

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

|                                  |   |                  |
|----------------------------------|---|------------------|
| THOMAS E. PEREZ,                 | ) | OSHRC DOCKET NO. |
| SECRETARY OF LABOR,              | ) | 13-1124          |
|                                  | ) | REGION IV        |
| Complainant,                     | ) |                  |
|                                  | ) |                  |
| v.                               | ) | INSPECTION NO.   |
|                                  | ) | 781282           |
| INTEGRA HEALTH MANAGEMENT, INC., | ) |                  |
|                                  | ) |                  |
| Respondent.                      | ) |                  |

**SECRETARY'S POST-HEARING BRIEF**

Complainant Secretary of Labor, United States Department of Labor (“the Secretary”), files his Post-Hearing brief pursuant to Occupational Safety and Health Review Commission (“Commission”) Rule of Procedure 2200.74, 29 C.F.R. § 2200.74, and the Judge’s Order.

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## II. STIPULATIONS

In the Joint Prehearing Statement dated April 10, 2014, the parties agreed that the following facts were admitted:

Integra, based in Owings Mills, Maryland, performs mental and physical health assessments and coordinates case management via contracts with various insurance companies. These assessments are performed by employees known as “community service coordinators.” Integra performs these services in four states: Tennessee, Pennsylvania, Maryland, and Florida. There are no company offices in Florida; service coordinators work from their homes or in the field. The Integra service coordinator program focuses on helping clients receive appropriate medical care. Service coordinators are assigned a caseload of clients and are responsible for calling them and for face to face meetings during which the clients are assessed and encouraged or persuaded to register for services. Insurance companies apparently refer these clients to companies such as Integra due to chronic difficulties in contacting them. Many of the clients suffer from mental illness.

On December 13, 2012, an inspection was initiated when the OSHA Tampa Area Office received an anonymous phone call reporting a workplace violence fatality. Three days earlier, on December 10, 2012, (b) (6) (b) (6) (b) (6) an Integra service coordinator, was fatally stabbed by a mentally ill client. The victim was meeting the assailant at his house for a required face to face visit to conduct an initial assessment.

Joint Prehearing Statement, p. 8.

## III. FACTUAL BACKGROUND

This case is the result of an inspection conducted by the Occupational Safety and Health Administration (“OSHA”), Tampa Area Office, following a workplace fatality involving Respondent Integra Health Management, Inc. (“Respondent” or “Integra”) on December 10, 2012.

OSHA Compliance Safety and Health Officer (“CSHO”) Jason Prymmer conducted a fatality-related safety and health inspection (pursuant to the Occupational Safety and Health Act of 1970, as amended) of Respondent as a result of the workplace death of (b) (6) (b) (6) (b) (6) (Prymmer, Tr. 77). As a result of his findings and recommendations, on June 6, 2013, OSHA

issued one "Serious" Citation alleging a violation of the OSH Act's general duty clause with a proposed penalty of \$7,000, and one "Other Than Serious" Citation alleging a violation of regulation set forth at 29 C.F.R. § 1904.39(a), with a proposed penalty of \$3,500. OSHA contends that (1) Integra did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that employees were exposed to the hazard of being physically assaulted by members with a history of violent behavior (OSHA § 5(a)(1)); and (2) Integra did not report to OSHA the work-related death of its employee (b) (6)(b) (6) (29 C.F.R. § 417(b)). Integra contested the Citations and proposed penalties and a hearing was held on May 6-9, 2014, in Tampa, Florida, before Judge Dennis L. Phillips.

#### **IV. FINDINGS OF FACT**

1. Jurisdiction of this action is conferred upon the Commission by §10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq. (hereinafter "the Act"). See Complaint, ¶ I, Answer, ¶ I.
2. Integra is an employer engaged in a business affecting commerce within the meaning of §3(5) of the Act. See Complaint, ¶ II, Answer, ¶ II.
3. Integra's principal place of business is at 10055 Red Run Boulevard, Suite 105, Owings Mill, Maryland 21117. See Complaint ¶ III and Answer ¶ III.
4. On December 10, 2012, (b) (6)(b) (6)(b) (6) an employee of Respondent Integra, was fatally stabbed in the course of her employment by (b) (6)(b) (6) a member serviced by the Integra program. Joint Prehearing Statement, p. 8.
5. Integra did not report the fatality to OSHA; rather, the fatality was reported to OSHA by an anonymous caller. (Prymmer, Tr. 82, 86).

#### **Service Coordinator Job Description and Conditions**

6. In Florida, Integra contracted with Amerigroup, a medical insurance company. (Rochelle, Tr. 270).

7. Amerigroup provided clients to Integra who were “high utilizers”, meaning they often used the hospital’s emergency rooms for medical treatment. (Rochelle, Tr. 271).
8. Integra’s service coordinators (“SCs”) coordinate services for people with medical and mental health issues. The purpose of the program is to get members connected with doctors for their treatment. The program’s goal is to prevent the members from over utilizing hospital emergency rooms for their treatment. Service coordinators were to build a rapport with members to get them to consent to receive these services from Integra. (Rochelle, Tr. 250).
9. Between May and October of 2012, SCs in Florida were supervised by Laurie Rochelle (“Rochelle”), a licensed mental health counselor. (Rochelle, Tr. 243, 245)
10. Rochelle supervised the nine SCs in the Florida area. (Rochelle, Tr. 245, 287).
11. Rochelle reported to Integra Vice President Melissa Arnott (“Arnott”) and her duties included training, caseload assignment and geographical assignments. (Rochelle, Tr. 245, 246).
12. SCs did not work out of an office and communicated with their supervisors by telephone and email. (Rochelle, Tr. 269, 288). Weekly meetings were conducted by telephone. (Rochelle, Tr. 269).
13. Rochelle attempted to assign SCs to geographical areas that were familiar to them. Rochelle believed this was an important safety precaution. However, her supervisor Arnott told her that assigning cases based on geographical area was unnecessary. (Rochelle, Tr. 254, 255)
14. Rochelle assigned SCs to work in neighborhoods and areas that were not familiar to them. SCs told Rochelle that there were not comfortable with these assignments. (Rochelle, Tr. 260)
15. SCs were required to make at least two face to face contacts with clients each month. (Rochelle, Tr. 255).
16. SCs primarily worked alone. (Schneider, Tr. 452).
17. Rochelle assigned SCs a very large caseload. (Rochelle, Tr. 260). The SCs caseloads started off at about 25 to 30 cases, but increased to as high as 50 to 60 per SC. (Schneider, Tr. 454).
18. The SCs job duties included going out into the community to visit clients and to assist them with getting medical treatment/medications, and a variety of other services such as obtaining transportation, public assistance and housing. (Rentz, Tr. 369).

19. "Locating them was the first priority. To do whatever we could to located them. Go in wherever, no matter what the conditions looked like, no matter what the situation was to try and locate them." (Daniel, Tr. 436).
20. When asked to describe the members she serviced, service coordinator Kimberly Daniel stated, "Dual diagnosis, mental illness and medical...was how it was presented. Come to find out later that they would also have ... violent histories, robbery, armed robbery, sexual assault backgrounds that weren't always – were not disclosed to us." (Daniel, Tr. 436).
21. Integra's ultimate goal was to reduce hospital and crisis stabilization admissions. (Schneider, Tr. 450).
22. Melissa Arnott told SCs to locate members "at any cost necessary" (Daniel, Tr. 437).
23. SCs were to make sure that members were taking their prescribed medications. (Stevens, Tr. 416). If the members were not compliant with their doctors' orders, SCs were instructed to find out why. (Daniel, Tr. 437-38)
24. SCs spent 15 to 20 percent of their time driving members in the SCs' personal vehicles to doctor's visits, psychiatric visits and mental health facilities. (Schneider, Tr. 452-453; Stevens, Tr. 417; Hinman, Tr. 809).
25. It was mandatory for SCs to drive members in the SCs' personal vehicles to psychiatric appointments. (Stevens, Tr. 430).
26. Employees did not feel safe driving certain mentally ill members in their personal vehicles because these members were not always taking their medications. (Stevens, Tr. 418-19).
27. Service Coordinators went to hospitals, mental health facilities, clients' homes, homeless shelters and restaurants to meet and find clients. (Rochelle, Tr. 251).
28. Service coordinators would meet with members alone in areas off the beaten path, in areas where the general public could not see them; e.g., trailer parks, government housing projects, and high crime areas. (Prymmer, Tr. 134:20-25; 135:1-4).
29. SCs would usually attempt to locate clients by going to their homes first. (Rentz, Tr. 369). They would also visit homeless shelters, "abandoned looking buildings that looked like they should be condemned" and go to unfavorable parts of the city. (Rentz, Tr. 374) (Daniel, Tr. 436-437). They also visited hospitals. (Schneider, Tr. 451).
30. SCs had to do two face to face contacts with each member per month and two phone calls per month. (Rentz, Tr. 369) (Schneider, Tr. 462). The purpose of the face to

face contact was to determine the member's needs. (Rentz, Tr. 369) (Daniel, Tr. 439) (Schneider, Tr. 462).

