduction" meetings where she presents analyses of patient aggression data and directly interacts with hospital employees regarding worker safety. Following these meetings, she prepares a "loss control summary" in which she compares injuries at Pembroke to targets set by UHS-DE and discusses whether Pembroke will receive a prevention credit to its workers' compensation budget if employee injuries fall below the UHS-DE target. In the loss control summary, Gilmore also analyzes data on patient aggression, identifies times when patient aggression is most likely to occur, and specifies corrective action to address such aggression. When injuries to staff occur due to patient aggression, she performs root cause analyses, which involve interviewing hospital staff, and presents Pembroke's CEO and other hospital managers, including the Risk Manager and Clinical Director, with the results of these analyses. Gilmore also advises Pembroke on safety training for employees and identifying and mitigating issues related to patient aggression.

Thus, this case is not like *Loretto-Oswego* where the corporate management entity was only infrequently and indirectly involved in employee safety and health, and nursing home personnel retained primary responsibility for safety matters. 23 BNA OSHC at 1360. Rather, as the Secretary asserts, it is clear that UHS-DE and UHS-WP "handled safety matters [at Pembroke] as one company." Compare *C.T. Taylor*, 20 BNA OSHC at 1083 (single-employer relationship established where entity assumed responsibility for employee safety on the job by directly intervening in safety matters); with *FreightCar Am. Inc.*, No. 19-0970, 2021 WL 2311871, at *6-7 (OSHC March 3, 2021) (single-employer relationship not established where record was unclear if parent was involved in safety at subsidiary's worksite).

Common president, management, supervision, or ownership

The judge found that this last factor weighed against a single-employer relationship because UHS-DE has its own management structure with a separate CEO, CFO, and management group. In addition, the judge found that Pembroke's CEO has no managerial duties for UHS-DE and that UHS-DE does not provide daily oversight at the hospital. The Secretary maintains that this finding was erroneous, citing the parties' stipulation that UHS is the ultimate corporate owner of both UHS-WP and UHS-DE. Again, the Secretary points to the direct line of management between Pembroke and UHS-DE that runs through the hospital's CEO, who supervises Pembroke's employees and is in turn supervised by UHS-DE employees. UHS-DE asserts the two companies' corporate parent—UHS—operates only as a holding company such that there is no shared ownership or management. According to UHS-DE, its role at the hospital is limited to administrative and financial functions while Pembroke controls clinical functions. UHS-DE also echoes the judge's finding in arguing that, unlike the entities in *Loretto-Oswego*, UHS-WP and UHS-DE have their own management structures and employees.⁸

For all the reasons already discussed above, we agree with the Secretary that the cited entities are linked through Pembroke's CEO and CFO who are UHS-DE employees supervised by higher-level UHS-DE managers. Dr. Hickey testified that as Pembroke CEO, he reported to the Regional Vice President and Regional Group Director of UHS-DE. Pembroke's CFO, in turn, reports to the CEO as her immediate supervisor, and UHS-DE's Regional CFO and Regional Vice President both have oversight over the CFO's work. Evidence of shared management is also found in Pembroke's Board of Advisors—as noted, the Board is comprised of both Pembroke and UHS-DE employees (including the hospital's CEO and CFO) and approves policy changes at the hospital. And as the parties stipulated, UHS-WP and UHS-DE share the same ultimate corporate parent. *Cf. S. Scrap Materials Co.*, 23 BNA OSHC at 1627 (common management factor not met where entities were owned by same parent company and shared a company president but record lacked evidence that “supervision or management at the two subsidiary companies' scrap yards was shared”); *Loretto-Oswego*, 23 BNA OSHC at 1359 (“At the time of the violations, LMC and

⁸ UHS-DE also relies on the judge's findings that Pembroke's CEO and CFO—both UHS-DE employees—have no managerial duties for UHS-DE and there are no shared management employees between UHS-DE and Pembroke because UHS-DE's corporate structure does not include either hospital official. But this merely shows that Pembroke's management did not control UHS-DE, not the converse.

the three affiliates shared the same president, chief executive officer, and chief financial officer. This outward appearance of a common identity gives way, however, . . . because the record shows that on a day-to-day basis, administrative personnel at Loretto-Oswego operated independently of LMC.”). Finally, as we have already found, the evidence shows that UHS-DE is integrally involved in the day-to-day management of Pembroke, including the hospital’s core function of patient care and related safety matters. *See C.T. Taylor*, 20 BNA OSHC at 1083 (finding single-employer relationship where direct management and safety involvement was present between the two entities.) In short, the key roles that UHS-DE employees play in managing operations, including safety, at Pembroke Hospital also establish their shared management.

