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

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

GLOSSARY OF ACRONYMS

ALJ – Administrative Law Judge

BHC – BHC Northwest Psychiatric Hospital LLC or Brooke Glen

I. INTRODUCTION

The Secretary of Labor's brief demonstrates the very point that Petitioner argued in its opening brief: there is a fundamental lack of fair notice to the Petitioner regarding what abatement methods would materially reduce the hazard of patient aggression to staff and what specific measures must be enacted for Petitioner to avoid a Citation for a violation of Section 5(a)(1) of the Occupational Safety and Health Act ("OSH Act"). Both the Secretary and the ALJ unreasonably rely upon the opinion of the Secretary's expert witness, Dr. Jane Lipscomb, to establish that there are feasible methods to materially reduce the hazard of patient aggression. A deeper review of Dr. Lipscomb's testimony exemplifies why the Secretary failed to meet his burden of proof regarding feasibility of abatement and why the ALJ's decision on this point is in error. There was no consensus by "conscientious experts, familiar with the industry," and no specific abatement measures identified, only suggestions that BHC evaluate measures to take to reduce the hazard of patient aggression. *Pepperidge Farms, Inc.*, 17 BNA OSHC 1993; 1997 OSAHRC LEXIS 40 at *160. Merely advising an employer to evaluate solutions is not offering specific measures of how to avoid a citation of the OSH Act.

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, 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.

II. STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Opening Brief for Appellant.

III. 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. As stated in its opening brief, 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. BHC maintains that it does have protocols

and processes in place to address the hazard of patient aggression to staff. However, even if it were found that the existing measures were inadequate, the burden of proving what specific proposed abatement measures are capable of being put into effect and would be effective in materially reducing the incidence of the hazard rests solely with the Secretary. *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).

As stated in its opening brief, the Secretary has failed to establish what a material reduction means in this case. As the Secretary's expert witness' testimony revealed, there were only vague notions, such as "evaluate" used to describe the proffered abatement methods. Further, the Secretary's expert maintained that there was no "one size fits all" abatement solution, thereby creating even more murky suggestions regarding abatement. Moreover, the Secretary's expert witness refused to quantify what a material reduction would mean. Thus, according to the evidence presented by the Secretary, an employer would never know what method would abate the hazard or when a material reduction has been achieved; rather, it could always be different depending upon the Secretary's position, or, worse yet, according to the expert who was retained for a case. This is a woefully inadequate

method of providing fair notice to an employer and fundamentally goes to the heart of due process.

IV. ARGUMENT

BHC Lacked Fair Notice Of The Secretary's Abatement Measures.

1. The Secretary Misapplies the A.H. Sturgill OSHRC Case Regarding Feasibility of Abatement Measures.

In its opening brief, BHC presented arguments regarding why its measures to materially reduce the hazard of patient aggression were effective. Thus, BHC maintains that the Secretary did not prove "that the methods undertaken by the employer to address the alleged hazard 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)." In a case issued by the Review Commission after the Decision was issued in the instance case, *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. The Secretary argues that his litigation position in the instant case is that all of the proposed "abatement methods

together would materially reduce the hazard." *Secretary's brief at p. 38-39.* Thus, attempting to argue that the *Sturgill* decision is irrelevant.

However, this is not the case. First, as outlined in its opening brief, the Secretary discussed the abatement measures in its briefing before the OSHRC in the **identical** fashion that it did in the *Sturgill* case – offering a menu of options for abatement. Second, and perhaps more importantly, the Secretary's expert testified that there is no "one size fits all" option for abatement. [A330]. An excerpt from Dr. Lipscomb's testimony further illustrates that the Secretary's own expert was certainly not taking the position that all abatement measures needed to be followed:

> Q I'm actually asking you if there is not a one-size-fits-all approach, and if you go from hospital A to hospital B to hospital C, and it could all be different abatement methods, then how would the hospital know -- how would the different hospitals know what abatement method would be successful in reducing patient aggression enough that they wouldn't be subjected to an OSHA citation?
>
> A Well, when I say one size fits all, I mean there is not a specific, you know, type of alarm that, you know, needs to be implemented in your facility versus another. But when it comes to the process, my recommendation about having a written

> workplace violence prevention program that has genuine employee involvement and utilizes the, you know, universe of information out there about how to develop and implement a program, that has to be present. So the process is one size fits all. But it's up to the individual facility to go through that process like they did in this study and figure out which particular -- from the checklist of feasible abatement measures, you're going to implement that fits your patient population.