31. SCs were required to perform an initial assessment of each member that addressed the member's medical, psychiatric, and living conditions and then develop a care plan that would set realistic goals for the member's specific situation. (Schneider, Tr. 459-60).
32. SCs experienced a great deal of stress and pressure "to produce an unrealistic goal in an unrealistic time frame." (Schneider, Tr. 494).
33. Service coordinators were not hired to provide counseling; they were hired to coordinate medical and mental services. (Rochelle, Tr. 252).
34. Integra said that the assessments performed by SCs were not clinical, but Integra manager Rochelle admitted that SCs were doing assessments of the client's needs, i.e., whether they should receive counseling and the extent of any substance abuse. (Rochelle, Tr. 265).
35. The initial assessment form Integra requires SCs to complete calls for the application of clinical tools, such as a brief mental status exam, clinical observations, BPRS (brief psychiatric rating scale), and GAF (global assessment of functioning). These tools are used by trained clinicians to diagnose a patient for mental illness and to assess that patient's level of functioning. (Nelson, Tr. 590-593, 1097-1098; Ex. 34).
36. The ability to do an accurate clinical assessment of a mentally-ill member would better allow the service coordinator to assess the member's propensity for violence. (Nelson, Tr. 599, 1100).
37. Service coordinators – who were not required to have any previous experience or training as clinicians or social workers – did not have the experience or knowledge necessary to accurately apply the clinical tools described in the assessment form. (Nelson, Tr. 1099-1100).
38. In part, service coordinators perform the jobs of clinical social workers. (Nelson, Tr. 1103-1104).
39. SCs knew very little about a member's background before being assigned a case. Initially, SCs were not even given a diagnosis. Rochelle asked for a diagnosis from Amerigroup and saw that some members had serious mental health issues. (Rochelle, Tr. 255-56).
40. Amerigroup generally provided only one diagnosis, but many members had multiple diagnoses. (Rochelle, Tr. 257).
41. SCs were pressured to find members. (Rochelle, Tr. 269).

42. SCs filled out progress note reports for every contact or attempted contact with a member. The progress notes were for documentation purposes. These notes described when contact was made with a client and what happened. (Rochelle, Tr. 272).
43. Rochelle reviewed and approved the SCs' progress note reports. (Rochelle, Tr. 272).
44. Sometimes, progress note reports entered in the Integra database system would disappear. (Rochelle, Tr. 297). Rochelle made several complaints to her supervisors about the database. (Rochelle, Tr. 298).
45. If two face to face contacts were not made each month, Integra would not get paid by the insurance companies. (Rochelle, Tr. 260).
46. Rochelle felt pressured by her supervisors to make face to face contacts with members. (Rochelle, Tr. 260).

#### **Characteristics of the Members Integra Serviced**

47. Rochelle knew that the majority of Integra's members had mental illness and criminal backgrounds. (Prymmer, Tr. 133:12-18).
48. Rochelle noticed that Integra had a lot of members who were getting out of jail and Integra required SCs to continue to serve them. (Rochelle, Tr. 247).
49. Chief Operating Officer ("COO") Dee Brown admitted to CSHO Jason Prymmer that "most members have a criminal background." (Prymmer, Tr. 89:9-12).
50. Vice President Melissa Arnott admitted to CSHO Jason Prymmer that "these members have criminal backgrounds and they're severely mentally ill." (Prymmer, Tr. 89:13-15).
51. SCs provided services to members who were drug users and who were involved in criminal activity. (Rochelle, Tr. 252).
52. SCs provided services to member who had severe mental health issues such a schizophrenia and bi-polar personality disorders. (Rochelle, Tr. 252).
53. SCs serviced members with a history of violence and who were volatile. (Rochelle, Tr. 253).
54. SCs interacted with members with severe mental illnesses; fifteen to twenty percent of the SCs' caseloads carried members with bipolar and multiple personality disorders. (Schneider, Tr. 451, 469-70; Stevens, Tr. 417-18; Daniel, Tr. 436).

55. Some members had violent histories like robbery, armed robbery, and sexual assault backgrounds that were not disclosed to SCs. (Daniel, Tr. 436).
56. Clients included people who were chronically admitted to crisis destabilization units because they did not have access to their medications. (Schneider, Tr. 451).
57. Neither Integra nor Amerigroup provided service coordinators with criminal background information for the members. (Rochelle, Tr. 257).
58. Integra did not perform criminal background checks on members. (Prymmer, Tr. 109:14-16).
59. Rochelle was afraid, at times, to go into clients' homes. (Rochelle, Tr. 252)
60. Rochelle assigned SC Annie Hinman to a member who had served prison time for burning down his mobile home. Hinman visited the member four or five times before she found out on her own about his criminal history. (Rochelle, Tr. 258).

#### **Hiring and Qualifications of Service Coordinators**

61. As part of her duties, Rochelle interviewed prospective SCs and made hiring recommendations to Melissa Arnott. (Rochelle, Tr. 247).
62. In 2012, Integra did not require its service coordinators to have any specialized education or certification; only a bachelor's degree was required. (See Ex. 9 and 10) (Prymmer, Tr. 104:5-105:13).
63. Because the starting salary for SCs was "very low," Integra encouraged Rochelle to hire people with only a bachelor's degree who were just getting out of college. (Rochelle, Tr. 247-248).
64. Experience visiting the homes of clients should have been a job qualification for the SC position, but was not a requirement. (Rochelle, Tr. 249). Rochelle would have preferred to hire SCs with at least six months experience visiting the homes of clients. (Rochelle, Tr. 249).
65. (b)(6) had her Bachelor's degree when she was hired by Integra. (Prymmer, Tr. 105:14-16). (b)(6) had no previous experience working with the mentally ill or any previous experience or certifications in social work. (Prymmer, Tr. 105:17-22).

#### **Integra's Inadequate Safety Policies and Procedures and Training**

66. SCs did not have panic buttons or alarms. (Rochelle, Tr. 258)
67. There was no sign in/sign out procedures for SCs. (Rochelle, Tr. 259). Integra supervisors did not know where SCs were at any given time. (Rentz, Tr. 375).

68. SCs attempted to schedule appointments with members prior to face to face visits, but if a member did not have a phone, Integra required SCs to go to the member's house unannounced and knock on the door. (Rochelle, Tr. 259).
69. Integra did not require SCs to perform their own background checks on members. (Prymmer, Tr. 109:18-20); (Hinman, Tr. 825).
70. In practice, SCs did not regularly perform background checks on members. (Prymmer, Tr. 109:21-110:2).
71. Integra did not require SCs to take a partner or buddy with them; rather, Integra told service coordinators to "consider" taking another service coordinator with them if they, in their subjective opinions, believed it would be useful. (Prymmer, Tr. 111:11-20); Ex. 16; Ex. 19).
72. Integra had a voluntary "buddy system," but it was very difficult to implement because employees often did not have the time to partner up with another SC because of the heavy case loads. (Rochelle, Tr. 266).
73. Integra assigned members to SCs through the computer system. (Rentz, Tr. 372). Integra provided very little information to the SCs about the members. (Rentz, Tr. 373). SCs received the telephone number and address of the member. (Rentz, Tr. 373). Sometimes they received medical diagnosis and mental health diagnosis. (Daniel, Tr. 437).
74. Integra provided SCs with little information about the members so SCs had to be "detectives and hunt them down by any means". (Schnieder, Tr. 451).
75. Some SCs worked at night to locate members for the face to face contact. (Rentz, Tr. 374). They worked in areas that were unsafe and that made them nervous. (Rentz, Tr. 374-75).
76. SCs did not know if the members they were visiting had a history of violence because Integra provided so little information about the members. (Rentz, Tr. 376).
77. Integra developed an on-line training program for its new service coordinators, referred to as the "Neumann Training." (Prymmer, Tr. 105:23-106:2).
78. The Neumann Training was developed by Integra's Vice President of Behavioral Health, Melissa Arnott. (Prymmer, Tr. 106:1-2).
79. The Neumann Training was intended to be 40 hours long and consisted of power point slides, reading assignments, and on-line discussion board posts. (Prymmer, Tr. 106:3-6).

80. Session Eight of the Neumann Training, entitled "In-Home & Community Safety," included two power point presentations entitled "Safety in the Community" and "Screening the Dangerous Member." (Prymmer, Tr. 108:1-3); Ex. 15, 16, and 17.
81. The "Screening the Dangerous Member" power point identifies that service coordinators may encounter "dangerous" members and "dangerous situation(s)". Ex. 16.
82. In the "Safety in the Community" power point, Integra identifies certain "high risk behaviors" a member may exhibit, including "history of violence or self-harm, substance abuse, verbal threats, criminal behavior, paranoia, suspiciousness, psychosis, confusion." (Prymmer, Tr. 114:17-25; 115:1-9); Ex. 17.
83. Integra expected SCs to identify these "high risk behaviors" while interacting face-to-face with the members; Integra did not take steps to identify whether members exhibited these behaviors before assigning a SC to their file. (Prymmer, Tr. 114:20-25; 115:20-23; 116:6-8; Arnott, Tr. 350-351).
84. These power points demonstrate that Integra recognized that the member posed a hazard of workplace violence against the SCs. (Prymmer, Tr. 110:4-8; 116:21-25; 117:1-5).
85. Rochelle worked at Integra for 5 1/2 months before she took the Neumann training. (Rochelle, Tr. 261).
86. The Neumann training was inadequate. (Rochelle, Tr. 262). It was "a joke" and basic, it did not teach SCs to be "savvy", or about real life safety skills and situations related to the job. (Rochelle, Tr. 262). For example, the training did not teach how to get members to come outside their doorways, or teach SCs not to go into a member's home in certain situations. (Rochelle, Tr. 262).
87. It took Rochelle two days to complete the Neumann Training. (Rochelle, Tr. 264).
88. Annie Hinman, a service coordinator, completed the Neumann Training in only eight hours. (Prymmer, Tr. 119:16-25; 120:1-2).
89. Ellen Elaine Rentz, a service coordinator, did not complete the Neumann Training before being assigned a caseload and going out into the field to do face-to-face visits with members. (Prymmer, Tr. 123:22-25; 124:1-7). (Rentz, Tr. 371). She contacted her supervisor, Rochelle, about the lack of training. (Rentz, Tr. 371). Rochelle told Rentz to call Scott Schneider, one of the other team members. (Rentz, Tr. 371).
90. Rochelle stated in a letter to COO Dee Brown dated December 3, 2012, that "the Neumann training [] was embarrassingly a cut and paste of the SAMSA website and not what service coordinators really need to do their job 'the Integra way.'" (Prymmer, Tr. 118:11-21; Ex. 14).