We therefore reverse the judge and find that all three factors support finding a single-employer relationship existed between UHS-DE and UHS-WP at the time of the alleged violation.

II. Abatement

In the citation, the Secretary lists several proposed measures to abate the cited workplace violence hazard and these measures address various aspects of hospital operations relating to patient care, such as admissions, security, and therapeutics.⁹ Prior to the judge’s decision in this

⁹ The proposed abatement measures are:

- a. Establish a team of nurses and mental health associates (MHAs) that focuses primarily on the performance of the tasks associated with the admission and assessment of new patients. This team should not be staffed by employees who are assigned to care for already-admitted patients.
- b. Dedicate a physical area, apart from all other units of the hospital, to the admission and assessment of new patients. Do not allow new patients into other units until the tasks associated with admission, including clinical assessments and the provision of medical orders, are complete.
- c. Cease efforts to interfere with the issuance of medical orders that specify required staffing arrangements. Ensure that staffing is sufficient to allow the issuance and implementation of medical orders that specify staffing arrangements.
- d. Provide personal panic alarms for all employees who may work in close proximity to patients, including but not limited to nurses, MHAs, housekeeping staff, and case workers. Provide training on this equipment and ensure that the equipment is maintained in working order at all times.
- e. Provide security staff and/or crisis intervention specialists on all three shifts to assist in preventing and responding to violent events.

case, but after the parties submitted their post-hearing briefs to the judge, the Commission issued its decision in another case involving a general duty clause violation, *A.H. Sturgill Roofing, Inc.*, No. 13-0224, 2019 WL 1099857 (OSHRC Feb. 28, 2019), and held that because the citation's list of abatement measures were proposed as alternatives, the Secretary could only prevail in that case if he proved that none of them were implemented by the cited employer. *Id.* at 9. In other words, the Commission held that implementing any one of the proposed alternatives would constitute abatement of the alleged violation. *Id.*

The judge did not address *Sturgill* in his abatement analysis as he relied on other Commission precedent to conclude that the Secretary had proposed the citation's listed measures as a process and correctly acknowledged that a process-based approach to abatement is permitted where the hazard alleged under the general duty clause cannot be abated with a single action.¹⁰ *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993 (No. 89-265, 1997) (finding that "the appropriate response to the hazard [alleged under the general duty clause] . . . was a process that included actions selected from a menu of alternatives"); *Integra Health Mgmt., Inc.*, No. 13-1124, 2019 WL 1142920, at *12-13 (OSHRC March 4, 2019) (considering numerous proposed abatement measures as means of materially reducing workplace violence hazard alleged under general duty clause); *see also BHC Nw. Psychiatric Hosp., LLC, v. Sec'y of Labor*, 951 F.3d 558, 564 (D.C. Cir. 2020) (Secretary proposed "menu" of abatement options to materially reduce workplace violence hazard alleged under general duty clause).

On review, Respondent invokes *Sturgill* and now claims that the Secretary proposed the abatement measures as alternatives, and because the record contains substantial evidence that it has adequately implemented at least some of the measures at Pembroke, the Secretary cannot prove the abatement element of the alleged violation. The Secretary responds that the proposed

f. Maintain staffing that is adequate to safely address changes in patient acuity and new patient admissions. For example, do not decrease staffing levels mid-shift regardless of the timing of patient discharges.

g. Maintain adequate staffing to support therapeutic activity groups and recreation periods, thereby engaging patients in activities that reduce patient agitation and incidents of workplace violence. Maintain equipment that is sufficient for the implementation of each patient's individual crisis prevention plan.

¹⁰ We note that the judge cited to *Sturgill* in his analysis of Respondent's due process claims, which he rejected. Those claims are not at issue on review.

abatement measures “would each cumulatively reduce the hazard” such that every measure identified in the citation should be implemented. According to the Secretary, “each proposed abatement method would help avoid different and separate acts of patient-on-staff violence.”

