

ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1089

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BHC NORTHWEST PSYCHIATRIC HOSPITAL LLC
d/b/a BROOKE GLEN BEHAVIORAL HOSPITAL,*Petitioner,*

v.

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,*Respondent.*

On Petition For Review Of An Order
Of The Occupational Safety and Health Review Commission

**OPENING BRIEF OF PETITIONER
BHC NORTHWEST PSYCHIATRIC HOSPITAL LLC
d/b/a BROOKE GLEN BEHAVIORAL HOSPITAL**

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CORPORATE DISCLOSURE STATEMENT

Petitioner BHC Northwest Psychiatric Hospital, LLC d/b/a Brooke Glen Behavioral Hospital, in accordance with the requirements of Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, states that (i) BHC Northwest Psychiatric Hospital, LLC is a wholly-owned subsidiary of BHC Properties, LLC, which is a wholly-owned subsidiary of Behavioral Healthcare LLC, which is a wholly-owned subsidiary of BHC Holdings, Inc., which is a wholly-owned subsidiary of Psychiatric Solutions, Inc., which is a wholly-owned subsidiary of Universal Health Services, Inc., and (ii) Universal Health Services, Inc. (NYSE:UHS) owns more than 10% of BHC Northwest Psychiatric Hospital, LLC's stock.

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. PARTIES, INTERVENORS, AND AMICI. The following parties appeared before the Occupational Safety and Health Review Commission (“OSHRC”) and appear in this Court:

1. Secretary of Labor, U.S. Department of Labor, as Complainant before OSHRC and as Respondent in this Court; and
2. BHC Northwest Psychiatric Hospital LLC d/b/a Brooke Glen Behavioral Hospital (“BHC”), as Respondent before the OSHRC and as Petitioner in this Court.

The following parties appeared before the Occupational Safety and Health Review Commission (“OSHRC”):

1. The Pennsylvania Association of Staff Nurses & Allied Professionals (PASNAP) moved for and was granted party status as an Authorized Representative for the affected employees in the proceeding before the OSHRC.
2. Teamsters Local 107 moved for and was granted party status as an Authorized Representative for the affected employees in the proceeding before the OSHRC.

No amici appeared before the OSHRC and, as of the date of this Certificate, no amici have appeared before this Court.

The following entity has a 10% or greater ownership interest in the certifying party:

1. Universal Health Services, Inc. (NYSE:UHS)

B. RULINGS UNDER REVIEW. The ruling under review is the Decision and Order of Covette Rooney, Chief Administrative Law Judge, Occupational Safety and Health Review Commission, Docket 17-0063, which became a Final Order of the OSHRC on February 21, 2019, [A82-162] affirming citations issued to BHC and assessing penalties against BHC for alleged violations of 29 U.S.C. §§ 651-678 and 29 U.S.C. § 654(a)(1) of the Occupational Safety and Health Act of 1970. The OSHRC's decision and order is reported as 2019 OSAHRC LEXIS 6. The Decision and Order was filed with this Court on May 24, 2019.

C. RELATED CASES. This case has not previously been before this Court or any other court. Petitioner is not aware of any related cases currently pending in this Court or in any other court.

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GLOSSARY OF ACRONYMS

BHC – BHC Northwest Psychiatric Hospital LLC or Brooke Glen

CPI – Crisis Prevention Institute

EAC – Extended Acute Care unit

EXR – Employee Accident Reporting system

HRI – HRI Hospital or HRI Arbour Hospital

MHT – Mental Health Technician

MIDAS – Medical Information Data Analysis System

WIG – Wildly important goal

WPV – Workplace Violence

WPV PPT – Preventing Workplace Violence PowerPoint

I. INTRODUCTION

The Occupational Safety and Health Administration (“OSHA”) issued a single Citation and Notification of Penalty to BHC Northwest Psychiatric Hospital, LLC d/b/a Brooke Glen Behavioral Hospital (“Brooke Glen” or “BHC”) alleging a violation of Section 5(a)(1) of the Occupational Safety and Health Administration of 1970 (“OSH Act”), the General Duty Clause, for not taking adequate measures to reduce employee exposures to the hazard of workplace violence, specifically defined as patient to staff aggression. BHC filed a timely notice of contest. A hearing was conducted in the matter on February 21-23, 2018 and May 2-4, 2018 before the Occupational Safety and Health Review Commission’s (“OSHRC”) Chief Administrative Law Judge (“ALJ”) Covette Rooney. The parties filed post-hearing briefs in the matter, and on January 10, 2019, ALJ Rooney issued a decision affirming the serious citation (“*BHC Decision*”). [A82]

BHC petitioned the OSHRC for review of the ALJ’s decision, however, review was not granted. Therefore, the ALJ’s decision became a Final Order of the OSHRC on February 21, 2019. Pursuant to 29 U.S.C. § 660(a), a timely petition for review of the OSHRC’s Final Order was made on April 18, 2019 to this Court.

The ALJ’s decision in this case is in error for multiple reasons. Most fundamentally, application of the General Duty Clause in this case deprives BHC of fair notice how to comply with the OSH Act to avoid citation. A unique set of

circumstances crystallizes the lack of fair notice as to what the General Duty Clause requires and prohibits in connection with workplace violence at behavioral healthcare facilities. Specifically, the ALJ decision in this case was issued the same week as another decision issued by the same ALJ, in a virtually identical case with strikingly similar facts, involving the same policies and training, and alleging the same hazard, patient aggression to staff, wherein a Section 5(a)(1) of the OSH Act was vacated. *See*, the decision in *HRI Hospital Inc., d/b/a Arbour-HRI Hospital* (“*HRI Decision*”), OSHRC Docket No. 17-0303. [Add.189-242].¹ Both cases involve behavioral health hospitals managed by the same healthcare management company, UHS of Delaware, Inc., and the issue of patient aggression to staff equating to workplace violence. The two cases are so similar that the same expert witnesses for both OSHA and Respondent testified in both cases. Their testimony was virtually identical in both cases. Further, similar procedures and policies were described and presented in both cases. Yet, for reasons that defy rational explanation, the HRI citation was vacated and the citation in this matter was upheld. It is difficult to imagine a clearer crystallization of the lack of fair notice.²

¹ The Secretary of Labor did not appeal the decision in *HRI*. It is also a Final Order of the OSHRC. (Unpublished decisions are contained in the Addendum for unpublished decisions attached hereto.)

² In fact, the disparity between two decisions on the identical issue, with such similar evidence and witness testimony presented and issued by the same Judge within the same week, should have triggered automatic review by the Commission

The difference in the two decisions contributes to the already existing uncertainty regarding the criteria a behavioral health hospital should follow to avoid being cited by OSHA. A fundamental issue of the concept of fair notice is that an employer must be provided notice of what is required to comply with the law. Here, the two decisions, when read together, create confounding uncertainty for any behavioral health hospital, but certainly for two hospitals managed by the same hospital management company. This dual set of decisions exacerbates the fundamental flaw in the application of the general duty clause to the issue of workplace violence, also known as patient aggression to staff, in a behavioral health hospital setting.³ Clearly, even the same Judge presented with similar facts and testimony was unable to apply the law consistently.

In sum, the General Duty Clause has been applied differently in very similar cases with no logical explanation. “[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” *Connally v. Gen Constr. Co.*, 269 U.S. 385, 391 (1926). In fact,

since this created an apparent “conflict in Administrative Law Judge’s decisions.” *See*, 29 CFR § 2200.92(b). Yet, the OSHRC elected to not grant review.