91. Rochelle knew that the service coordinators had safety concerns regarding potential violence from members and/or the communities they serviced. (Prymmer, Tr. 133:12-21).
92. Integra provided an employee handbook to service coordinators. (Prymmer, Tr. 120:7-9; Ex. 18).
93. This employee handbook contains one page entitled "Workplace Violence" which generally states that violence by an employer or anyone else against an employee, supervisor or member of management will not be tolerated. (Prymmer, Tr. 122:1-7; Ex. 18, p. 96 of 107).
94. The "Workplace Violence" page of the employee handbook does not identify the specific types of workplace violence to which service coordinators were most likely to be exposed, i.e., violence from a mentally ill member with a history of violent behavior. (Prymmer, Tr. 122:11-14).
95. Some SCs would shadow other more experienced SCs for a day or a few days, but such shadowing was not uniformly required for all new SCs. (Prymmer, Tr. 122:15-25; 123:1-24).
96. Integra did not have a policy regarding the preparation of incident reports. (Rochelle, Tr. 299). Rochelle was not required to prepare an incident report of significant events. (Rochelle, Tr. 299).
97. SCs learned their jobs through "trial and error". (Daniel, Tr. 435). SCs had to figure out a lot of their duties "as they went along". (Schneider, Tr. 455). One SC (Scott Schneider) stated that whenever he asked his supervisors questions, he "never really got an answer." (Schneider, Tr. 456).
98. Neumann training did not cover much, it was basic. It did not help employees do their jobs. (Daniel, Tr. 435)
99. SC Schneider testified that he did not receive safety training prior to (b) (6)(b) (6) death. (Schneider, Tr. 456). SC Daniels stated, "I wouldn't consider anything I received safety training". (Daniel, Tr. 436).
100. Integra did not provide safety training to its employees. (Rochelle, Tr. 261).
101. Integra did not provide much information about safety to its employees. (Rentz, Tr. 371). Some computerized safety training, the Neumann Training, was given to SCs online. (Rentz, Tr. 370). It took about 6-9 hours for employees to do the training. There was not a lot of information given to employees about workplace violence. (Rentz, Tr. 370).

102. At the end of the Neumann training, SCs were asked questions that were “totally irrelevant” to the actual instruction modules. (Schneider, Tr. 454).
103. The weekly telephone rounds with Integra medical director Dr. Krajewski (“Dr. K”) were not a forum to discuss safety issues. The purpose of the rounds was to get services for the members. They discussed getting members food, housing and medical attention. (Rentz, Tr. 394).
104. There was no support from management in terms of training new employees; the SCs depended upon each other to figure things out. (Schneider, Tr. 487).
105. It was “up in the air” whether Integra would remove a member from the service list if a SC expressed a safety concern about interacting with the client. (Schneider, Tr. 460).
106. During corporate training in September 2012, SCs did not engage in role playing. (Hinman, Tr. 817).
107. There was no real buddy system or partnering for safety reasons. (Rentz, Tr. 382). Kimber Daniel requested a buddy for a home visit and her request was denied because no one was available because everyone was too busy with his or her own caseload. (Daniel, Tr. 439-440)
108. Integra claims it had a “shadowing” program, however, some employees (Rentz and Daniels) were not “shadowed” or partnered with a supervisor or experienced employee when they began working for the company. (Daniels, Tr. 434-435) (Rentz, Tr. 373). Schneider also did not shadow a more experienced SC. (Schneider, Tr. 488).
109. The portion of the Neumann training regarding workplace safety was vague and lacked depth; it offered no “how-tos” or experiential process. (Nelson, Tr. 609).
110. The “shadowing” practiced by Integra, to the extent SCs participated in it, was on-the-job training of the most minimal kind. (Nelson, Tr. 613).
111. The “workplace violence” page in the employee handbook was a general statement which did not adequately prepare SCs to prevent workplace violence. (Nelson, Tr. 608).
112. Integra’s failure to provide adequate safety training contributed to the risk of workplace violence. (Nelson, Tr. 614).
113. Integra provided SCs with laptop computers with GPS, but Integra did not use this GPS function for realtime check-in or tracking of the SCs; the intended use of the GPS function was to locate a SC if he went missing. (Arnott, Tr. 1013).

114. On October 16, 2012, SC Andy Macaluso asked Integra if it would provide take-down training and “hands on crisis de-escalation training” because he has had “to transport or visit more than one member who has a history of violence towards others resulting in severe bodily injury.” (Macaluso Tr. 505-506, Exhibit 31, p. 1).
115. Prior to (b) (6) death, Integra did not teach its SCs any de-escalation techniques. (Nelson, Tr. 613).
116. SC Schneider complained to supervisors Melissa Arnott and Laurie Rochelle about the safety issues he encountered when interacting with members. (Schneider, Tr. 491).
117. SC Schneider told Melissa Arnott about one member on his case list who was violent and aggressive. (Schneider, Tr. 491; Exhibit 29, p. 24). Integra would not remove the member from the case list and he was required to continue to make face to face contact. (Schneider, Tr. 491-492).
118. Integra would not “roll off”, i.e., remove from the program, too many members because it would cause the company to lose money. (Schneider, Tr. 492).
119. (b) (6) was exposed to a heightened risk of workplace violence due to her inexperience and the fact that she was expected to apply clinical tools she was not qualified to apply. (Nelson, Tr. 601).
120. SCs often worked alone, traveling by car to do home visits with members, which contributes to the risk of workplace violence. (Nelson, Tr. 602).
121. It is particularly dangerous for a SC to do an unscheduled visit to a member’s home. (Nelson, Tr. 619).
122. Integra’s employees wrongly believed Integra was doing what was necessary to ensure their safety – such as pre-screening members – and was not sending them into a dangerous work environment. (Rentz, Tr. 380 “I didn’t say anything to anybody about safety because I assumed we were safe. We were working for a company. I felt I was safe to go out there. They had already done the legwork necessary to make sure they were not sending me into harm’s way.”) (Schneider, Tr. 457 “I think I was really naïve, and I believed that the company had my best interest at heart, they properly screened these people, and I never really thought about it, you know.”).

**SC (b) (6) (b) (6) Interactions with Assailant (b) (6)(b) (6)**

123. (b) (6)(b) (6) the member who fatally stabbed Integra service coordinator (b) (6)(b) (6)(b) (6) was previously incarcerated for aggravated battery with a deadly weapon, aggravated assault with a weapon, and battery against a police officer or first responder. *See* Ex. 25; (Prymmer, Tr. 136:22-25; 137:1-4; 139:6-21).

124. When (b) (6) case was assigned to (b) (6) Amerigroup provided (b) (6) with (b) (6) diagnosis (schizophrenia and cardiovascular disease), his date of birth, and his home address; Amerigroup did not provide Integra or (b) (6) with any information about (b) (6) history of violent behavior. (Arnott, Tr. 357; Ex. 7, p. 1).
125. (b) (6) had three face-to-face interactions with (b) (6) at his home prior to his fatal attack of her on December 10, 2012. (See Ex. 7; Prymmer, Tr. 139-140).
126. After her first visit with (b) (6)(b) (6) on October 12, 2012, (b) (6) reported in her Progress Note Report that (b) (6) "said a few things that made SC uncomfortable, so SC asked member to be respectful or she would not be able to work with him. Because of this situation, SC is not comfortable being inside alone with member and will either sit outside to complete assessment or ask another SC to accompany her." Ex. 7, p. 5.
127. Integra COO Dee Brown, Integra Vice President Melissa Arnott, and Integra manager Laurie Rochelle all read and were aware of (b) (6)(b) (6) comments regarding her interaction with (b) (6) on October 12, 2012. (Prymmer, Tr. 143, 148. Ex. 19). (Arnott, Tr. 356-358).
128. Integra did not assign an employee to go with (b) (6) to visit (b) (6) at any time. (Rochelle, Tr. 278).
129. Referring to this Progress Note Report from October 12, 2012, CSHO Prymmer asked COO Brown what Integra did to ensure that "staffing resources would be made available to address (b) (6)(b) (6) concerns"; (b) (6) Brown responded that "we do not make certain people are doing their jobs. There is an entire team available to accompany someone and if staff feel they are in need of a buddy visit, they arrange it or report to their supervisor so that the supervisor can intervene to assist if they cannot arrange it. Staff are trained not to go alone if they feel they need another person with them." Ex. 19, p. 3-4.
130. After reading (b) (6) progress note report from October 12, 2012, Arnott never asked (b) (6) what made her feel uncomfortable. Arnott did not follow up with Rochelle or (b) (6) to determine how (b) (6) intended to service (b) (6) in the future. (Arnott, Tr. 358-359).
131. Integra did not conduct a safety assessment after (b) (6) described feeling uncomfortable with (b) (6)(b) (6) (Rochelle, Tr. 278).
132. Integra knew that (b) (6) had been prescribed injectable antipsychotic medication. (Arnott, Tr. 360). Integra did not have confirmation from (b) (6) psychiatrist whether (b) (6) was properly monitored and medicated for his schizophrenia. (Arnott, Tr. 360).