[A331-332]. Ultimately, the only abatement that would be "one size fits all" is that there should be a workplace violence program that is developed and implemented. So, according to the Secretary's expert, the only abatement method that "fits all" is abatement method 6, creating and implementing "a Comprehensive Written WPV Prevention Program." Secretary's Post Hearing Brief at [A53-66]. Thus, all of the other five abatement methods offered as the Secretary's litigation strategy are alternatives. And, if BHC were doing any of them, then according to *Sturgill* the Secretary would have failed to prove his case.

A review of at least two of the recommended abatements demonstrates that BHC was in fact doing them, just not to the degree that the Secretary thought should be done. For example, the Secretary states that BHC should have "drastically improved its procedures for summoning assistance when patients become agitated

or violent." Secretary's Brief at p. 60. By the phrasing of this abatement method alone, the Secretary concedes that BHC had procedures for summoning assistance[1] – the Secretary demands that BHC should "drastically improve" the procedures. Advising an employer to "drastically improve" something is not providing any specificity of what the improvement should be. In yet another example, the Secretary states that BHC should "significantly improve post-incident measures such as documenting WPV incidents and de-briefing." Secretary's Brief at p. 63. Here again, the Secretary concedes that BHC had post-incident measures[2] for documenting workplace violence events, however, BHC should have "significantly improved" them.

Simply put, this is not fair notice of measures that BHC could have reasonably anticipated to avoid a Citation in the current case or in the future. Who will be the arbiter of whether BHC has "drastically" or "significantly" done something? In practice, it would be the next OSHA compliance officer who inspects BHC. Defining the criteria as "drastically" or "significantly" improving its processes is a completely arbitrary standard left to the subjective discretion of an individual OSHA compliance officer - a far cry from adequate fair notice and certainly not something that meets the level of proof set out in other cases. *Beverly Enterprises, Inc.*, 2000

[1] BHC outlined its procedures for summoning assistance in its opening brief.
[2] BHC outlined its procedure for employees reporting injuries and the tracking and trending it does of workplace violence incidents in its opening brief.

OSAHRC LEXIS 121 at *121-122; *National Realty and Constr. Co., Inc.*, 489 F.2d 1257, 1267 (D.C. Cir. 1973).

2. The Secretary's Recommended Abatement Measures in Litigation Differed From the Originally Issued Citation.

As the Review Commission recently 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." *See Mid-South Waffles, Inc.,* No. 13-1022, 2019 OSAHRC LEXIS 3, *24 (OSHRC Feb. 15, 2019) ("[W]hen an employer already has a safety program designed to eliminate the recognized hazard, the Secretary must 'show [the] specific additional measures' required to abate the hazard.") (quoting *Pelron Corp.*, 12 BNA OSHC 1833, 1836 (No 82-388, 1986) (emphasis added)). The Secretary did not pursue all of the abatement methods that were originally offered when the Citation was issued. Yet, the Secretary failed to amend the complaint and citation to define the abatement methods that he intended to pursue during litigation. A review of the original abatement methods offered, and the abatement methods offered during litigation reveal a stark contrast. The original Citation offered five categories of abatement methods with many containing multiple subparts. The categories were as followed:

a. Evaluation and modification to the Management of Aggression policy and the Workplace Violence policy.

b. Develop workplace violence controls, including implementation of the following[3] engineering and administrative controls and methods used to prevent potential workplace violence incidents.

c. Development of a recordkeeping system designed to report any violent incident. The reports should be in writing and maintained for review after each incident and at least annually to analyze incident trends.

d. Evaluation of training needs and implementation of appropriate workplace violence training. Determine the appropriate length of time between refresher classes and ensure affected employees received the training within that timeframe. The training should include the employer's workplace violence prevention program, crisis prevention, de-escalation techniques, the employer's policies and, requirements for recording and documenting a patients' aggressive behavior, and how and when to complete an Employee Accident Report

[3] Multiple suggestions were offered under this category.

> e. Annually review the workplace violence prevention program, including updating the program as necessary. Such review and updates should set forth any mitigating steps taken in response to any workplace violence incidents. Solicit and include employee input in the review.

See Secretary's Complaint with Citation [A28-51]. Compare the abatement methods that the Secretary litigated:

> 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.

A comparison of category "a" in the Citation compared to category "6" in the litigation reveals a significant difference between the position the Secretary took at the time of issuance of the Citation versus his litigation position. In the Citation, the

Secretary stated that BHC should evaluate and modify its management of aggression and workplace violence policy, yet, in litigation, the Secretary changed this to creating and implementing a comprehensive workplace violence policy. Further, the Secretary abandoned some proffered abatement methods completely during litigation, such as evaluating nursing station heights, using a buddy system and blocking pads. See Citation Recommended Abatements b. iii, iv, and v. [A37].