We agree with the judge that the Secretary proposed, and the parties tried, the measures listed in the citation as a process-based approach to abate the cited hazard. Indeed, the Secretary explained in his post-hearing brief that while “each of his proposed abatement measures would have independently provided a material reduction in the hazard of workplace violence[,]” it may also be necessary for UHS to “implement[] . . . multiple abatement measures” to satisfy its “duty to remove all preventable instances of the hazard.” Before the judge, Respondent demonstrated the same understanding, referring in its joint post-hearing brief to the proposed measures as “abatement steps” and accusing the Secretary of trying to impose “various abatement methods” through a general duty clause citation to effectively create a workplace violence standard. This supports the Secretary’s position on review that the parties understood the measures were proposed as a process, not as alternatives. *See Nat’l Realty v. OSHRC*, 489 F.2d 1257, 1266-67 (D.C. Cir. 1973) (“All preventable forms and instances of hazardous conduct must [] be entirely excluded from the workplace.”). *Cf. Sturgill*, 2019 WL 1099857, at *9 n.17 (noting Secretary’s acknowledgement during oral argument that abatement measures were proposed as alternatives). The Secretary’s approach in this regard aligns with the nature of workplace violence, which as alleged here arises in different contexts and conditions at Pembroke, necessitating different abatement measures. *Cf. Sturgill*, 2019 WL 1099857, at *9 (finding abatement measures to be alternatives where “any one of them would constitute abatement of the alleged violation”); *SeaWorld*, 748 F.3d 1202 (D.C. Cir. 2014) (finding two abatement measures proposed as alternatives because if one were implemented, the second would offer no further protection). Indeed, the citation identifies measures that range from preventative to mitigative.

For all these reasons, we reject Respondent’s argument and find that to establish the abatement element here, the Secretary need only prove that at least one of the measures he proposed was not implemented and that the same measure is both effective and feasible in addressing the alleged hazard. *Sturgill*, 2019 WL 1099857, at *9 (noting where each measure is proposed as a “component of a single means of abatement,” the Secretary “need only show a failure to implement one of them”); *Arcadian Corp.*, 20 BNA OSHC 2001, 2011 (No. 93-0628, 2004) (citing *Beverly Enters. Inc.*, 19 BNA OSHC 1161, 1190 (No. 91-3144, 2000) (consolidated) (to

establish the feasibility of a proposed abatement measure, the Secretary must “demonstrate both that the measure[] [is] capable of being put into effect and that [it] would be effective in materially reducing the incidence of the hazard”) (citations omitted). And given that Respondent has taken measures to address the cited hazard, the Secretary must also show that those measures were inadequate. *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1773-74 (No. 04-0316, 2006); *Cerro Metal Prods. Div., Marmon Grp., Inc.*, 12 BNA OSHC 1821, 1822 (No. 78-5159, 1986)).

As discussed below, we agree with the judge that the Secretary established Respondent’s failure to adequately implement two feasible and effective means of abatement proposed here: the provision of personal panic alarms for staff to summon assistance and the provision of adequate equipment to support de-escalation efforts for patients in crisis.¹¹

Equipment for summoning assistance

The Secretary proposes that Respondent “[p]rovide personal panic alarms for all employees who may work in close proximity to patients” and “[p]rovide training on this equipment and ensure that the equipment is maintained in working order at all times.” There is no dispute that Pembroke’s employees are not provided with any type of panic alarms. Before the judge and also on review, Respondent maintains that employees were nonetheless able to adequately summon assistance when faced with patient aggression because the hospital provided them with walkie-talkies and access to an intercom system in every common area. The judge disagreed, finding that (1) walkie-talkies were not consistently available to allow every staff member to carry one; (2) if an employee did not have one, there was only access to one phone (connected to the intercom system) in the middle of each unit; (3) the walkie-talkies were not reliable due to technical issues, such as faulty batteries; and (4) requiring staff to call out for help or make such requests through walkie-talkies or the intercom system meant they could be heard by the agitated patient, which could escalate the situation further.

¹¹ The judge also found that the Secretary established that Pembroke was inadequately staffed in several respects, including regarding its admissions procedures and found that the Secretary had established feasible and effective abatement measures to remedy those deficiencies. Because we conclude that the Secretary has proven two of his proposed abatement measures, we need not reach these other proposed abatement measures. *Sturgill*, 2019 WL 1099857, at *9; see *S. Scrap Materials Co.*, 23 BNA OSHC at 1599 n.1 (“Although the parties briefed Citation 2, Item 40, as requested, we decline to review the judge’s disposition of this item.”) (citations omitted).