133. On October 15, 2012, (b) (6) had a second face-to-face visit with (b) (6) at his home; (b) (6)(b) (6) notes from this visit do not indicate that she had another service coordinator with her, or that she stayed outside of the home during the visit. Ex. 7, p. 6. (Prymmer, Tr. 149:21-25; 150:1-4).
134. During the October 15, 2012 visit with (b) (6)(b) (6) (b) (6) notes that “member showed SC a print of the Last Supper, crediting it to Michelangelo. He pointed to the depiction of Jesus and said, ‘This is my father.’ He pointed to someone else in the picture and said, ‘This is me.’ He then pointed to a few others in the picture and described them as people in the community, such as the waitress who works down the street, etc. This was also interwoven with conversation about his trespassing charges, people who owe him money, and how he will behave in his upcoming court date.” Ex. 7, p. 6.
135. The October 15, 2012 Progress Note Report was reviewed by Integra manager Laurie Rochelle on October 15, 2012. Ex. 7, p. 6. (Prymmer, Tr. 150:5-6).
136. (b) (6) told Dr. K about (b) (6) (b) (6) strange comments concerning the Lord’s Supper. Rochelle saw the strange comments as a red flag. (Rochelle, Tr. 292-93).
137. Rochelle approved the progress notes involving the encounter. (Rochelle, Tr. 293-94).
138. Arnott did not know whether (b) (6) took another SC with her when she visited (b) (6) on October 15, 2012. Arnott never inquired as to whether (b) (6) was following the plan she outlined in her October 12, 2012 progress note report. (Arnott, Tr. 360-61).
139. Integra did not discipline (b) (6) for failing to bring another SC with her on her visits to (b) (6)(b) (6) (Rochelle, Tr. 285-286).
140. Arnott admitted that (b) (6) comments about the Lord’s Supper could indicate delusional or paranoid behavior. (Arnott, Tr. 362). Delusions and paranoia are identified in Integra’s training as “high risk” behaviors. (Arnott, Tr. 362).
141. On November 14, 2012, (b) (6) had a third face-to-face visit with (b) (6) at his home; (b) (6)(b) (6) notes from this visit do not indicate that she had another service coordinator with her. Ex. 7, p. 7. (Prymmer, Tr. 151:17-20).
142. During the November 14, 2012 visit with (b) (6)(b) (6) (b) (6) notes that “Member answered the door and pretended to be his own twin brother” and “Member also told SC to get a cowboy hat and go to a rodeo.” Ex. 7, p. 7.
143. Arnott reviewed the November 14, 2012, progress note report prepared by (b) (6) (b) (6) Integra did not follow-up with (b) (6) to determine whether (b) (6) was following

the plan she outlined in her October 12, 2012 progress note report. (Arnott, Tr. 364-365).

144. Arnott claimed to believe that (b) (6) notes about (b) (6) pretending to be his twin brother indicated that he did not want “to deal with” (b) (6) that day and that (b) (6) was “kind of playing” with her. (Arnott, Tr. 365).
145. According to Integra’s policy, (b) (6) had 30 days from receiving signed consent from (b) (6) in which to complete her initial assessment of him. (Arnott, Tr. 366). After two face to face visits, (b) (6) still had not completed an initial assessment and had no information about (b) (6) history of violent behavior. (Arnott, Tr. 366).
146. During these three face-to-face visits, (b) (6) did not perform her “initial assessment” of (b) (6)(b) (6) (Prymmer, Tr. 151:14-16). Ex. 7, p. 9.
147. After three face-to-face visits, (b) (6) was still unaware of (b) (6) (b) (6) history of violent behavior. (Arnott, Tr. 366).
148. On (b) (6)(b) (6) next face-to-face visit to (b) (6) (b) (6) home, on December 10, 2012, (b) (6) attacked (b) (6) and stabbed her to death with a knife. (Arnott, Tr. 366).

#### **Previous Incidents of Workplace Violence and/or “Close Calls”**

149. Yahaydra Stevens described two incidents in which she was in the car with mentally ill patients who were not taking their medications. She was in the car, along with supervisor Whitney Ferguson, for two hours with a mentally ill member who made her feel uncomfortable. The member was fidgety during the drive. (Stevens, Tr. 419-20). She also recalled driving another member with Ferguson who stated that he was uncomfortable driving with her because of her ethnicity. (Stevens, Tr. 420).
150. Prior to (b) (6) death, SC Ellen Rentz visited a member’s home to get the member’s signature for the Integra consent form. The member was agitated about the timing of the visit. Later, after (b) (6) death, Rentz learned that the member had a criminal background that involved a weapons charge. (Rentz, Tr. 376-77, 395).
151. Prior to (b) (6) death, a schizophrenic client threatened to assault SC Scott Schneider while Schneider met with him to perform an initial assessment. (Schneider, Tr. 458; Ex. 29, p. 6).
152. Prior to (b) (6) death, SC Schneider met with a member whose personality appeared to change quickly. At some point during the meeting, the member grabbed a kitchen knife and began twirling it. (Schneider, Tr. 470; Ex. 29, p. 18). This incident occurred in the member’s home. After this meeting, Schneider continued to meet with the member, but conducted the meetings outside the home. (Schneider, Tr. 470).

153. Prior to (b) (6) death, Schneider reported in his progress notes that one of his members had “physically assaulted” her boyfriend; this member “has a serious addiction to meth and becomes violent and thins she is God.” (Schneider, Tr. 471-472; Ex. 29, p. 24). Schneider reported to his supervisor, Laurie Rochelle, that this member “scared the bejesus out of me” and he would only meet her in public places; he would not meet her at her home. (Schneider, Tr. 472).
154. Prior to (b) (6) death, SC Scott Schneider was chased by dogs while attempting to contact a member for a face to face visit. (Rochelle, Tr. 267). Rochelle told him not to risk his life. (Rochelle, Tr. 267)
155. Prior to (b) (6) death, Schneider attempted to visit a member who resided in a broken down trailer where there were vicious dogs tied up near the front door. (Schneider, Tr. 495-96). Schneider was concerned about being bitten by the dogs. He reported the situation during round calls to his supervisors. His supervisors told him to continue to go to the home. (Schneider, Tr. 496).
156. Prior to (b) (6) death, SC Annie Hinman conducted several face to face meetings with a member who had burned down his home. (Hinman, Tr. 830-31). She transported the member to provider appointments. During one appointment, the member’s therapist asked him if he had homicidal thoughts. The member pointed to Hinman and told the therapist that he had thoughts of wanting to kill Hinman. (Hinman, Tr. 831). Annie Hinman told her supervisor, Laurie Rochelle, that this member admitted to having thoughts of killing her. (Rochelle, Tr. 268). Integra required Hinman to continue servicing this member after the incident. (Hinman, Tr. 832).
157. Prior to (b) (6) death, Andy Macaluso told his supervisor, Rochelle, that he was uncomfortable being alone with a member who had expressed homicidal ideations and had access to a firearm. (Macaluso, Tr. 507, Ex 31, p. 3). Later, the member threatened to kick Macaluso’s ass. (Macaluso, Tr. 51-15; Exhibit 31, p. 2). Macaluso informed Integra Vice President Melissa Arnott and supervisor Whitney Ferguson about this incident. (Macaluso, Tr. 515, Ex. 31, p. 2).
158. Arnott admits she was aware that a member verbally threatened Andy Macaluso, but she did not create an incident report on this instance of workplace violence. (Arnott, Tr. 1010).

#### **Employer Recognition of Hazard of Workplace Violence**

159. Dr. Melissa Arnott is the Vice-President of Community programs for Integra Health Management. (Arnott, Tr. 340).
160. Arnott supervised the team lead in each location. (Arnott, Tr. 340).