³ California’s Occupational Safety and Health agency has promulgated a standard for workplace violence in healthcare. *See*, California Code of Regulations, Title 8, Section 3342. OSHA issued a proposed rule in December 2016, however, there is no final rule on the issue. <https://www.osha.gov/laws-regs/federalregister/2016-12-07> (FR Doc No: 2016-29197) (last accessed August 28, 2019).

the General Duty Clause been held to be unconstitutional as applied unless it provides “reasonably prudent employer[s]” with “notice and warning” of the prohibited conditions. *Asamera Oil (U.S.), Inc.*, 9 BNA OSHC 1426, 1980 WL 81803, at *14 (Nos. 79-949 & 79-1756) (ALJ). BHC had no such notice or warning. When the same set of facts, evidence, and expert witnesses can yield opposing results, there is no clear direction for how a behavioral health hospital can comply with the law. Thus, BHC has been deprived of fair notice of what a “reasonable prudent employer” should do to comply with the OSH Act. For this reason alone, the ALJ’s decision must be vacated.⁴

Beyond this, there are multiple other errors in the ALJ’s decision that render the decision arbitrary and capricious. Briefly, these errors include not considering all of the evidence submitted or considering the evidence submitted in a vastly different manner that considered in the *HRI* case. For instance, verbal de-escalation training, workplace violence training, tracking and trending of patient aggression incidents were considered differently or not at all in the instant case.

⁴ Further complicating the issue is the OSHRC’s disparate application of the General Duty Clause in a variety of recent cases that has so complicated the jurisprudence in this area as to deny employers the constitutionally-mandated notice necessary to understand how to comply with the requirements of the OSH Act.

For these reasons, as further explained below, the Secretary's citation should be vacated.

II. STATEMENT OF JURISDICTION

This case arises from an investigation by OSHA, pursuant to which the Secretary issued one Serious Citation for alleged violations of Section 5(a)(1) of the OSH Act, the General Duty Clause. *See*, 29 U.S.C. § 654(a)(1). Following a trial from February 21-23, 2018 and May 2-4, 2018, ALJ Rooney issued a Notice of Decision on January 10, 2019 affirming the citation. ALJ Rooney had jurisdiction under Section 10(c) of the OSH Act. *See*, 29 U.S.C. § 659(c).

BHC sought review of ALJ Rooney's decision by filing a Petition for Discretionary Review with the OSHRC on February 10, 2019. Because the OSHRC did not direct review, ALJ Rooney's decision became a final Order of the OSHRC on February 21, 2019. *See*, 29 C.F.R. § 2200.90(d).

This Court has jurisdiction pursuant to 29 U.S.C. § 660(a) because BHC filed its petition for review on April 17, 2019, within sixty days of the Commission's final Order.

STANDING

ALJ Rooney's Final Order substantially injures BHC as it is the recipient of the Citation at issue.

III. STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in an Addendum to this brief.

IV. STATEMENT OF ISSUES

1. Whether the Review Commission erred by holding that the Secretary established that BHC violated Section 5(a)(1) (“the General Duty Clause”) of the Occupational Safety and Health Act of 1970?
2. Whether the Review Commission erred by finding that the Secretary is not required to specify what a material reduction of a hazard would be when a hazard cannot be eliminated?
3. Whether the Review Commission erred by finding that BHC had fair notice, as required by the Due Process Clause of the Constitution, how to comply with the requirements of the General Duty Clause of the OSH Act?
4. Whether deference to the Review Commission’s decision should be denied because the Review Commission issued conflicting opinions in two cases involving virtually identical facts and alleged violations?

V. STATEMENT OF FACTS

A. Patient Population

BHC is in the business of treating patients with various psychiatric disorders, including those with aggression. [A370-371, 374-377].⁵ Patients are referred to BHC upon a showing that they are suicidal, aggressive or assaultive towards others, or gravely disabled or disorganized in their ability to make good decisions. [A370:18-25, 371:1-25, 372:1-8. Patients will only be referred to BHC if they are unable to be treated in a less restrictive setting within the community and outside of an in-patient hospital setting. [A372:18-23].

The manifestation of the psychiatric illness can look very different for different people and, as a result, an assessment of each patient is performed and treatment plan for each individual is created based on the disease and how it affects that individual person. [A378: 6-25, 379: 1-25. Additionally, clinical interventions and medications, which can vary based on the individual needs of the patient, are used to treat the patient. *Id.* BHC has a clinical team that works with the patient in helping them in their recovery, including the psychiatrists, doctors, social workers, activity therapists, occupational therapists, registered nurses and mental health technicians (“MHTs”). [A380:6-25, 381:1-13]. This clinical team meets daily. *Id.*

⁵ Citations to the Joint Appendix are “A.” Citations to the Addendum are “Add.” Citations to the Supplemental Appendix are “SA.” Citations to the Second Supplemental Appendix are “SSA.”

B. Workplace Violence Prevention Policies and Procedures

BHC developed and implemented a robust, comprehensive workplace violence prevention program comprised of numerous individual policies, procedures, physical design decisions and other engineering and administrative controls. Foundational elements of the overall workplace violence prevention program are discussed in the sections that follow.

1. Admissions, Clinical Treatment and Communications Regarding Patients

BHC's workplace violence program begins even before patients are admitted to the facility. The process of evaluating patients prior to admission is designed to gain as much information as possible to determine whether BHC has capacity to keep staff and patients safe if the patient is admitted. [A239, 721-723]. The process begins with an intake form (the "call sheet") that is completed by the organization referring the patient to BHC. [A238-239]. The intake call sheet is used to gather and compile information for the nursing supervisor to evaluate the patient in order to determine whether admission to BHC is appropriate. The information compiled in this evaluation includes the patient's history prior to admission, including any history of aggression and/or violence towards others so a treatment plan can be developed if admission is granted. *Id.*

Importantly, this information also becomes part of the patient's chart if admitted, and it is used to provide staff with an overarching understanding of the

patient's tendencies and any points of concern, including whether this patient presents a risk of violence. [A240, 378]. If a patient is a "walk-in" patient, similar information is taken in the admissions office. [A241, 724-736].

Additionally, once the patient is admitted, a nursing assessment is completed by a registered nurse (RN). [A242]. The purpose of the assessment is to further assess a patient's potential for being assaultive or violent. [A243]. After the nursing assessment, an evaluation is then made by a psychiatrist. [A737-744]. In addition, another assessment is conducted by a social worker. [A745-759]. The point of these layered assessments is to develop a robust and comprehensive understanding of whether the patient presents a risk of violence to staff or other patients at BHS; the patient's proclivity towards violence; and effective methods that have proven to reduce any violence potential. [A352]. All of this information becomes part of the patient's chart, and is accessible by every staff member who is providing care to the patient. [A352].

Beyond the comprehensive evaluations, BHC has in place a myriad of other procedures or processes designed in part or in whole to ensure the safety of its staff.

By way of example:

- Patients are provided a handbook that outlines the rules of the hospital when patients first arrive at BHC during the registration process. [A246-248, 784-786].

- Before patients are assigned to a room, staff perform a search of the patient's belongings and body for contraband, including items that could be used as a weapon. [A244-245, 352-353].
- Patients are also provided a handbook that outlines rules of the hospital. [A246-248, 784-786].
- A treatment team is created for each patient composed of the attending physician, charge nurse, and assigned social worker. The treatment team meets each morning to discuss each patient. [A381].
- The treatment teams meet with their assigned patients to discuss their treatment plans. In these meetings, the Team discusses with the patient any issues that need to be addressed or changes that need to be made, including any troubling behaviors the patients may have exhibited. [A382-383].
- For any patients who have persistent aggressive behaviors, special meetings are held to determine if additional clinical treatments, including adjustments to medication, are needed. [A383-384].
- A protocol exists to enable any patients exhibiting aggressive behaviors to be transferred to a different unit; placed on "one-to-one" protection (which is a specialized observation process whereby a

trained staff member is assigned to directly monitor and observe the patient); or given additional medication, as necessary. [A385-387].

- BHC's medical director, Dr. Nair, interfaces with the direct care staff (those staff most familiar with each patient) to identify and understand the observations and any concerns identified by the direct care staff so this information can be folded into BHC's treatment plan for the patient in order to minimize risk behaviors. [A386-387].
- BHC patients' treatment includes attendance at therapeutic groups designed to, among other things, address underlying issues that might cause a proclivity to violence and to teach patients how to self-moderate their behavior. [A236]. Patients are required to complete information for their own individualized crisis plan. [A355-356, 762-763]. This plan is useful in providing tailored instruction on how to deescalate a patient who is becoming aggressive. *Id.*
- BHC patients are continuously monitored via, at minimum, 15-minute safety checks in which the patient's mood and location are documented. [A354, 760-761]. Any change in a patient's behavior is documented in progress notes. [A355, 764-765].
- As referenced above, management holds "Flash" meetings every Monday through Friday. [A221-222]. The Medical Director, Plant

Operations Director, Risk Manager, Nursing Managers and Chief Nursing Officer, as well as Admissions Director, attend these meetings. [A495]. Management discusses patient admissions, any incidents that took place, any Codes or patient aggression incidents, any staff injuries, any restraints performed, any staffing issues or problems, including whether sufficient staff has been available to ensure safety of all personnel. [A222, 495-496].