We agree with the judge that Pembroke's reliance on walkie-talkies and the intercom system was inadequate. The evidence shows that the hospital supplied three to four walkie-talkies per unit at the time of the OSHA inspection but not every employee always carried one during their shift. Employees who did carry a walkie-talkie would at times forget to return the device at the end of their shift and leave work with one in their possession, making the device unavailable for others to use. Even when available, testimony from former Pembroke MHA Andrew Santos, former Pembroke Registered Nurse Janine Senatore, and Pembroke's Director of Nursing shows that the walkie-talkies were not reliably functional because the batteries would die over time or would not hold a charge; these employees also testified that static or chatter due to the device's shared communication channels made it difficult to decipher a call for help.

As for the intercom system, the judge found, and the record shows, it was neither practical nor widely used—to access the one phone connected to the system located in the middle of each unit, an employee had to walk away from a potentially unstable situation to call for help rather than remain with the patient in crisis, as Pembroke encouraged. And as we find below, requiring employees to audibly call for assistance creates the potential to further escalate an agitated patient's distress. In sum, we find that the Secretary established Pembroke's program was inadequate to address the cited hazard because it failed to provide employees with the means to reliably, timely, and discreetly summon help when confronted with a threat of workplace violence.

The Secretary also has proven that the use of personal panic alarms is an effective and feasible means of addressing the cited hazard.¹² The Secretary's expert witness, Dr. Robert Welch,¹³ testified that access to personal panic alarms correlated with significantly lower rates of employee assault by hospital patients. Specifically, Dr. Welch stated that employees can wear personal panic alarms inconspicuously and silently call for help, making the devices more efficient in reducing the likelihood of staff becoming victims of patient violence. He explained that personal panic alarms allow employees to immediately seek help without audibly calling for help over a walkie-talkie or with a loud voice, as that can agitate a distressed patient and escalate the

¹² Respondent does not dispute the feasibility of providing personal panic alarms to employees.

¹³ Dr. Welch, a board-certified physician in psychiatry and neurology, holds degrees from Harvard College and Columbia University, and has served as a professor of psychiatry at Harvard Medical School; he also has had overall clinical responsibility and served as chief of psychiatry at mental health hospitals, and is a member of numerous professional organizations for psychiatry.

situation.¹⁴ Dr. Welch's opinion was corroborated by former Pembroke Registered Nurse Senatore, who testified that she had effectively used personal panic alarms at other behavioral health hospitals: "They're just a very immediate system for alerting that you need help . . . and people come right away. There's very little lag time."

On review, Respondent disputes the relevance of Dr. Welch's testimony, arguing that one study he relied on to support his opinions involved emergency rooms, not psychiatric hospitals. But in both situations medical personnel are caring for potentially violent patients in a hospital setting. Put simply, it is apparent from the record that in the face of patient aggression and the potential for imminent violence, verbally asking or yelling for help in the presence of the distressed individual is not equivalent to silently and discreetly summoning help via a personal panic alarm.

For all these reasons, we find the Secretary has established that Respondent failed to maintain adequate equipment for Pembroke employees to summon assistance when faced with patient aggression and that providing personal panic alarms is both feasible and effective.

Equipment for de-escalation

The Secretary also proposes that Respondent "[m]aintain equipment that is sufficient for the implementation of each patient's individual crisis prevention plan."¹⁵ The judge agreed, finding that Pembroke lacked the necessary equipment to implement these plans, also known as "de-escalation" plans, specifically regarding the availability of music-playing devices. On review, Respondent does not dispute that Pembroke lacked enough devices to make them immediately available to every patient who wanted or needed one but argues that the hospital had numerous alternative techniques to keep patients calm, and the Secretary has not shown that these other measures were ineffective. The Secretary maintains that Pembroke's patients specifically

¹⁴ We note that on review, Respondent does not rely on its expert witness, Monica Cooke, with respect to the efficacy of personal panic alarms, or otherwise dispute the judge's decision to afford less weight to Cooke's expert testimony. According to the judge, "[w]hile satisfying the minimum requirements for admissibility," Cooke failed to identify the source material for her opinions and her testimony was largely based on her experience rather than peer-reviewed studies or time spent reviewing Pembroke's records. Indeed, on this particular issue, the judge found that it is unclear if Cooke had reviewed any studies or peer-reviewed literature in reaching her conclusion.