161. Integra defined threatening communications as a type of workplace violence. (Arnott, Tr. 341).
162. Integra's members would say threatening things to SCs "every once in a while." (Arnott, Tr. 343). People do curse. (Arnott, Tr. 343).
163. Arnott stated, "I don't think it's workplace violence if a member is saying, you know, get the F out of here, or I don't F'king like you... That's the normal talk that we... hear sometimes from certain members..." (Arnott, Tr. 343).
164. Arnott admits that "if another SC made the same comments to another SC, [she] would consider that to be a threatening communication or instance of workplace violence." (Arnott, Tr. 343).
165. According to Arnott, SCs decide if they feel threatened by a member's conduct and need to call their supervisors. (Arnott, Tr. 344). It is up to the SC to identify a threatening situation. (Tr. 344).
166. The Neumann training contained a Power Point slide entitled, "Screening the Dangerous Member". (Exhibit 16; Arnott, Tr. 345).
167. Integra recognized that certain members might be dangerous and could present a threat to an SC. (Arnott, Tr. 345).
168. Integra felt it was necessary to instruct SCs on how to identify and assess dangerous members because SCs would be working directly with mentally ill members. (Arnott, Tr. 346).
169. Integra did not provide SCs with information about a member's previous unsafe behavior. (Arnott, Tr. 346). Integra did not require SCs to obtain this information. (Arnott, Tr. 346).
170. Integra did not make the buddy system mandatory; it only "suggested" the use of the buddy system. (Arnott, Tr. 347-48).
171. The Neumann Training included information about certain high risk behaviors that a Service Coordinator should be looking for in its members. (Arnott, Tr. 349). The training listed the high risk behaviors as a history of violence or self-harm, paranoia, suspiciousness, psychosis, confusion, substance abuse, hopelessness, verbal threats, lack of future plans, and criminal behavior. (Arnott, Tr. 349; Exhibit 17).
172. SCs were required to identify these behaviors while doing their initial assessment of the member. (Arnott, Tr. 349). These behaviors are included on Integra's official assessment form. (Arnott, Tr. 349).

173. Integra relied on members to self-report their criminal behavior, mental state, and history of violence. (Arnott, Tr. 350).
174. Integra required SCs to correctly identify high risk behaviors of the members they serviced. SCs were expected to find out about issues like antisocial personality, head injury, family history of violence, history of impulsive behavior, noncompliance, loud manic behavior, and possession of weapons. (Arnott, Tr. 350).
175. Integra recognized that members might have criminal histories, including felony convictions. (Arnott, Tr. 352).
176. Integra left it up to the SCs to determine if they needed a buddy for safety reasons. (Arnott, Tr. 353). Integra did not routinely assign buddies to SCs and had no written procedure for requesting a buddy. (Arnott, Tr. 354).
177. Prior to (b) (6) death, Integra in Pennsylvania had a policy of partnering two SC's for each visit. (Arnott, Tr. 354-55).
178. Arnott supervised the team leads and reviewed and approved progress notes. (Arnott, Tr. 356).

#### **Industry Recognition of Hazard of Workplace Violence**

179. Integra is a part of the social services/healthcare industry. (Prymmer, Tr. 160; Nelson, Tr. 1103-1104).
180. Workplace violence is a recognized hazard in the social services/healthcare industry. (Prymmer, Tr. 161; Nelson, Tr. 555-557, 575, 605; Ex. 32 and 33).
181. Violence against social service workers and home healthcare providers is a well-recognized problem in this industry. (Prymmer, Tr. 362; *see* Ex. 32, p. 44-46).
182. Social service workers, such as Integra's service coordinators, are particularly at risk of violence because they work with volatile, unstable people; they work alone or in isolated areas; they provide in-home care and services; and they may work at night and in areas with high crime rates. (Ex. 33, p. 8; Nelson, Tr. 605-606).
183. OSHA recognizes "healthcare and social service settings" as an industry in which workers are at high risk of workplace violence. Ex. 32 and 33, p. 10.

#### **Feasible Abatement**

184. OSHA has published a directive regarding workplace violence listing a series of potential methods to abate workplace violence, both generally and in the social services industry. (Prymmer, Tr. 164; Ex. 33, p. 29-34).

185. The abatement methods listed in OSHA's directive are based on studies indicating that using any combination of listed abatement methods may materially reduce or eliminate the hazard of workplace violence. (Prymmer, Tr. 164; Ex. 33, p. 29, 36-38).
186. The proposed abatement found in Citation 1, Item 1, was gleaned from the OSHA directive and lists effective methods for abating the hazard of workplace violence that are applicable to Integra. (Prymmer, Tr. 165, Ex. 33, p. 33-38; Nelson, Tr. 672-673).
187. If an employer is serving seriously mentally ill individuals that may have criminal backgrounds, it is advisable to conduct background checks before allowing employees to enter their home. (Nelson, Tr. 722).
188. Lost cost methods of abatement for preventing workplace violence to SCs include: establishing a safety committee; assigning the committee to write field safety procedures; developing safety plans and practice them; assigning clients/caseloads considering client risk, race, gender, language and culture; having home visit itineraries and call-in requirements to monitor location of employees; establishing a system to communicate to employees all incidents of threats or violence; developing code words to indicate when there is a problem; supplying employee training in de-escalation and self-defense. (Nelson, Tr. 644-666; Ex. 27, p. 12).
189. Integra could have feasibly implemented any or all of the safety measures outlined above prior to December 10, 2012. (Nelson, Tr. 666).
190. Criminal background checks are often available on-line; in Florida, the Department of Corrections has a free on-line database that can be searched by name. (Nelson, Tr. 617).
191. Social service workers may partner with local law enforcement to discover relevant criminal background of members before interacting directly with the members. (Nelson, Tr. 617).
192. Knowing a member's criminal history may reduce the risk of violence. (Nelson, Tr. 675)
193. Training in self-defense – including de-escalation and non-harming escape techniques – is an effective method of abating the hazard of workplace violence against social service workers. (Nelson, Tr. 675, 1094-1095).
194. Integra begin performing background checks and "red-flagging" certain members in the system after (b) (6) death. (Rentz, Tr. 389) (Prymmer, Tr. 160, 166).
195. Integra now "rolls off" members whose criminal backgrounds indicate a history of violent behavior. (Prymmer, Tr. 160, 166-167).

196. Integra has “rolled off” at least eight members because their criminal histories indicated that they were too dangerous to service. (Prymmer, Tr. 160).
197. After (b) (6) death, Integra updated the safety training it provides to SCs.
198. After (b) (6) death, SCs discussed safety concerns with Dr. K at rounds meeting. (Schneider, Tr. 484).
199. After (b) (6) death, Integra created a written workplace violence prevention program. (Prymmer, Tr. 166).
200. On or about May 1, 2013, Integra provided de-escalation training called “CPI” to its service coordinators. (Macaluso, Tr. 521-522, 525; Nelson, Tr. 676).

## V. ARGUMENT

Congress enacted the Occupational Safety and Health Act (the Act), 29 U.S.C. § 651 et seq., in response to millions of workplace accidents and occupational illnesses, which it found excessively costly, in terms of both dollars and of human suffering. *National Realty and Constr. Co. v. OSHRC and Secretary*, 489 F.2d 1257, 1260-61 & n. 7 (D.C. Cir. 1973). The goal of the Act is to prevent the first injury that might result from unsafe conditions. *Mineral Indus. & Heavy Constr. Co. v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981).

### A. The Secretary has established each element of Citation 1, Item 1, which alleges a Section 5(a)(1) violation.

In Citation 1, the Secretary cites Integra for violating Section 5(a)(1) of the Occupational Safety and Health Act of 1970, as amended (the “Act”), which provides:

(a) Each employer –

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

29 U.S.C. § 654(a)(1). Under Commission precedent, a citation alleging a violation of Section 5(a)(1) – “the general duty clause” – is appropriate only when a specific OSHA standard does not apply to the facts. *Waldon Health Care Center*, 16 BNA OSHC 1052, 1060, 1993 WL 119662 (No. 89-2804, 1993). There is no dispute here that no specific OSHA standard applies to the facts of this case.

To establish a violation of Section 5(a)(1), the Secretary must prove that (1) a condition or activity in the employer’s workplace presented a hazard to employees, (2) the cited employer or the employer’s industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard. *Id.* at 1058 (citing *Kastalon, Inc.*, 12 BNA OSHC 1928, 1931 (Nos. 79–3561, 1986) (consolidated); *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82–388, 1986)).

#### **1. Existence of a hazard**

“A ‘hazard’ is defined in terms of conditions or practices deemed unsafe over which an employer can reasonably be expected to exercise control.” *Valley Interior Systems, Inc.*, 21 BNA OSHC 2224, 2007 WL 2127305 at \*3 (No. 06-1395, 2007) (citing *Morrison-KnudsenCo./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121 (No. 88-572, 1993)). “There is no requirement that there be a ‘significant risk’ of the hazard coming to fruition, only that if the hazardous event occurs, it would create a ‘significant risk’ to employees.” *Id.* “A ‘hazard’ has been defined to mean ‘a condition or practice in the workplace’ which introduces an element of danger into the work environment.” *Foseco, Inc.*, 10 BNA OSHC 1949, 1982 WL 22452 at \*13 (No. 81-944, 1982) (citing *Empire–Detroit Steel Div., Detroit Steel Corp. v. OSHRC*, 579 F.2d 387 (6th Cir. 1978)).