- More generally, communications regarding patients are documented each shift via “shift reports.” [A223-224]. These reports provide a 24-hour picture of everything that is occurring at the hospital, including whether any aggressive behaviors have been observed and details associated with those observations and/or incidents. [A225, 418-419].
- Finally, select management personnel throughout the hospital routinely conduct hospital rounds to ensure that all staff are following workplace violence and other required procedures, as well as providing additional support in the care of the patients. [A237].

2. Preventing Workplace Violence PowerPoint

BHC has developed a Preventing Workplace Violence PowerPoint (“WPV PPT”) to educate staff. The training covers multiple aspects of a workplace violence program including defining workplace violence, identifying patient aggression as a

possible hazard, and identifying signs of patient aggression and instruction on how to address patient aggression. [A787-818]. BHC trains staff on the WPV PPT at orientation. [A369-370]. The WPV PPT training is intended to provide an overview of the facility's Workplace Violence Prevention Program. [A789]. Upon completion of the training, staff understand that they could potentially be subject to patient aggression and that the "most aggressive or violent events in healthcare facilities are caused by patients." [A370-375].

The WPV PPT defines workplace violence as "any physical assault, threatening behavior, or verbal abuse occurring in the work setting." [A790]. The WPV PPT provides examples of violence as physical assault, threats (oral or written) and harassment/intimidation. [A791]. The WPV PPT identifies risk factors for workplace violence such as patients with a history of criminal activity, substance abuse and certain psychosis. [A793]. The WPV PPT provides that "[v]iolence should be expected but can be avoided or managed through planning" and "[t]he facility has established protocols to keep you aware of risk factors that may lead to violence and aggression, and how to take steps to keep you safe." [A794].

The WPV PPT states that staff are responsible for taking measures to keep themselves safe, and that staff should "[c]omply with [BHC's] protocols at all times." [A794]. The WPV PPT provides multiple universal precautions that include, for instance: (1) Be alert for a situation that may lead to potential violence

such as escalating anger or distress; (2) Evaluate each situation when you enter a room or interact with a patient, visitor or someone unknown to us; (3) Stay vigilant throughout the encounter; and (4) Do not isolate yourself with a potentially violent person. [A795]. The WPV PPT tells staff to be aware of indicators of aggression that may include warning signs such as yelling, swearing, threatening, staring, heaving breathing, and clenched fists. [A803].

The WPV PPT also provides staff with instruction for avoiding violent behavior, including modeling the behavior that want the patient to mimic (*e.g.*, do not be escalated), presenting a calm attitude, address a patient's concerns, acknowledge a patient's feelings, do not make threats, do not get into power struggles with patients, and avoid why questions. [A804-805].

The WPV PPT informs staff that any incident of violence, including harassment, intimidation, verbal abuse, etc., should be immediately reported. It also directs staff to complete the requisite paperwork associated with reporting these incidents and to participate in any and all follow-up investigations of the reported incident. [A801]. The WPV PPT provides that all reports of violence will be treated seriously and investigated promptly. [A802]. The WPV PPT informs staff that all “[i]ncident reports are reviewed on an ongoing basis to identify any issues which may lead to future violent events.” [A816].

3. Code 100 Policy and Responding to Codes

BHC's Code 100 Policy is designed to address psychiatric emergencies. [A459-460]. The Policy was implemented in August 2003. [A781-783]. Psychiatric emergencies under the Code 100 Policy can include patients who are out-of-control, aggressive, violent or threatening violence. [A781-783]. To call a Code 100, any employee on the unit can dial 100 on one of the phones and state "Code 100 – location." [A781-783]. Staff can also call a silent code. [A440-441, 781-783]. Staff can also use walkie-talkies as a means to communicate codes or other issues related to a unit. [A250-251].

Staff are expected to call a Code 100 early in the process. [A403]. BHC trains employees on preventing and responding to Code 100s. [A402-403]. (BHC would rather have employees call a Code 100 early, have staff respond to that Code and there not be a psychiatric emergency than have staff not call a Code 100 and there be a psychiatric emergency. *Id.*)

4. Employee Accident Reporting Policy and Procedures

BHC has an Employee Accident Reporting ("EAR") Procedure. [A361]. The EAR Procedure provides that all employees are expected to immediately report all accidents and injuries to their supervisor. [A362]. All accidents are tracked and investigated. [A363, 365]. Once the employee completes the EAR, the Risk Manager and Human Resources review the EAR and the employee accident is

discussed during a weekly “Flash” meeting specifically dedicated to a review of [fill in]. *Id.*

In addition to reviewing the EAR, BHC completes a camera review if a video of the incident is available. [A437]. The camera reviews give BHC an opportunity to identify what happened in the incident, which helps it determine whether re-education and/or other correction actions should be implemented. [A438].

5. Management of Aggression Policy, Verbal De-Escalation and CPI

The “Management of Aggression” Policy identifies strategies to address patient aggression and works in conjunction with Verbal De-Escalation and CPI. [A457-459, 773-780, 819-883]. CPI is the Crisis Prevention Institute’s method for safely managing behavioral health patients who are in crisis. Verbal De-Escalation and CPI are key components to keeping staff safe while working with aggressive patients. [A518-519]. The Secretary recommended de-escalation techniques as abatement and BHC’s expert, Monica Cooke, opined that BHC had implemented those. [A523]. Interestingly, the Secretary’s expert witness, Dr. Lipscomb, testified in rebuttal that verbal de-escalation was a training tool that was used at another facility. [A539]. Joel Somers trains all employees who work directly with patients on Verbal De-Escalation and CPI. [A430-431]. Training on these programs is conducted annually [A433] and employees are tested following training to ensure

that they fully understand the instruction provided in these programs. [A436, 884-888].

6. Committees, Tracking and Trending and Methods to Address Patient Aggression Concerns

BHC has in place a series of committees and meeting requirements designed specifically to, among other things, review issues related to patient aggression. [A461-462]. For instance, the Quality Council Committee and the Safety Committee each review issues of patient aggression. [A473, 494, 928-932]. The Safety Committee meets monthly and reviews trends and patterns as well as specific data related to tracking and trending patient aggression. [A462]. Specifically, the Safety Committee reviews information from the MIDAS system, a system that tracks all incidents at the hospital, including all incidents of patient aggression.⁶ [A463-464, 933-941].

MIDAS tracks every incident of patient aggression whether the aggression is against a staff member, property or other patients. [A463]. Also tracked in this same system is whether the incident was attributable to any particular department. [A465]. Further, any injuries resulting from an incident; whether a patient was required to be restrained; and the location of where the event occurred are also tracked. [A466].

⁶ This is primarily an electronic system, however, in the event there is an inability to input the incident into the electronic system, it can be completed via a paper form. [A469, 939-941].

Typically, it is the charge nurse that is responsible for inputting this information, with input from MHTs. [A467]. The robust nature of the input data allows BHC to generate extremely valuable patient aggression tracking and trending data. [A470, 473].

In addition to the Safety Committee, the Quality Council Committee also reviews reports from the MIDAS. [A474]. The Quality Council Committee is comprised of the CEO, Risk Manager, Chief Nursing Officer, Nurse Managers, Director of Admissions, Director of Plant Operations and the Director of Social Services. [A494-495]. Among other things, this Committee tracks how many patient restraints occur per 1000 patient days. [A475]. Data demonstrate that staff can be at increased risk for injury during patient restraints. Accordingly, in light of the correlation between patient restraints and staff injury, tracking and reducing restraints is an important objective of the hospital. [A475-476].