¹⁵ Given how this case was argued and tried by the parties, the Secretary need only show that at least one of the citation's proposed abatement measures was feasible and effective to establish this element of his case. This does not, however, preclude our consideration of more than one abatement measure, and we find that it is appropriate to do so here.

identified music as a means of de-escalation in their plans, but it was not consistently available to them due to the limited supply of devices. The Secretary also argues that regardless of whether other measures might calm patients, the record clearly shows that providing sufficient equipment would reduce the cited workplace violence hazard.

We agree with the judge that Pembroke lacked sufficient equipment to adequately implement its patient de-escalation plans. Approximately nine out of ten patients identified listening to music as a “helping” strategy in their respective plans, yet at the time of the inspection, Pembroke supplied at most four music-playing devices to each unit. This was plainly inadequate, as the record shows that one of the adult units had sixteen patients, but only three music-playing devices, and that patient conflicts regarding access to the limited number of music-playing devices occurred regularly. And while Pembroke permitted units to borrow devices from each other when needed, availability was neither assured nor immediate. In short, regardless of whether other calming techniques listed in the patient plans were effective, it is nearly impossible to reconcile Pembroke’s decision to provide so few devices to each unit with the fact that approximately 90% of its patients requested music as their preferred coping strategy. For all these reasons, we find the Secretary has established that implementation of Pembroke’s patient de-escalation plans was deficient.¹⁶

Turning to the effectiveness and feasibility of providing additional listening devices, Respondent argues that the Secretary has not shown, through Dr. Welch or otherwise, that providing more equipment would materially reduce the cited hazard. We disagree. According to Dr. Welch, the use of music as a de-escalation measure can result in a significant reduction in the potential for a violent incident:

[I]t’s largely what the patients [here] . . . identify as their technique, their preferred technique for calming down and de-escalating when they are upset. So you’ve got patients tell[ing] staff this is what works to help me stay calm and not being able to provide that creates a higher risk situation.

¹⁶ On review, Respondent claims that “the decision regarding the appropriate therapeutic means for managing patient agitation is a clinical one properly made by a patient’s treating doctors and clinical staff and should not be second guessed or regulated by the Secretary with a one-size-fits-all approach.” While a clinical judgment may be present in determining how best to de-escalate a situation involving an agitated patient, the fact remains that the vast majority of Pembroke patients identified music as their preferred calming strategy, yet the hospital lacked sufficient music equipment to meet that demand.

He also gave an example of how being able to provide a patient with a listening device can assist the staff with de-escalating a situation:

[Y]ou can say, John you seem upset, would [you] like to listen to music and then maybe we can talk about what's getting you upset later. You put the headphones on, they walk up and down the hall, you've de-escalated the situation right there.

And Dr. Welch testified that in his experience, hospitals can readily obtain wireless headphones at minimal expense.¹⁷

Three employee witnesses confirmed that listening to music helps calm agitated patients. Former MHA Sherwin testified that as a verbal de-escalation instructor, she has observed how patient aggression, agitation, and pacing can be lessened by listening to music:

So oftentimes you'll see [patients] continue to keep pacing for a couple more minutes, kind of still agitated, and then slowly within 15 to 20 minutes you can see them start to calm down and deescalate and then be able to have a conversation with staff about what is occurring.

Former Pembroke nurse Libby offered similar testimony, explaining the positive effect music has on patients in crisis:

It is a great help. And I realized it even more once I became board certified how much of a role music can be in deescalating a situation. Especially with patients that have a schizophrenic diagnosis. They are hearing voices; it is very helpful.

And former MHA Santos testified that music was “[s]oothing, calming” and confirmed that he had seen listening to music work to calm “patients who were acting aggressive and threatening.” Thus, we find that Dr. Welch’s expert testimony, corroborated by these former Pembroke employees, shows that providing sufficient music equipment would materially reduce the risk of patient assaults by de-escalating situations in which patients may become violent.

Based on the foregoing, we conclude that the Secretary has established that Respondent failed to maintain adequate equipment for Pembroke employees to summon assistance and implement patient de-escalation plans, and that the proposed abatement measures in this regard are both feasible and effective. Accordingly, we find that the Secretary has established the

¹⁷ After the inspection, Pembroke switched to providing wireless headphones and supplied as many as ten pairs per unit. See *Pitt-Des Moines, Inc.*, 16 BNA OSHC 1429 (No. 90-1349, 1993) (employer’s post-inspection implementation of abatement measure admissible to establish feasibility).

abatement element of the general duty clause violation. As none of the other prima facie elements of the violation are in dispute on review, we affirm the citation.