Thus, even the Secretary could not offer consistent means of feasible abatement methods from the issuance of the Citation to the litigation of the case. Rather, the Secretary proffered shifting means of abatement. This is not the type of notice Courts have held to be sufficient to address due process concerns. "[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, 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). Moreover, this shifting of recommended abatement methods demonstrates that there is no consensus amongst "conscientious experts, familiar with the industry" as to what would be a feasible abatement method that would 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).

Indeed, a further review of Dr. Lipscomb's testimony reveals that she intentionally does not proscribe any specific abatement method, but, rather, thinks an employer should evaluate methods to make determinations about abatement. As Dr. Lipscomb testified:

> Q So, Dr. Lipscomb, going back to the question -- I'm asking you if a hospital had a work -- a comprehensive workplace violence prevention program, would that be abatement in your opinion to the hazard of patient aggression to staff?
>
> A I think the best answer is in my report I lay out what I see as the feasible abatement measures in this case for Brooke Glen. And I'm careful not to be very prescriptive about this particular engineering control versus that. In fact, we can look in my report where I say Brooke Glen should be evaluating and then implementing if they find the need, you know, X, Y, or Z.

[A335]. In sum, rather than the Secretary carrying his burden of proof to show any **specific** abatement measures that BHC should implement above what it is already doing, the Secretary's expert witness **intentionally** declined to provide specific abatement measures.

3. The ALJ Erred in Ruling that BHC Knew of Feasible Abatement Measures and Failed to Implement Them.

The ALJ found that "BGH took some steps to develop abatement measures." BHC Decision and Order at [A156]. The ALJ then found that BHC "failed to implement many of the measures it identified as ways to protect employees and minimize serious injuries from workplace violence." This is a flawed analysis. BHC was taking multiple steps to reduce incidents of patient aggression at its hospital as were outlined in detail in its opening brief.

In the Secretary's brief, the tracking and trending of patient aggression is minimized because it takes into account all patient aggression – not just patient aggression to staff. Secretary's Brief at p. 25-26. Yet, tracking and trending all patient aggression regardless of whether any staff are hurt is exactly what should be done. If overall patient aggression decreases, then it necessarily holds true that patient aggression to staff is reducing as well. BHC had a dramatic reduction of overall patient aggression going from a rate of 11.85 in 2014 to 4.41 in 2016. R-55. This was not done accidentally or because BHC had failed to implement abatement methods, rather, as testified to at length by BHC's risk manager, Ann Hunter, this was due to specific efforts. [A472-493].

Moreover, both the ALJ's and the Secretary's reliance upon this Court's ruling in *SeaWorld of Fla., LLC v. Perez,* 748 F.3d 1202 is misplaced. In SeaWorld, the employer had already enacted the exact abatement method that was being suggested

by the Secretary. As this Court held, "after Ms. Brancheau's death, SeaWorld required that all trainers work with Tilikum from a minimum distance or behind a barrier, and "waterwork" ceased with all of its killer whales… SeaWorld had not argued the Secretary's proposed abatement was not economically or technologically feasible and had already implemented abatement for at least one of its killer whales." *Id. at * 1215.* The issue in the instant case is what specific feasible abatement method will materially reduce the hazard of patient aggression towards staff. There was no evidence presented that BHC had already implemented a specific abatement measure that was recommended by the Secretary. Indeed, the Secretary's Citation and litigated abatement methods demonstrate that he did not assert that BHC had implemented those abatement measures. The Secretary stated in his brief that the "ALJ based her finding that the Secretary's identified abatement methods were feasible and effective on Dr. Lipscomb's expert opinion." Secretary's Brief at p. 36, citing BHC Decision and Order at [A95, 135-153]. Thus, the Secretary has not taken the position that BHC had already implemented a feasible abatement method that would reduce the hazard. Further, for all the reasons stated previously, the ALJ's reliance on Dr. Lipscomb's opinion 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). Dr. Lipscomb intentionally did not provide a specific abatement

method in her report or during her testimony that would materially reduce the hazard. The lack of specificity as to an abatement method lacks the requisite notice to BHC of an abatement method that will materially reduce the hazard and the Citation must be vacated.

V. 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)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,206 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and

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By: */s/ Carla J. Gunnin*
Carla J. Gunnin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 4, 2019, the within and foregoing Reply 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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