For patients involved in repetitive issues related to aggression, special meetings are held in addition to the other meetings referenced above. [A496-497]. The objective of these meetings is to address the behavior in a “very in-depth” manner to ensure that nothing is being overlooked in addressing the aggressive behavior. [A497].

In fact, prior to the OSHA inspection, the hospital had implemented a specific effort to reduce restraint through a method referred to as “wildly important goal” or

“WIG.” As part of this WIG effort, BHC engaged in an effort to improve in areas and methods designed to facilitate patients’ ability to deescalate themselves. [A477]. In addition, “code cards” to help outline the roles and responsibilities of staff members as they respond to crisis situation were introduced. [A441-442, 477]. The tracking and trending of patient restraint data showing the reductions in restraints as a result of these efforts is posted at the hospital so that it can be celebrated amongst the staff. [A477-478].

The review and revision of treatment plans after a patient incident is an important component in reducing future workplace violence incidents. Accordingly, data regarding the review and updating of patient treatment plans is also tracked and trends in this data analyzed by the hospital. [A479].

Tracking and analyzing all of this data is an important component of keeping staff safe from patient aggression. [A485-486]. After monthly review, the data is included in an annual report that is submitted to the Quality Council and Safety Committees. [A491, 928-932].

C. Staffing and Staffing Process

BHC’s threshold staffing levels for each hospital unit were agreed to and set pursuant to labor/management negotiations. [A229]. The agreed upon minimum staffing levels are reflected in a “staffing grid” established for each hospital unit. [A226, 905-909]. Beyond the staffing levels mandated by the grid, other staff members

not reflected on the grid are available to respond to codes and/or provide staffing as needed. [A230]. Additionally, nurses, unit managers, doctors, and MHTs all have authority to request and obtain additional staffing if they believe additional staff is necessary to maintain a safe environment in any area of the hospital. [A226-227].

The Chief Nursing Officer evaluates requests for additional staffing. [A227]. She is completely free to determine and direct additional staffing, with no management override authority to question her staffing decisions. [A228]. The record reflects ample evidence of the Chief Nursing Officer's use of this authority to add additional staff in situations where there is an increased frequency of code use and where staffing requests are made by nurses, MHTs or social workers. [A232].

Also, where there is concern that a patient may be suicidal or become aggressive against others, additional staff is also added to allow patients to be placed on one-to-ones. [A231-232].⁷ BHC tracks the number of one-to-ones assigned and generates a monthly report reflecting this information. [A233-234, 910-927].

BHC uses a staff assignment sheet to track all staff assigned to a unit. [A235, 766-767]. The assignment sheet outlines the roles and responsibilities of each staff

⁷ An extra staff member that is assigned to a one to one is not available to assist for anyone else but the patient that they are assigned to. *Id.*

member in the unit and is also used to ensure that staff-assigned walkie-talkies are in working order. [A235]. The assignment sheets which staff members are responsible for carrying walkie-talkies during the shift. [A250-251].

D. Staff Training

Verbal De-escalation and CPI are core to BHC's workplace violence protection programs. All staff are trained on Verbal De-escalation and CPI during new employee orientation and then annually thereafter. [A430-431, 433, 819-837]. Staff also can request and obtain retraining at any time. [A432].

In addition, staff are trained specifically on patient behaviors, daily routines for employees, patient rounds, restrictive interventions and the documentation required for all of these things. [A401-402]. Staff are also trained on all assignment sheets and how to respond to codes. [A402]. There is also training related to how to interact with the patients. [A404-407].

Beyond the CPI course, there is additional instruction from the clinical side related to de-escalation and patient interventions (such as holds or restraints). [A407]. Staff are trained on what a crisis plan is and how that can assist when a patient is escalating. [A408-409]. Staff are also trained on the importance of looking for contraband and how to conduct searches for this material. [A410-411].

Staff are also trained specifically on patient aggression. [A411]. Staff are taught about the crisis plan, treatment plans and active listening to attempt to defuse

escalation of patients. [A412]. Staff are also trained about what to do if they have concerns about the unit, such as alerting the charge nurse so that another staff member can be assigned to the unit. [A413]. Staff are trained to document any incidents of patient aggression in progress notes and/or in an incident report in MIDAS so that this can be communicated to oncoming staff. [A412-417].

Prior to staffing the unit, all nurses and MHTs participate in a mandatory shadowing program to ensure that they are properly trained, know how to recognize risk signs and signs of potential patient aggression, and know how to protect themselves from patients who present such a risk. [A420, 889-904]. Staff are not counted toward the staffing grid until they have fully completed all training and the shadowing process. [A420].

E. Nursing Station Heights

Prior to the OSHA inspection, BHC evaluated nursing station heights to ensure that its stations were set at the optimal height to protect staff. [A254-257]. This evaluation determined that all but one station were not in need of adjustment. The rationale behind the decision to not raise the height of the stations was that doing so would create a barrier between patients and staff - which does not equate to a safe unit. *Id.* To the contrary, staff need to be continuously interacting with patients to ensure safety on the unit; station barriers would interfere with this need. *Id.*

The Extended Care Unit (EAC) is the only exception to this evaluation. [A255]. The EAC is a unique unit where patients who need an extended period of time to become stabilized are housed. *Id.* Because a patient in the EAC unit had attempted to climb over the nurse's station, the hospital determined that a higher station was appropriate, and that change was made. [A255-256].

F. Security

BHC has carefully evaluated whether security personnel are needed at the hospital and determined that such personnel are not necessary to ensure the safety of its staff. [A500]. A security person would provide no additional expertise than the staff already well-trained in CPI.⁸ [A501-502].

VI. STANDARD OF REVIEW

This Court will vacate an order of the Commission if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Am. Wrecking Corp. v. Sec’y of Labor*, 351 F.3d 1254, 1265 (D.C. Cir. 2003). The factual findings of the Commission, if supported by **substantial** evidence on the record considered as a whole, shall be conclusive. 29 U.S.C.S. § 660(a). Under this standard, the court must uphold Commission findings so long as there is such relevant evidence as a reasonable mind might accept as

⁸ To the extent security personnel tend to be physically imposing, BHC has found no indication that an imposing figure would create a more therapeutic environment for patients or a safer environment for staff. [A503].

adequate to support a conclusion. *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1204). In determining whether the Commission’s findings of fact were “supported by substantial evidence,” this Court looks to the record “as a whole,” considering that “evidence that is substantial when viewed in isolation may become insubstantial when contradictory evidence is taken into account.” *See, id.* at 1261 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

VII. SUMMARY OF ARGUMENT

OSHA cited BHC under Section 5(a)(1) of the General Duty Clause, of the Occupational Safety and Health Administration of 1970 (“OSH Act”) for exposing employees to the hazard of workplace violence, specifically defined as patient to staff aggression. BHC stipulated that it recognized the hazard of patient to staff aggression in its work environment treating patients with a variety of behavioral health disorders. Patients who are treated at BHC are either a potential harm to themselves or others – this is what qualifies them for in-patient hospital treatment. Therefore, these patients are known to have the potential to become aggressive, including the potential to be aggressive to the direct care providers who are trying to help them.

Since the core of BHC’s business is to treat people with the potential for aggression (among other acute psychiatric episodes), BHC has always had in place practices, protocols and policies aimed at minimizing patient aggression incidences

and keeping both patients and staff safe. Some of these methods include the actual clinical treatment of the patients; others involve using techniques to verbally de-escalate patients, or, if that effort fails, to handle the patients in a manner to reduce the likelihood of injury to either patients or staff. BHC uses a patient-handling method called CPI, which is an acronym for the Crisis Prevention Institute, a method that staff are trained on to safely restrain patients who have become out of control.