III. Characterization

The Secretary argues that the judge erred in recharacterizing the general duty clause violation from repeat to serious. *See* 29 U.S.C. § 666(a) (setting increased penalties for employer that “repeatedly violates” the Act’s requirements). Under Commission precedent, a violation is properly characterized as repeat, “if, at the time of the alleged . . . violation, there was a Commission final order against the same employer for a substantially similar violation.” *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979); *Lake Erie Constr. Co.*, 21 BNA OSHC 1285, 1289 (No. 02-0520, 2005). The Commission has long held that “similarity of abatement is not the criterion for finding a repeat violation; it is whether the two violations resulted in substantially similar hazards.” *Lake Erie Constr. Co.*, 21 BNA OSHC at 1289 (citing *Stone Container Corp.*, 14 BNA OSHC 1757 (No. 88-310, 1990)). To determine whether the hazards are substantially similar, the Commission looks to the circumstances surrounding the violation. *See, e.g., Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1189 (No. 00-0553, 2005) (finding general duty clause citation violations substantially similar where both involved employee exposure to hazard of asphyxiation in entering fuel tanks to clean).

In citing the violation here as repeat, the Secretary relies on a 2015 general duty clause citation issued to UHS-WP for exposing employees at its Lowell Treatment Center, an inpatient psychiatric care facility also located in Massachusetts, “to acts of workplace violence including, but not limited to: verbal threats of assault, physical assaults, choking, punches, kicks, human bites, scratches and/or pulling of hair by patients.” Specifically, the 2015 citation alleged that:

From January 1, 2011 through December 31, 2014 there have been at least 16 documented cases identified in the OSHA 300 log of employees assaulted on the job by patients resulting in approximately 255 restricted duty days and 730 days away from work. Additionally there have been at least 38 documented non-recordable cases resulting in a dislocated shoulder, concussion, sprains, strains, contusions, swollen body parts, headaches, human bites, punched in the face, kicked, hit, choked, hair pulled, scratched, bitten, grabbed and thrown by patients. During 2014 there were at least five instances of workplace violence, including an incident on November 30, 2014, when a nurse was punched in the face and knocked out unconscious by a patient, resulting in soft tissue damage to the face and jaw, contusions, swelling, and headaches.

The citation was resolved by a settlement agreement and became a final order in April 2016.

In the present citation, the Secretary alleges that Pembroke employees were exposed to assaults by patients in that:

Employees including Nurses, Mental Health Associates (MHAs), and Crisis Intervention Specialists (CISs) at UHS of Westwood Pembroke, Inc. (Pembroke Hospital) have suffered serious workplace violence related injuries such as concussion, fracture, strains, contusions, and burns (from hot coffee thrown at face) while performing their job duties, such as attempting to prevent injuries to staff and patients, and during restraint holds.

In rejecting the citation's repeat characterization, the judge concluded that the Secretary failed to proffer sufficient information to determine if the workplace violence hazards at issue in the two cases were substantially similar. He acknowledged that the hazards "share some commonality" but found that "the limited information in the record reveals only that the cited workplaces had significant differences related to the hazard" in that some of the abatement measures proposed in the two citations are different.

On review, Respondent adopts the judge's rationale in claiming that the Secretary failed to establish the two violations are substantially similar and relies on the same underlying fallacy—that substantial similarity hinges on abatement.¹⁸ But the Secretary need only show that employees were exposed to a substantially similar hazard and here, both violations involve employees exposed to an almost identical hazard—the hazard of physical assault by patients at a psychiatric care facility. *Lake Erie Constr. Co.*, 21 BNA OSHC at 1289 (holding that "similarity of abatement is *not* the criterion for finding a repeat violation") (citation omitted) (emphasis added). The burden therefore shifts to Respondent to rebut the Secretary's prima facie showing of similarity, and it has not done so here given that its arguments focus almost exclusively on abatement.¹⁹ *See Manganas*

¹⁸ Respondent specifically relies on the Commission's decision in *Angelica Textile Serv.*, 27 BNA OSHC 1246, 1254-59 (No. 08-1774, 2018), *vacated as moot*, 803 F. Appx. 542 (2d Cir. 2020, unpublished), *dismissed case on remand*, 2020 WL 4475583 (OSHRC July 27, 2020), a case identified in the Commission's briefing notice, to argue that the prior citation "did not place [Respondent] on notice of what additional measures were required to prevent subsequent violations," and the present citation should not be characterized as repeat because it does not indicate a failure to learn from the prior citation. The Second Circuit, however, has since vacated the Commission's *Angelica* decision, rendering any arguments that rely on the rationale of that case unsupported. 803 F. Appx. 542. Accordingly, we do not consider those arguments here.