The Secretary must show that the cited condition actually poses a hazard to employees, but “[t]here is no mathematical test to determine whether employees are exposed to a hazard

under the general duty clause.” *Waldon Healthcare Center*, 1993 WL 119662 at \*11 (citing *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265 n. 33 (D.C. Cir. 1973)). “Rather, the existence of a hazard is established if the hazardous incident can occur under other than a freakish or utterly implausible concurrence of circumstances.” *Waldon Healthcare Center*, 1993 WL 119662 at \*11. In establishing that a hazard presents a significant risk to employees, the Secretary is not required to show that previous injuries or deaths from the hazard occurred; the goal of the Act is to prevent the first accident. See *American Phoenix, Inc.*, \_\_ BNA OSHC \_\_ (No. 11-2969, Mar. 13, 2014) (“The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors.”) (citing *Mineral Industr. & Heavy Constr. Group*, 639 F.2d at 1294 (which also stated that “no proof of specific instances where employees were exposed to the hazardous condition is necessary to support the finding of a violation”)); *Waldon Healthcare Center*, 1993 WL 119662 at \*10 (“Since the goal of the Act is to prevent the first accident, [] the absence of any recorded case of HBV transmission from nursing home resident to nursing home employee is not dispositive.”) (citation omitted).

In this case, the cited condition is the hazard of a service coordinator being physically assaulted by a member with a history of violent behavior. The evidence amply establishes the existence of this hazard. First, the evidence establishes that Integra’s operations in Florida were geared towards members who suffered from chronic mental illness, and that many of these members possessed criminal records and histories of substance abuse. (Prymmer, Tr. 89, 133; Rochelle, Tr. 247, 252; Stevens, Tr. 417-18; Snyder, Tr. 451). Many members were not compliant with their doctor’s orders or their prescriptions. (Daniel, Tr. 437-38; Stevens, Tr. 416). In addition, the evidence establishes that many members, including the member who attacked and fatally stabbed (b) (6) had histories of violent behavior which included physical assaults,

batteries, and armed robbery. (Ex. 25; Prymmer, Tr. 136-137, 139; Rochelle, Tr. 258; Daniel, Tr. 436). Integra required employees in the service coordinator position to conduct face-to-face visits at these members' homes, and to transport members to hospitals and other appointments in their personal vehicles. (Rochelle, Tr. 255; Rentz, Tr. 369; Schneider, Tr. 452, 462; Stevens, Tr. 417; Hinman, Tr. 809). Often, visiting members meant traveling into dangerous neighborhoods or homeless shelters. (Rentz, Tr. 374; Daniel, Tr. 436-437; Rochelle, Tr. 251). The fact that most members suffered from mental illness does not necessarily mean that all members possessed violent tendencies, but service coordinators had reported to management that certain members made them uncomfortable. (Arnott, Tr. 1010). Several "close calls" had occurred, during which members behaved belligerently or aggressively towards service coordinators. (Schneider, Tr. 458; Ex. 29, p. 6; Schneider, Tr. 470; Ex. 29, p. 18; Schneider, Tr. 471-472; Ex. 29, p. 24; Hinman, Tr. 831; Rochelle, Tr. 268; Macaluso, Tr. 507, Ex 31, p. 3). The company's own training concedes that employees may occasionally deal with "dangerous" members and dangerous situations. (Prymmer, Tr. 108:1-3; Ex. 15, 16, and 17). Furthermore, the evidence establishes that service coordinators themselves were inexperienced and did not possess the skills necessary to accurately assess a member's propensity for violence. (Nelson, Tr. 590-593, 1097-1100; Ex. 34). Under these circumstances, violence resulting in serious injury to a service coordinator would not require "a freakish or utterly implausible concurrence of circumstances." See *Waldon* at \*11.

In *Megawest Financial, Inc.*, the only previously litigated case alleging a violation of the general duty clause on the basis of workplace violence, the Court found that the hazard of violence against the staff of an apartment complex by one of its tenants was present "[b]ecause the responsibilities of the office staff led to adversarial relationships with the tenants, the staff

was not trained to diffuse anger, the residents often directed intimidating threats or conduct towards the staff, that conduct was not sanctioned, and [] there were no positive measures in effect to discourage attacks.”<sup>1</sup> *Megawest Financial Inc.*, 17 BNA OSHC 1337 (No. 93-2879, 1995). Based on this evidence, the Court held that “a future violent incident leading to serious physical harm was neither freakish nor implausible.” *Id.* Similarly, the evidence in this case establishes that service coordinators’ work regularly placed them alone in crime-prone neighborhoods, that members were known to behave erratically and had previously been actively hostile towards the service coordinators, that many members were mentally ill and had histories of violent and/or criminal behavior, and that service coordinators were not adequately trained or experienced to prevent or anticipate acts of violence. Accordingly, the Secretary has established that the hazard existed as cited.

Indeed, on December 10, 2012, Integra service coordinator (b) (6)(b) (6) was attacked and stabbed to death by (b) (6)(b) (6) a schizophrenic member with a criminal history including aggravated battery with a deadly weapon and aggravated assault with a weapon, while she was performing a visit to his home. Clearly, the evidence establishes that (b) (6) was exposed to the hazard of being physically assaulted by a member with a history of violent behavior, as alleged in Citation 1, Item 1.

## **2. Recognition of the hazard**

A hazard is deemed “recognized” when the potential danger of a condition or practice is either actually known to the particular employer or generally known in the industry. *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997); *Kansas City Power & Light Co.*,

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<sup>1</sup> Although she found that the hazard of workplace violence did exist in *Megawest*, Judge Spies ultimately decided that the hazard of workplace violence was not recognized by either the employer or the relevant industry (i.e., apartment leasing offices), and that therefore a violation of the general duty clause had not been established. As set forth in Section 2, *infra*, the facts of *Megawest* relevant to recognition of the hazard are clearly distinguishable from the facts of this case. Moreover, *Megawest* is an unreviewed ALJ decision with no precedential value for the Commission.

10 BNA OSHC 1417 (No. 76-5255, 1982). In this case, both Integra and the general industry of social service and healthcare workers recognize the risk of workplace violence.

a. **Integra's Recognition of the Hazard**

The evidence establishes that Integra recognized the hazard of violence against service coordinators from the members they served. Integra's own training and handbook identified the hazard and Integra's managers knew that many members suffered from mental illness and substance abuse issues, that many members had criminal histories, and that members had previously behaved aggressively or violently towards service coordinators.

Employer recognition of a hazard can be established by evidence of safety precautions taken by the employer in conjunction with other evidence, such as warnings by or to company personnel regarding existence of a hazard. *See Ted Wilkerson Inc.*, 9 BNA OSHC 2012, 2016, 1981 CCH OSHD ¶ 25,551, p. 31,856 (No. 13390, 1981) (employer's work rule establishes recognition of hazard under general duty clause); *St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840 (8<sup>th</sup> Cir. 1981) (actual knowledge of a hazard may be gained by means of prior accidents, prior injuries, employee complaints, and warnings communicated to the employer by an employee.) As the Commission stated in *Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 2000 WL 34012177 at \*28 (No. 91-3144, 2000):

While an employer's safety precautions alone do not establish that the employer believed that those precautions were necessary for compliance with the Act, *Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1218, 1221-22, 1993-95 CCH OSHD ¶ 30,050, p. 41,291 (No. 89-3389, 1993), precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence. *Waldon*, 16 BNA OSHC at 1061-1062, 1993-95 CCH OSHD at p. 41, 154-55 and cases cited therein. Moreover, as the Commission observed in *Pepperidge Farm*, 17 BNA OSHC at 2007, 1995-97 CCH OSHD at p. 44,018, warnings by or to company personnel regarding the existence of a hazard are more persuasive on the issue of recognition than purely voluntary safety precautions.

Integra clearly recognized that members could pose a threat of violence to the service coordinators. Section 8 of the Neumann Training provided to new service coordinators outlines the risks of working with “dangerous members” (Ex. 16); the assessment form used by service coordinators asks members to assess the members for traits and behaviors identified as creating a “high risk” for violence (Ex. 17 and Ex. 34); the employee handbook identifies “workplace violence” as a potential hazard (Ex. 18, p. 96); and Integra instructed its service coordinators to consider bringing a “buddy” with them if they “suspect that there is potential danger,” (Ex. 16, p. 4), despite the fact that the service coordinators categorically did not have the training or experience to make such determinations. As such, Integra’s own training, handbook, and existing policies establish that it recognized that its service coordinators were exposed to the hazard of workplace violence. (Prymmer, Tr. 110:4-8; 116:21-25; 117:1-5).

Moreover, the evidence establishes that, prior to the fatal attack on (b) (6) Integra managers were aware of several instances of violence or aggression by members against service coordinators. In particular, service coordinators Andy Macaluso, Scott Schneider, and Annie Hinman had all reported to their supervisors particular instances in which members acted aggressively, threateningly, or so strangely as to raise safety concerns. (Schneider, Tr. 458; Ex. 29, p. 6; Schneider, Tr. 470; Ex. 29, p. 18; Schneider, Tr. 471-472; Ex. 29, p. 24; Hinman, Tr. 831; Rochelle, Tr. 268; Macaluso, Tr. 507, Ex 31, p. 3). This prior history of workplace violence clearly put Integra on notice that its employees were exposed to the hazard of workplace violence.