Prior to reaching the issue of whether there are additional measures that an employer should take to materially reduce a hazard, the Secretary must prove that existing measures were inadequate. *See, Alabama Power Co.*, 13 BNA OSHC 1240, 1987 CCH OSHD ¶ 27,892 (No. 84-357, 1987) (citation alleging insufficient safety rules vacated where employer's safety program was not inadequate); *Jones & Laughlin*, 10 BNA OSHC 1778, 1981 CCH OSHD ¶ 26,128 (No. 76-2636, 1982).” *USPS at* *8. In this case, the Secretary and, ultimately, ALJ Rooney, ignored the numerous steps that BHC was taking to address and reduce patient aggression as well as the precautions in place to safely interact with patients, such as verbal de-escalation and CPI. Further, BHC trained employees annually on verbal de-escalation, CPI and the threat of patient aggression to staff. As an initial matter, the Secretary must show that BHC’s existing safety precautions were inadequate. In analyzing very similar training relating to patient management (verbal de-escalation, responding to Codes, patient handling (CPI)) and the workplace violence program,

as well as policies to address patient aggression, ALJ Rooney found it was lacking in the instant case, but found those same efforts acceptable in the *HRI* case. This completely opposite result is without explanation and is contrary to providing fair notice to an employer on what it is expected to do to comply with the OSH Act. For this reason alone, ALJ Rooney's decision should be overturned and the Citation vacated. However, the Secretary also failed to prove that additional measures would materially reduce the hazard of patient aggression to staff.

As the Supreme Court has indicated and courts have repeatedly affirmed, the OSH Act does not require risk-free workplaces. The Secretary must show that the additional steps proposed by the Secretary and not taken by the employer "were feasible and that their efficacy in reducing the hazard was so compelling that the failure to have implemented them by the time of the inspection rendered [the employer's] process inadequate." *Pepperidge Farms, Inc.*, 17 BNA OSHC 1993; 1997 OSAHRC LEXIS 40 at *190. To meet this burden, the Secretary must prove that specific proposed abatement measures are capable of being put into effect and, equally important, that they would be effective in materially reducing the incidence of the hazard. *Beverly Enterprises, Inc.*, 2000 OSAHRC LEXIS 121 at *121-122 (holding "the Secretary must specify the **particular steps a cited employer should have taken to avoid citation**, and demonstrate the feasibility and likely utility of those measures." (emphasis added)); *National Realty and Constr. Co., Inc.*, 489 F.2d

1257, 1267 (D.C. Cir. 1973). In this case, the Secretary has failed to demonstrate how any of the recommended abatement measures would assist BHC in avoiding future citation or how they would materially reduce the hazard. In fact, the question of what a material reduction of the hazard would be has never been answered by the Secretary. In other words, would one less incident of patient aggression to staff be a material reduction, or would the number need to be greater?⁹ The Secretary has failed to establish what a material reduction means in this case. Moreover, ALJ Rooney opined that the Secretary need not provide that information to the employer. *BHC* Decision at [A157]. Thus, an employer would never know when a material reduction has been achieved; rather, it could always be different depending upon the Secretary's position at any given time.

It is the Secretary's burden, not the employer's, to prove that a hazard may be reduced by *specific* means. The Secretary's abatement recommendations do not explain the specific abatement that would materially reduce the injuries, relying instead on vague notions, such as "as necessary," "effective," "evaluate" and "adequate." Moreover, there has never been a quantification of what material reduction of the hazard in this case would be. In other words, if there cannot be an elimination, how would an employer know that it has achieved abatement to an

⁹ This question is important as the data submitted in the case revealed the BHC had achieved a reduction of patient aggression. *See*, [A928-932].

extent that it would not potentially be cited by the Secretary in the future? Thus, an employer is left to only “hope” that a citation will not be issued in the future – even if all suggested abatement methods were tried. This is clearly a fundamentally flawed approach to due process and fair notice.

The Secretary did not prove that BHC’s existing measures were inadequate or that the Secretary’s proposed abatements would materially reduce the hazard. ALJ Rooney’s decision should be reversed and the Citation should be vacated.

VIII. ARGUMENT

1. The Court erred in holding that BHC had not done all it could do to materially reduce the patient aggression to staff hazard.

“To show that a proposed safety measure will materially reduce a hazard, the Secretary must submit evidence proving, as a threshold matter, that the methods undertaken by the employer to address the alleged hazard were inadequate. Where the Secretary fails to show any such inadequacy, a violation of the general duty clause has not been established. *See, Alabama Power Co.*, 13 BNA OSHC 1240, 1987 CCH OSHD ¶ 27,892 (No. 84-357, 1987) (citation alleging insufficient safety rules vacated where employer's safety program was not inadequate); *Jones & Laughlin*, 10 BNA OSHC 1778, 1981 CCH OSHD ¶ 26,128 (No. 76-2636, 1982).” *USPS at* *8. The Review Commission has ruled on the issue of adequacy of the use of safety rules to materially reduce a hazard. In the *Alabama Power* case, the Review Commission held that an employer may use work rules to materially reduce or

eliminate a hazard. In that case, employees were given direction to keep clear of coal dumping trucks. An employee was fatally injured when one of the coal trucks turned over on top of him. The Review Commission analyzed whether this work instruction was sufficient to protect employees from the hazard of the coal trucks overturning and found that it was sufficient. The hazard of coal trucks overturning was recognized by the employer and the work rule was designed to abate the hazard. “In certain situations a specific and detailed safety rule may be necessary, whereas in other situations such detail may be impractical, and it may be necessary to rely on employee judgment. *See, Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir.1984); *Capital Electric Line Builders of Kansas, Inc. v. Marshall*, 678 F.2d 128, 131 (10th Cir.1982).” *Id.*

In the instant case, the court held that BHC had not done all it could do to feasibly reduce the hazard of patient aggression at the hospital. Yet a review of the record provides no evidence of any further actions that BHC could have taken or programs it could have implemented to further minimize the patient aggression hazard. In fact, the uncontroverted data introduced into evidence demonstrate that BHC had made significant advances in patient aggression reduction rates prior to the 2016 inspection that the Secretary neither disputed nor was able to challenge with any specific alternative rate. Accordingly, the Commission’s finding is not

supported by substantial evidence in the record, and its holding that BHC could have done more to further reduce patient to staff aggression is arbitrary and capricious.

BHC introduced evidence of a myriad of components of its workplace violence program, some of which were ignored completely by the ALJ in reaching her decision, including, for example, BHC's verbal de-escalation training, its workplace violence training, and the shadowing training program it provides to new hires. Overall, the Commission failed to consider that BHC introduced evidence of the extensive efforts it has taken to reduce patient to staff aggression, which resulted in BHC successfully reducing overall patient aggression at the time of the OSHA inspection.

The myriad of efforts taken by BHC were testified to by many witnesses, but were best summed up by Risk Manager, Ann Hunter. Ms. Hunter testified about the multiple policies, programs and practice in place prior to and during the OSHA inspection to reduce patient aggression. Inexplicably, the court ignored the extensive testimony on this point. Evidence introduced by Ms. Hunter demonstrated that the overall patient aggression rate (which included incidents of patient aggression to staff) had dropped significantly from 2014 to the time the OSHA inspection commenced in July 2016.¹⁰ [A471-472, 492-493, 928-932]. The reduction of overall patient aggression from 2014 to 2016 was dramatic – the rate

¹⁰ The OSHA inspection began in July 2016 and concluded on January 5, 2017.

calculated per 1000 patient days went from 11.85 in 2014 to 4.41 in 2016. [A928-932]. Ms. Hunter testified at length about all the tracking and trending that is done in an effort to reduce any injuries occurring. [A472-493]. Particularly insightful is testimony from Ms. Hunter about why all of the tracking and trending is helpful to keep staff safe:

“All of this is essential. It is first telling us if the policies and procedures that we have in place to keep everyone safe are working. If we need to add some intervention, where more support might be needed. Something, for instance, such as contraband means that something may danger us be on a unit. We might have caught it as a good catch. We don't want to wait until something bad happens. We want to know when we have trends before something bad happens, so this is our way to be prepared, anticipate, intervene when something starts to change before something bad happens.

Q: And are you aware of any one thing that you could do at Brooke Glen to reduce patient aggression?

A: I think many of the things we do to prevent patient aggression is helpful and works. To completely eliminate ever somebody suffering with a psychiatric crisis acting out in some way, being paranoid, afraid, not knowing what -- is that always, always going to be preventable?

Probably not. But I think we do have lots of systems in place that can reduce the probability.

Q: So then, when you bring this information to the Safety Committee, what's the purpose of you bringing this information?

A: To look for those trends and patterns that are happening and opportunities to intervene to reduce the likelihood or probability of anybody getting hurt.” [A485-486].