¹⁹ Although the similarity of abatement measures is not relevant to the inquiry here, we note that at least one of the measures proposed in the prior citation is essentially the same as one proposed in the present citation—maintaining sufficient equipment to summon assistance.

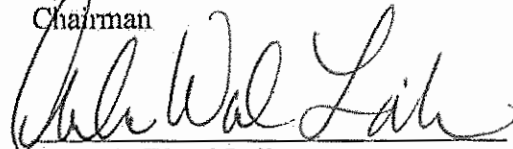
Painting Co. v. Sec'y of Labor, 273 F.3d 1131, 1135 (D.C. Cir. 2001) (once Secretary has made prima facie showing of substantial similarity, "burden then shifts to the employer to demonstrate that the violations took place under disparate conditions and hazards associated with the separate violations") (citing *Potlatch*, 7 BNA OSHC at 1061).

For all these reasons, we affirm the citation as repeat and assess the proposed penalty of \$25,350.²⁰

SO ORDERED.



Cynthia L. Attwood
Chairman



Amanda Wood Laihow
Commissioner

Dated: **MAR 03 2022**

²⁰ Respondent has not disputed the \$25,350 proposed penalty throughout these proceedings. See *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (assessing proposed penalty where undisputed).

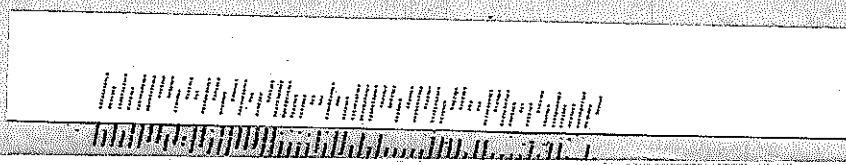
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UHS OF WESTWOOD PEMBROKE INC; UHS OF DELAWARE INC,

Petitioners

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, SECRETARY OF LABOR,

Responden

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK



UNITED STATES COURT OF APPEALS

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RE: UHS of Westwood Pembroke Inc, et al v. OSHRC
Case Number: 22-1845
Agency Case Number: 17-0737

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To All Parties:

Enclosed is the case opening information regarding the above-captioned petition for review filed by **UHS of Westwood Pembroke Inc, UHS of Delaware Inc**, docketed at **No. 22-1845**. The petition was received on **May 2, 2022**. All inquiries should be directed to your Case Manager in writing or by calling the Clerk's Office at 215-597-2995. This Court's rules, forms and case information are available on our website at <http://www.ca3.uscourts.gov>.

Pursuant to Fed. R. App. P. 17 (a), the agency must file the record with this Court within forty (40) days after being served with the petition for review, unless the statute authorizing review provides otherwise.

Attached is a copy of the full caption. Please review the caption carefully and promptly advise this office in writing of any discrepancies.

The docketing fee was received on **May 2, 2022**. Payment made through pay.gov..

A03-62648-124.

For Immigration cases only:

The filing of this petition for review will not automatically stay removal. A separate Motion for Stay of Removal must be filed.

Counsel for Petitioner(s) must file:

1. Application for Admission (if applicable);
2. Appearance Form
3. Disclosure Statement (except governmental entities);
4. Docketing Statement.

These forms must be filed **within 14 days of the date of this letter.**

Failure of Petitioner(s) to comply with any of these requirements by the deadline will result in the DISMISSAL of the case without further notice. 3rd Cir. LAR Misc. 107.2.

Counsel for Respondent(s) must file:

1. Application for Admission (if applicable);
2. Appearance Form
3. Disclosure Statement (except governmental entities).

These forms must be filed **within 14 days of the date of this letter.**

Very truly yours,

s/Patricia S. Dodszuweit,
Clerk

By: Stephanie
Case Manager
267-299-4926