A reasonable inference from the evidence also establishes that Integra indeed recognized that (b) (6) presented a specific threat to the victim, (b) (6) Integra performed no

background check on (b) (6) to determine if he possessed violent tendencies,<sup>2</sup> and took no action when the victim's progress note reports described her discomfort and his alarming, delusional behavior. (Rochelle, Tr. 278). The victim noted that the member made her so "uncomfortable" that she did not want to be alone in his house with him. (Ex. 7, p. 5). She stated that she planned to bring another individual with her on the next visit or to remain outside the member's home. (Id.) Although Integra managers admit to reading this note, Integra took no steps to assess the risk posed by (b) (6) and made no follow-up to ensure that (b) (6) took either measure she outlined to protect her safety. (Prymmer, Tr. 143, 148; Ex. 19; Arnott, Tr. 356-359; Rochelle, Tr. 278). Integra also did not discipline (b) (6) for failing to bring a partner on her subsequent visits to (b) (6) and/or for failing to remain outside his home. (Rochelle, Tr. 285-286). Integra made no inquiries into whether the victim's interactions with the assailant had improved or changed since her initial visit. (Arnott, Tr. 358-359, 364-365). Thereafter, (b) (6) performed three additional face-to-face visits with (b) (6)(b) (6) (See Ex. 7; Prymmer, Tr. 139-140). During these visits, (b) (6)(b) (6) notes indicate that (b) (6) exhibited behaviors that could indicate delusional or paranoid behavior. (Arnott, Tr. 362). Delusions and paranoia are identified in Integra's training as "high risk" behaviors. (Arnott, Tr. 362). (b) (6)(b) (6) progress note reports, accordingly, would have caused Integra to recognize that she was exposed to the hazard of workplace violence. On her fourth face-to-face visit to (b) (6) (b) (6) home, on December 10, 2012, (b) (6) attacked (b) (6) and stabbed her to death with a knife. (Arnott, Tr. 366).

Respondent may contend that working in close contact with persons with mental illness, substance abuse issues, and/or histories of violent behavior does not necessarily present a

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<sup>2</sup> A simple search of (b) (6) (b) (6) name on the Florida Department of Corrections website would have shown that he had an existing criminal history including aggravated battery with a deadly weapon and aggravated assault. (Ex. 25; Prymmer, Tr. 136-137, 139).

recognized hazard to its employees, because of the difficulty of predicting the criminal behavior of non-employees. Respondent may seek to rely upon *Megawest Financial Inc.*, 17 BNA OSHC 1337 (No. 93-2879, 1995), in support of its position. *Megawest* is an unreviewed ALJ decision with no precedential value for the Commission. In that case, Judge Spies vacated a § 5(a)(1) citation where the alleged recognized hazard was workplace violence inflicted on apartment complex management personnel by tenants of the apartment complex. In vacating the citation, Judge Spies states:

In the past, employers have been required to reduce hazards they could anticipate and reduce or eliminate. The problem with predicting workplace violence is the unpredictability of human behavior. In this case, the Secretary is asking *Megawest* to predict the criminal behavior of non-employees. Additionally, the anger and frustration that drives a resident to become violent may be fueled by a variety of factors.

*Id.* at 1341.

*Megawest* is distinguishable from this case for several reasons. First, unlike the employer in *Megawest*, the evidence establishes that *Integra* did actually recognize the hazard of violence by one of its members against its employees. As part of the training for new service coordinators (called “the Neumann training”), *Integra* identified certain dangers that employees might face in the execution of their duties, including “Screening the Dangerous Member,” “Risk Factors,” and “High Risk Behaviors.” Second, several employees – including the victim (b) (6)(b) (6) – had informed management that certain clients’ behavior made them feel uncomfortable or unsafe. Furthermore, unlike the leasing-office workers in *Megawest* who interacted in an office setting with residents similar to members of the general public, the service coordinators interacted daily with a population known by *Integra* to be mentally ill and substance abusers, and many of which had a violent criminal record. In addition, service coordinators traveled, usually alone, to these members’ homes and communities to meet with them; they were not meeting them in the

relatively secure and stable environment of an office. While the behavior of such members is still “unpredictable” in a specific sense, Integra clearly recognized that violence by one of these individuals was a hazard and cannot credibly deny having such recognition. *See SeaWorld of Florida, LLC v. Perez*, 748, F.3d 1202, 1209 (D.C. Cir. 2014) (dismissing SeaWorld’s argument that close contact with whales “was not a recognized hazard because all whales behave differently”, explaining that “even though SeaWorld had not recorded incident reports on all of its killer whales, a substantial portion of SeaWorld’s killer whale population had at least one reported incident” and that “SeaWorld management personnel, including corporate curators of animal training, [] described the need for caution around killer whales generally, not only around certain killer whales”).

***b. Industry Recognition of the Hazard***

Integra’s industry recognizes the hazard of workplace violence against employees. The Commission and courts have held that expert testimony and other sources such as industry publications and standards can demonstrate that the hazard is recognized in the employer’s industry. *American Phoenix*, supra (citing decisions that recognize ANSI standards reflect industry consensus).

A relevant expert’s testimony is sufficient evidence in and of itself to establish that a particular industry recognizes a hazard. *See Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317, 322 (5th Cir. 1984) (holding that expert testimony established recognition of hazard); *National Realty*, 489 F.2d at 1265 n.32 (holding that recognition standard centers on “the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question.”). In this case, the testimony of Janet Nelson, recognized by the Court as an expert in “personal safety skills and safety programs for health and human service workers”

(Nelson, Tr. 584), establishes that the social services industry recognizes that workplace violence is a known hazard. (b) Nelson testified that, in the past ten years, several high profile murders of social service workers have raised awareness within the industry of the hazards faced by social service workers. (Nelson, Tr. 555-556). (b) Nelson has dedicated the majority of her career to teaching self-defense and safety skills to social service and other community outreach workers, and has been hired by multiple chapters of the National Association of Social Workers across the nation to teach these skills. (Nelson, Tr. 558-561).

In addition to (b) Nelson's testimony, the Secretary presented evidence of multiple industry publications recognizing the hazard of workplace violence in the social services and home healthcare industry. Specifically, the OSHA directive on workplace violence (Exhibit 33), and the OSHA publication offering Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers (Exhibit 32), both list multiple publications within the social services and healthcare industry addressing the recognized hazard of workplace violence.<sup>3</sup>

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<sup>3</sup> OSHA, in its Violation Worksheet entered as Exhibit 6, also identified the following publications as evidence of the industry's recognition of the hazard of workplace violence:

- OSHA Publication 3148-11R 2004 Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers
- OSHA Workplace Violence Factsheet
- NIOSH Publication No. 2001-101, Violence: Occupational Hazards in Hospitals
- NIOSH Publication No. 2006-144, Workplace Violence Prevention Strategies and Research Needs
- NIOSH Publication No. 2004-100D (DVD), Violence on the Job
- NIOSH Publication No. 2002-101, Violence Occupational Hazards in Hospitals
- NIOSH Publication No. 96-100, Violence in the Workplace
- NIOSH Publication No. 93-109, Preventing Homicide in the Workplace
- NIOSH Publication No. 92-103, Homicide in U.S. Workplaces: A Strategy for Prevention and Research
- FBI Workplace Violence: Issues In Response
- Journal of Teaching Social Work (2000) "Encountering Violence in Field Work: A Risk Reduction Model"
- The Journal of Baccalaureate Social Work (2001) "The Power of Collaboration: Developing a safety training program for student interns"

(See Ex. 32, p. 25 and 44-46; Ex. 33, p. 36-38). Both of these documents explain that social service workers are particularly susceptible to the hazard of workplace violence because they work with volatile, unstable people; work alone or in isolated areas; provide in-home services and care; and work late at night or in areas with high crime rates. (Ex. 32, p. 8-9; Ex. 33, p. 8).

Courts and the Commission have also looked to industry standards and guidelines to determine whether a particular industry recognizes the hazard cited. *See Bethlehem Steel Corp. v. OSHRC & Marshall*, 607 F.2d 871 (3d Cir. 1979) (safety officer admitted that advisory ANSI standard represented industry consensus); *Betten Processing Corp.*, 2 BNA OSHC 1724 (No. 2648, 1975) (holding judge erred in failing to consider ANSI standard as evidence of industry recognition). “Where a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question.” *Arcadian Corp.*, 20 BNA OSHC 2001, 2997, 2004-2009 CCH OSHD ¶ 32,756, p. 52,074 (No. 93-0628, 2004) (citing *Kelly Springfield*, 729 F.2d at 317). The evidence establishes that the National Association of Social Workers has published a set of “Guidelines for Social Worker Safety in the Workplace.”<sup>4</sup> These Guidelines address the hazard of workplace violence specifically for social workers, and set forth

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- Journal of Social Work Education (2008) “Developing Student Knowledge and Skills for Home Visiting”
  - The New Social Worker (2011) “Tips for Making Home Visits”
  - The Clinical Supervisor (2007) “Home Visits in a Violent World”
  - Social Work (2005) Conflict in the workplace: Social workers as victims and perpetrators”
  - Social Work (2003) “Client Violence Toward Social Workers: The role of management in community mental health programs”
  - The Provider (2008) The need to make safety a priority”
  - Archives of General Psychiatry (2009) “The Intricate link between violence and mental disorder”

See Exhibit 6, p. 8.

<sup>4</sup> The Secretary’s expert, Janet Nelson, contributed to the creation of these industry guidelines. (Nelson, Tr. 588, 723).

suggested methods of abatement, many of which were also recommended in this case by OSHA and (b) Nelson. (Nelson, Tr. 723-730).