In response to the testimony of several BHC witnesses about the successful reduction in patient aggression, the Secretary provided no evidence of how additional efforts would successfully reduce this number further. In fact, Ms. Hunter testified that even despite their best efforts, the aggression rate went up slightly in 2016 to 4.41 from the low in 2015 of 3.27. This was due to two particularly difficult patients who were being treated in 2016. [A498-499]. In that case, additional efforts were made in an attempt to solve the difficulty of these patients. However, as the numbers represent, due to the difficulty of some patients, patient aggression rates can increase. Even the Secretary’s own expert analyzed this data in her expert report.

The Secretary’s expert recognized and acknowledged that there was a significant reduction in the rate of patient aggression at BHC, and that this was important data in making hazard feasibility determinations. [A337-339]. The

Secretary's expert testified that looking for a significant reduction was also important, yet could not challenge BHC's reduction rate with any specific alternative rate. [A336].

In sum, BHC implemented effective efforts that materially reduced the hazard of patient aggression to staff prior to the OSHA inspection. Undisputed data demonstrate the effectiveness of these efforts. The Secretary failed to provide any data or evidence whatsoever that a further reduction was feasible.

Moreover, BHC provided data from other comparable behavioral hospitals operating under the same management company as part of R-55 [A928-932]. This additional data provides a useful benchmark to evaluate for patient aggression reduction metrics and determine whether a successful reduction had occurred. UHS data are depicted as a dotted line on R-55 [A928-932]. The 2016 data for patient aggression shows the UHS average rate between 8 and 10. Thus, BHC not only successfully reduced its patient aggression rate compared to prior years, but it also had a significantly lower rate compared to the average rate for comparator behavioral health hospitals in 2016. Accordingly, BHC provided a benchmark to weigh whether its efforts of reducing patient aggression were successful. This benchmark demonstrated that BHC was successful. The Secretary provided no benchmarks or guidelines of any kind. Nevertheless, the ALJ held that BHC had not

successfully addressed the hazard of patient aggression to staff.¹¹ This decision is not supported by substantial evidence in the record and is arbitrary and capricious.

2. The Court erred by not appropriately applying the General Duty Clause to the facts of this case, violating Respondent's Due Process and applying an incorrect burden of proof.

The Secretary is tasked with proving that a feasible abatement method exists that “conscientious experts, familiar with the industry” would recommend as methods to eliminate or materially reduce the recognized hazard. *Pepperidge Farms, Inc.*, 17 BNA OSHC 1993, 2032, citing *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973). The parties agree that the hazard of patient aggression to staff in the psychiatric healthcare setting cannot be completely eliminated. BHC argued that the failure of the Secretary to provide information defining a material reduction of patient to staff aggression was a fatal flaw to the Secretary's case. The Judge, however, ruled that there is no need for the Secretary to prove “that the hazard can be eliminated or that the abatement methods will reduce the hazard by a specific quantifiable measurements.” *BHC Decision* at [A157]. The decision conflates recognition of the hazard between BHC and the industry with fair notice of what BHC must do to comply with the OSH Act. Interestingly, much of the decision's 77 pages is devoted to demonstrating that BHC and the industry

¹¹ If the overall rate of patient aggression is reduced, then necessarily, patient aggression to staff would also be reduced.

recognize the hazard of patient to staff aggression. This was not even an issue in dispute, as BHC stipulated that it had recognized the hazard of patient aggression to staff (which, of course, is why BHC has so many protocols in place to reduce patient aggression).

Further, the decision simply adopts the Secretary's very simplistic view of abatement – to paraphrase, “just try everything.” Directing an employer to “try everything” – without any consideration of industry standards or other defined regulatory or legal requirements - does not provide an employer fair notice and warning of what must be done to comply with the law.

Further missing the point, the decision relies heavily on the fact that patient-to-staff aggression was still occurring, and finds that BHC failed to implement policies and programs that would decrease the hazard. *BHC Decision* at [A156-157]. This is wholly unsupported by the evidence. The uncontroverted testimony from all management witnesses explains in detail the policies and programs in place to reduce patient to staff aggression. Ms. Hunter's testimony summarized these efforts. Importantly, BHC's data demonstrate that, not only did it have policies and programs in place designed to minimize patient to staff aggression, but these efforts worked and they did in fact successfully materially reduce patient aggression at the facility from 2014 to 2016. In fact, BHC reduced the rate of patient aggression during the course of the OSHA inspection – reducing patient aggression from 5.89 in July 2016

to 3.82 in December 2016. Thus, even without implementing any of OSHA's suggestions, BHC was reducing the risk of patient aggression overall – which, includes patient-to-staff aggression.

The decision fails to consider whether or how this data on patient aggression would actually provide BHC with fair notice of a metric to determine if programs and policies in place were effective in materially reducing the hazard of patient aggression to staff. Yet, even the Secretary's own expert thought that data-driven processes, which are exactly what BHC was using with its MIDAS¹² system, were an effective methodology to reduce patient to staff aggression. [A350].

The ALJ ultimately finds that that Secretary need not prove anything at all regarding what a material reduction of the hazard would be. In other words, the Secretary does not have to define for an employer what constitutes a material reduction of a hazard. This would be similar to a motorist driving on a stretch of road without a posted speed limit, but being required to comply with an unknown speed limit established each day by a different police officer. In other words, the violation is purely up to the individual tasked with enforcement. Indeed, this would violate all concepts of fair notice. Yet, in this case, there is no metric to be followed

¹² The MIDAS system is a computer based system where incident data is entered into. It is from this system that reports such as R-55 [A928-932] are generated. [A468-473, 511-512].

to allow the employer to know whether it has reached a material reduction of the hazard sufficient to avoid a citation.

Ultimately, the Secretary's expert testified that she would look for a "significant reduction" of incidents of aggression to determine the effectiveness of controls. [A336]. When asked what that significant number would be, however, she testified that she could not put a number on it.¹³ *Id.* And, when presented with actual data that would demonstrate the significant reduction of patient aggression as demonstrated in R-55 [A928-932], it was completely disregarded. [A337-339].

If this decision stands, the criteria for the Secretary to meet its burden is essentially non-existent. OSHA will need not prove anything at all related to material reduction of hazard. And, since BHC demonstrated a significant or material reduction of patient aggression in this case, the unavoidable implication of the decision is that any more than zero incidents may result in a Citation. This is exactly what the U.S. Supreme Court held cannot be done in that it would be imposing strict liability for compliance with the General Duty Clause. *See, National Realty, supra.* Simply put, there is no notice of what must be done to comply with the OSH Act in the behavioral hospital industry.

¹³ When Respondent's counsel attempted to question the Secretary's expert, who was purportedly testifying about methods that could materially reduce the hazard, both the Secretary's counsel and the ALJ created obstacles. [A331-336].

3. The Judge erred in finding that the Secretary's expert's opinion of feasible abatement methods were recognized by either BHC or the industry.

In yet another exceedingly light analysis, the court fails to address the point that feasible abatement is determined by “conscientious experts, familiar with the industry.” *Pepperidge Farms, supra*. The decision faults Respondent's expert for relying upon what is customary in the industry to determine feasible abatement. *BHC* Decision at [A94]. Respondent's expert works as a registered nurse in the industry and is a certified mental health nurse. [A516]. She is intimately familiar with the industry, having conducted about 100 risk assessments in this area [A515] and worked in the industry for over 40 years. [A517]. Respondent's expert is in fact a “conscientious expert, familiar with the industry.”

In contrast, the Secretary's expert is an academic with no real experience in the industry and who relied on studies to support her position with regard to feasible abatement methods. [A271]. Yet, when questioned about the studies that back up the feasible abatement methods she recommended, the best she could point to was one study stating that a hospital should have a process to address workplace violence. [A341-345].

More confounding, however, is the fact that in the *HRI* case, with similar testimony, the same Judge held that this **identical** study did not “establish that the Secretary's proposed methods of abatement would materially reduce the hazard

beyond what has been accomplished by HRI's methods." *See, HRI Decision* at [Add.202].

Nevertheless, if having a process is the ultimate abatement method required, as outlined by the Secretary's expert, then the court should have ruled in favor of BHC. Indeed, BHC has a comprehensive process for identifying patient aggression, and undisputed data demonstrating the effectiveness of the process in terms of incident reductions. Yet, the court seemingly gives no attention to this at all. Rather, the decision offers pages and pages of strained attempts to justify the Secretary's expert witness testimony regarding feasible abatement methods, while completely ignoring the fact that there was only one study that supported the expert's recommended abatement -- and that was one that BHC utilized and utilizes -- having a process.

4. BHC's Affirmative Defenses Foreclose The Secretary's Citation.

Not only did the court err in finding that the Secretary established its *prima facie* case, but BHC's affirmative defenses should have defeated the citation even if the Secretary *had* carried her burden.

a. The General Duty Clause Is Unconstitutionally Vague As Applied, And BHC Lacked Fair Notice Of The Secretary's Abatement Measures.

"[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and

differ as to its application violates the first essential of due process of law.” *Connally v. Gen Constr. Co.*, 269 U.S. 385, 391 (1926). For this reason, the OSH Act is unconstitutional as applied unless it provides “reasonably prudent employer[s]” with “notice and warning” of the prohibited conditions. *Asamera Oil (U.S.), Inc.*, 9 BNA OSHC 1426, 1980 WL 81803, at *14 (Nos. 79-949 & 79-1756) (ALJ).

The prohibition against vague standards applies with particular force in the context of the General Duty Clause, which provides only that employers “shall furnish . . . a place of employment . . . 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). “[A]ny statute . . . imposing general obligations,” such as the General Duty Clause, “raises certain problems of fair notice.” *Nat’l Realty*, 489 F.2d at 1268 n.41. [T]hese problems dissipate,” the Ninth Circuit has explained, only “when we read the clause as applying when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required under the job conditions where the citation was issued.” *Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir. 1981); *see also, e.g., Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1984 WL 34818, at *1 (No. 77-2350)(finding that the “broad, generic definition” of a hazard did not “apprise [the employer] of its obligations and identify conditions or practices over which [it could] reasonably be expected to exercise control.”).

The Secretary's citation disregards these principles. BHC's precautions were more than "reasonably prudent."

In stark contrast is ALJ Rooney's decision in the *HRI* case. There, Judge Rooney herself found that similar precautions were either adequate to defeat the citation at issue or that the Secretary failed to prove that similar proposed abatement measures would materially reduce the hazard. Illustrative of this point is ALJ Rooney's summation in the *HRI* case:

"In sum, the Secretary's proposed abatement methods essentially fall into one of two groups. The first group consists of measures HRI has already taken: remove dresser drawers, preclude soda bottles, have sufficient staff, involve employees in workplace violence prevention, require incident reporting and tracking, train workers about how to prevent and respond to workplace violence, limit access to items that could harm staff, have a comprehensive written workplace violence prevention program, implement, monitor and assess compliance with that program. For this group, the shortcomings the Secretary alleges are either not supported by record evidence or the Secretary fails to show that the proposed additional action would materially reduce the hazard beyond what HRI already achieved. *See, Ala. Power*, 13 BNA OSHC at 1245 (finding no violation of the general duty clause, when

the Secretary did not show that employer's measures were inadequate or that additional efforts would have been more effective); *Beverly*, 2000 OSAHRC LEXIS 121 at *120 (Secretary must show that the abatement "would be effective in materially reducing the incidence of the hazard").

The second category of proposed measures consists of efforts that the Secretary failed to establish would reduce the hazard of patient on staff violence at HRI, e.g., install panic alarms and change the height of the nurses' station. For this employer, the Secretary did not show these steps were necessary when evaluated in the context of the precautions already in use. *See, Cerro Metal*, 12 BNA OSHC at 1822-23 (Secretary must show the actions are necessary and valuable for the worksite's safety program); *Pepperidge Farms*, 17 BNA OSHC at 1995 (vacating a general duty clause violation when the Secretary failed to show that further abatement was required considering what was already undertaken)." *HRI Decision* at [Add.240].

Inexplicably, the court comes to a completely opposite result in this case. Yet, a review of the facts submitted in each of the cases reveal very similar protocols, training, management of patient aggression, employee involvement in committees, identical workplace violence trainings, policies and programs.

For example, BHC's Exhibit 27 [A787-818] is the same as HRI's Exhibit 2 [SSA1-11]. This exhibit is the workplace violence training that is provided to employees at both BHC and HRI. However, the identical exhibit is analyzed completely differently in the two cases. In the *HRI* case, the Judge credits this training as part of adequate training on workplace violence. *HRI* Decision and Order at [Add.203]. Yet, in the instant case, the Judge does not give any credit to the same training. *BHC* Decision at [A103-104, 127-129]. And, this was despite direct unrefuted testimony by the Human Resources Director, Laura Nolet, that employees are trained on this upon hire and annually thereafter. [A388]. The court's analysis of workplace violence training document is clearly arbitrary.

To further convolute her analysis, notwithstanding Ms. Nolet's unrebutted testimony about employee training, ALJ Rooney speculates that there may be no evidence demonstrating that this training was conducted in 2016 or during the inspection time period. *BHC* Decision and Order at [A128]. Yet the training document was obtained by OSHA's compliance officer during the course of his inspection and is part of the inspection file.¹⁴ Further, testimony presented by both Ms. Nolet and Ms. Hunter clearly indicates that this was training that was given as

¹⁴ Note that the document is Bates numbered with the same Bates numbering as other documents produced as part of OSHA's inspection file. Compare Secretary's Exhibit C-34 [A597-600, 204].

part of annual competencies that all direct care staff were required to take. [A388, 513-514]. The ALJ's speculation is unsupported by the evidence in the case.

In addition to both training from the same workplace violence prevention document, both BHC and HRI train employees on verbal de-escalation. In the *HRI* Decision, the court highlights this training and references the Secretary's expert, Dr. Lipscomb, as agreeing this training "was good." *HRI* Decision at [A203-204]. In contrast, the *BHC* Decision does not even reference this training. Yet Joel Somers, the trainer for Verbal De-Escalation, testified about this very training and the value it adds in handling a patient in crisis. [SSA12-20]. Not surprisingly, this verbal de-escalation training was an exhibit in both the *BHC* and *HRI* trials. *See*, Exhibit R-32 [A838-883] of *BHC* trial and Exhibit 13 of *HRI* trial, [SA1-SA168].¹⁵

Additionally, in both cases, witnesses testified about the shadowing program mandated for new hires. *See*, *HRI* Decision at [Add.204] and [A420]. In the *BHC* Decision, the ALJ fails to address this training program at all, yet, it is highlighted as important training in the *HRI* Decision.

Finally, both HRI and BHC utilized the same documents for recording employee injuries: the Employee Accident Report ("EAR"). The court notes that the EAR is an effective tool for tracking employee injuries in the *HRI* Decision. *HRI*

¹⁵ The exhibits are in slightly different formats, but are both called Verbal De-Escalation training and were developed for UHS. *See* R-32 [A838-883], and [SA1-SA168], respectively.

Decision and Order at [Add.214-217, 222]. Yet, this same form document, with the same process, is rejected as not being effective in the *BHC* Decision. *BHC* Decision and Order at [A115-121]. EARs were part of the exhibits in both cases and are clearly the identical forms. See, Exhibit C-1 in the *HRI* case, [SA169-SA179], referenced at [Add.194] of the *HRI* Decision and Exhibit C-56 [A719-720] in the *BHC* case referenced at [A89] of the *BHC* Decision.

In sum, with remarkably similar evidence presented on the identical legal issue, the two cases come to diametrically opposite results. Any employer reading the two decisions to determine its compliance obligations in this area would be completely mystified. Certainly, that is the case for *BHC*.

The contrast with the *HRI* Decision highlights the arbitrary nature of the court's decision in this case, and, further, demonstrates that this decision is not in accordance with the due process clause of the Constitution requiring fair notice and warning of prohibited conditions.

b. The Secretary Was Required To Use Rulemaking, Rather Than Ad Hoc Adjudication, To Regulate The Hazard of Workplace Violence.

The Supreme Court has instructed that agencies should perform “the function of filling in [statutory] interstices . . . as much as possible, through the quasi-legislative promulgation of rules.” *SEC v. Chenery*, 332 U.S. 194, 202 (1947). Problems of notice and fairness arise when agencies use adjudication to develop

policy on novel issues or change their existing policy. *See, id.* at 203; *see also Martin v. OSHRC*, 499 U.S. 144, 158 (1991) (noting that “the decision to use a citation as the initial means for announcing a particular interpretation may bear on the adequacy of notice to regulated parties”).

Agencies must therefore use rulemaking if the problem of retroactively deeming conduct unfair, which is inherent in the use of adjudication, outweighs “the mischief of producing a result which is contrary to a statutory design.” *Chenery*, 332 U.S. at 203. In *Ford Motor Co. v. FTC*, for example, the Ninth Circuit announced that agencies may proceed by adjudication “to enforce discrete violations of existing laws where the effective scope of the rule’s impact will be relatively small,” but must proceed by rulemaking if they seek “to change the law and establish rules of widespread application.” 673 F.2d 1008, 1009 (9th Cir. 1981).

The nebulous, complicated, and individualized nature of workplace violence, at least as the hazard exists in the behavioral hospital setting, makes reliance on the General Duty Clause as the enforcement tool particularly problematic. Evidenced by the Secretary’s inability to provide any consistent guideposts to notice employers of their compliance obligations, and in fact the stark lack of due process available to BHC in this case in light of the *HRI* Decision, demonstrates that rulemaking -- rather

than the blunt General Duty Clause -- is the only appropriate tool to use to establish and enforce compliance obligations.¹⁶

c. Recent Decisions from OSHRC have Created Further Confusion Regarding Citations issued pursuant to the General Duty Clause.

Subsequent to the decision issued in this case, the OSHRC issued decisions in a number of other cases challenging the use of the General Duty Clause to enforce compliance obligations. These cases further complicate and confuse the law surrounding the use of the General Duty Clause and add to the unreliability of how the law will be applied to a General Duty Clause citation. By issuing these decisions, OSHRC has demonstrated why the use of the General Duty Clause is open to abuse by the Secretary and can result in arbitrary and capricious rulings by the OSHRC.

For example, OSHRC issued its decision in *Integra Health Management*, 2019 OSAHRC LEXIS 8 *; 27 OSHC (BNA) 1838; 2019 OSHD (CCH) P33,713, in March 2019, approximately two months after the instant decision was issued.¹⁷ In that case, the majority of the Review Commissioners expressed dismay over the agency's use of the General Duty Clause for workplace violence cases. In particular, Commissioner Sullivan stated that he did not "believe" that Congress expected the Secretary to use the General Duty Clause to apply to workplace violence hazards;

¹⁶ The fact that, unlike several state plans, federal OSHA has been unable to progress a rulemaking to completion in this area is further evidence that reliance on the General Duty Clause is inappropriate.

¹⁷ A little over a month after the decision became a Final Order of the OSHRC.

however, he agreed it covered the hazard in that “specific” case. *Id.* at *45. Commissioner MacDougall went further, expressing the opinion that OSHA should promulgate a standard for workplace violence and that “bad facts make bad law,” *citing Tharpe v. Sellers*, 138 S.Ct. 545, 547, 199 L. Ed. 2d 424 (2018) (Thomas, J., dissenting).” Commissioner MacDougall expressed concern that there would be “precedent...that the workplace violence hazard alleged here is a hazard covered by the general duty clause. *See also Sucic v. McDonald*, 640 F. App'x. 901 (Fed. Cir. 2016) (Wallach, J., dissenting).” *Integra* at *84 (O.S.H.R.C. March 4, 2019). Nevertheless, true to Commissioner MacDougall’s prediction, the *Integra* case has made bad law as all Commissioners upheld the General Duty Clause citation alleging the hazard of workplace violence against the employer.

Creating further confusion, OSHRC issued a decision on February 15, 2019 regarding the Secretary’s burden of proof on the issue of feasibility of abatement, part of the Secretary’s burden in a General Duty Clause case. *Mid South Waffles, Inc.*, 2019 OSAHRC LEXIS 3, (O.S.H.R.C. February 15, 2019). In contrast to the *Integra* decision in which OSHRC glosses over the feasibility of abatement, *Mid South Waffles* holds that the Secretary failed to prove feasibility of abatement due to not providing fair notice of the specific steps the employer should take to abate the hazard – the exact concern for BHC. As the OSHRC held, “absent such specificity, MSW lacked adequate notice as to what the Secretary was claiming was the extent

of MSW's obligation under the general duty clause. In short, the Secretary has merely identified the result it asserts MSW must achieve, but not the additional steps--beyond those the company already had in place--it should have taken to achieve this result and consequently, abate the hazard.” *Id.* at *24. Consequently, the OSHRC reversed the ALJ and vacated the Citation. The reasoning and rationale in *Mid South Waffles* apply precisely to this case.

In yet another case issued this year (after the *BHC* Decision), the OSHRC further analyzed the element of feasibility of abatement. In *A.H. Sturgill Roofing, Inc.*, 2019 OSAHRC LEXIS 7, (O.S.H.R.C. February 28, 2019), the OSHRC ruled that on the issue of feasible abatement methods, if there are multiple abatement methods proffered by the Secretary as alternative means of abatement, then the employer's implementation of any one of them would result in compliance. As the OSHRC held, “the Secretary's post-hearing brief clearly identifies four measures as alternative abatement methods:

CSHO Wallace suggested a **number** of feasible abatement methods. Perhaps *the most obvious means* of reducing exposure to the hazards *was to acclimate* workers to working in the heat Sturgill *could also have feasibly reduced exposure* to the heat hazards by preventing MR from working while wearing clothing wholly unsuitable for hot environments Sturgill *could also have feasibly reduced*

exposure to heat hazards by implementing a formalized work-rest regimen Sturgill *could also have feasibly reduced exposure* to the heat hazards by implementing a formalized water drinking program Sturgill could have feasibly reduced employees' exposure to heat hazards in at least *four separate ways*”

Id. at *30-31. The OSHRC further held that “if the record shows that Sturgill implemented any one of the Secretary's proposed measures, or is equivocal in that regard, the abatement element of the Secretary's burden of proof has not been established.” *Id.* at *31. This is exactly the position that the Secretary took in the BHC case – that there were multiple abatement methods offered and, as expressed by the Secretary in briefing, BHC could have done the following:

1. Performed a Comprehensive Evaluation of WPV at the Workplace;
2. Increased Staffing and Hired Specialized Security Employees;
3. Drastically Improved its Procedures for Summoning Assistance when Patients Become Agitated or Violent;
4. Significantly Improved Post-Incident Measures Such as Documenting WPV Incidents and De-Briefing;
5. Included Non-Management, Front-Line Staff on the Safety Committee;
6. Created and Implemented a Comprehensive Written WPV Prevention Program.

Secretary's Post Hearing Brief at [A53-66]. Thus, according to the *Sturgill* decision, any one of these proposed abatement methods, if implemented by BHC, would have been sufficient abatement such that the citation should have been vacated. Not only did BHC present direct evidence of one of these recommended abatement methods in the case below, but it actually presented evidence on *each* of these methods. Had the *BHC* Decision been issued after *Sturgill*, ALJ Rooney would have been required to vacate the Citation issued to BHC to comply with OSHRC's precedent.

In sum, these recent decisions from OSHRC demonstrate that the use of the General Duty Clause and the resulting case law has created confusion and inconsistency with regard to the application of the General Duty Clause. In particular, the General Duty Clause is impermissibly vague as applied to the facts of this case. Therefore, the Citation must be vacated.

IX. CONCLUSION

For the foregoing reasons, the Court should overturn the court's decision and vacate the Secretary's Citation.

Respectfully submitted this 4th day of November, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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By: /s/ Carla J. Gunnin
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 2019, the within and foregoing Opening Brief of Petitioner BHC Northwest Psychiatric Hospital LLC d/b/a Brooke Glen Behavioral Hospital was submitted for filing with the Clerk of Court via ECF, with service electronically through the Court's ECF system on all registered counsel of record.

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