Respondent may argue that service coordinators are not trained social workers and, therefore, the NASW guidelines and other industry publications relevant to social service workers do not establish recognition of the hazard by Integra's industry. The evidence establishes, however, that Integra's service coordinators, despite their lack of formal training, perform the work of social workers. (Nelson, Tr. 590-593, 599, 1097-1100, 1103-1104; Ex. 34). Furthermore, it is beyond dispute that the service coordinators work under conditions recognized by the social service industry as creating a higher risk of workplace violence; namely, the service coordinators, like many social service workers, work with volatile, unstable people; work alone or in isolated areas; provide in-home services and care; and work late at night or in areas with high crime rates.<sup>5</sup> Accordingly, regardless of which "industry" Integra claims to belong to, because the conditions of the service coordinators' work are plainly recognized by the social work industry as creating the hazard of workplace violence, the Court should "infer recognition [of the hazard] in the industry in question." *Arcadian Corp.*, 20 BNA OSHC 2001 at \*11.

**3. The hazard is causing or likely to cause death or serious physical harm**

To prove a 5(a)(1) violation, the Secretary must show that the alleged hazard was causing or likely to cause death or serious physical harm. In determining whether employee exposure exists, the Commission has held that the Secretary must prove that "employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are or have been in a zone of danger." *Fabricated Metal Products, Inc.*, 18 O.S.H. Cas. (BNA) 1072 (No. 93-1853,

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<sup>5</sup> Indeed, (b) Nelson testified that the service coordinator's lack of formal social work training actually increases their risk of workplace violence, because they lack the experience and clinical knowledge necessary to adequately assess a member's propensity towards violence. (Nelson, Tr. 1100).

1997) (citing *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976)). See also *Con Agra Flour Milling Co.*, 16 O.S.H. Cas. (BNA) 1137 (No. 88-1250, 1993) (“[t]he Commission’s test for determining access is whether in the course of the employee’s duties, it is ‘reasonably predictable’ that they will be, are or have been in a ‘zone of danger’”) (citations omitted).

This case involves the violent killing of one of Integra’s employees, (b) (6)(b) (6)(b) (6) by a member with a history of violent behavior. This tragic event establishes that the hazard of work place violence caused the threat of serious physical harm or death.

**4. The Secretary’s proposed abatement is feasible and will eliminate or materially reduce the cited hazard.**

The final element in establishing a general duty clause violation is the Secretary’s showing that the proposed abatement will “eliminate or materially reduce the hazard.” *Cardinal Operating Company*, 11 BNA OSHC 1675 (No. 80-1500, 1983). “The proposed method of abatement is judged by what a reasonable person familiar with the conditions of the industry would have instituted.” *Valley Interior Systems, Inc.*, 2007 WL 2127305 at \*7. “Feasible means of abatement are established if ‘conscientious experts, familiar with the industry’ would prescribe those means and methods to eliminate or materially reduce the recognized hazard.” *Arcadian*, 20 BNA OSHC 2001 at \*13 (quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032 (No. 89-0265, 1997)). “[T]he Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard.” *Morrison-Knudsen*, 16 BNA OSHC at 1122.

In the Citation item, the Secretary proposes that Respondent could abate the hazard of workplace violence through (1) implementing a written workplace violence prevention program

containing specified elements<sup>6</sup>; (2) determining the behavioral history of new/transferred members and establish a system – such as a chart, log book, or report – to identify members with assaultive behavior problems and to communicate such information to all potentially exposed employees; (3) establishing procedures for communicating any incident of workplace violence to all staff; (4) updating and overhauling the safety training; (5) implementing a buddy system as appropriate based upon a complete hazard assessment which includes procedures for all staff to request and obtain double coverage when necessary; (6) providing all staff with a reliable way to rapidly summon assistance when needed; and (7) establishing a liaison with law enforcement representatives. (Ex. 1, p. 6-8). CSHO Prymmer testified that he developed the list of proposed abatement from the OSHA directive itself, which lists engineering and administrative controls shown to minimize the risk of workplace violence within the healthcare and social services industries. (Prymmer, Tr. 165; Ex. 33, p. 33-38). He further explained that “the more robust [workplace violence prevention] program you have, a written comprehensive program, the lower incidence of workplace violence you’re exposed to.” (Prymmer, Tr. 164). (b) Nelson, recognized by the Court as an expert in “personal safety skills and safety programs for health and human service workers”, testified that performing background checks, implementing certain administrative and engineering controls,<sup>7</sup> and providing employee training in de-escalation and non-harming self-defense techniques, would be low-cost to Integra and would materially reduce the risk of workplace violence. (Nelson, Tr. 617, 644-666, 675, 1094-1095; Ex. 27, p. 12). She also testified that the abatement recommended by OSHA was feasible and would materially

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<sup>6</sup> These elements are set forth in the Citation itself.

<sup>7</sup> Examples of such controls include establishing a safety committee; assigning the committee to write field safety procedures; developing safety plans and practice them; assigning clients/caseloads considering client risk, race, gender, language and culture; having home visit itineraries and call-in requirements to monitor location of employees; establishing a system to communicate to employees all incidents of threats or violence; and developing code words to indicate when there is a problem.

reduce instances of workplace violence. (Nelson, Tr. 672-673). This portion of (b) Nelson's testimony was unchallenged by Integra, which provided neither lay nor expert opinion testimony claiming that these abatement measures were infeasible or would not reduce the hazard of workplace violence.

Indeed, since the death of (b) Integra has implemented several of the abatement methods proposed by OSHA. For example, Integra has created a written workplace violence prevention program which includes some of the above-referenced administrative and engineering controls. (Prymmer, Tr. 166-167). Integra began performing background checks and "red-flagging" certain members in the system after (b) death. (Rentz, Tr. 389; Prymmer, Tr. 160, 166). Integra now "rolls off" members whose criminal backgrounds indicate a history of violent behavior, and has "rolled off" at least eight members because their criminal histories indicated that they were too dangerous to service. (Prymmer, Tr. 160, 166-167). On or about May 1, 2013, Integra provided de-escalation training called "CPI" to its service coordinators. (Macaluso, Tr. 521-522, 525; Nelson, Tr. 676). Accordingly, the evidence establishes that many of the measures outlined by OSHA, including background checks of new clients and more robust training, are reasonable to implement, are economically and technologically feasible, and materially reduce the instances of workplace violence.

Integra may claim that its existing policies and procedures were sufficient to address the hazard of workplace violence. *See Waldon*, 16 BNA OSHC at 1063 ("[T]he employer may defend against a general duty clause citation by demonstrating that it was using an abatement method that is as effective as the one suggested by the Secretary."). However, the evidence established that Integra's safety training program was inadequate and it did not have or enforce a workplace violence prevention program. Prior to (b)(b) death, Integra's policies establish

that it was *aware* of the hazard of workplace violence, but they fail to provide enforceable work rules or administrative or engineering controls which could adequately prevent workplace violence. The evidence establishes that, before (b) (6)(b) (6) death, Integra attempted to shift its own responsibilities for safety to its employees by instructing its service coordinators to leave a situation “if [they] feel there is any risk” or to bring a “buddy” if they “suspect that there is potential danger.” (Ex. 16, p. 2 and 4). Integra may claim that this instruction – which was part of the on-line Neumann training power points – sufficiently protected its employees from exposure to workplace violence. This argument, however, must fail because Integra’s entire “safety program” was dependent upon the service coordinator’s accurate assessment and identification of potential danger. (Prymmer, Tr. 111). Further, service coordinators testified that they felt pressured by management to complete the goals of making face to face contact with members in unrealistic time frames, regardless of the workplace conditions. (Schnieder, Tr. 494; Daniel, Tr. 436; Rochelle, Tr. 269). (b) Nelson also testified that service coordinators, because they were not clinically trained or experienced in working with mentally ill patients, were ill-equipped to make the type of “assessment” of a member that would reasonably predict his propensity towards violence. (Nelson, Tr. 1099-1100). Integra’s reliance on its service coordinators to recognize potential danger and thereby prevent violent behavior by the members runs counter to the requirements of the Act. *See Sea World of Florida, LLC*, 24 O.S.H. (Cas.) BNA 1303 (2012), *affirmed by SeaWorld of Florida, LLC*, 748, F.3d 1202 (stating that employer’s reliance on employees to recognize precursors and prevent unpredictable behavior is inconsistent with the requirements of the Act). “The duty to comply with section 5(a)(1), however, rests with the employer. An employer cannot shift this responsibility to its employees

by relying on them to, in effect, determine whether the conditions under which they are working are unsafe.” *Armstrong Cork Company*, 8 BNA OSHC 1070, 1074 (No. 76-2777, 1980).

**B. The Secretary has established each element of Citation 2, Item 1, which alleges a violation of 29 C.F.R. § 1904.39(a).**

The regulation at Section 1904.39(a) provides that “within eight (8) hours after the death of any employee from a work-related incident . . . , you must orally report the fatality [] by telephone or in person to the Area Office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, that is nearest to the site of the incident.” It is undisputed that (b) (6) an employee of Respondent, was fatally injured from a work-related incident on December 10, 2012. It is also undisputed that Respondent did not report the fatality to OSHA at all. (Prymmer, Tr. 82, 86). Accordingly, the undisputed facts establish a violation of 29 C.F.R. § 1904.39(a).

**C. The Secretary has established that violation in Citation 1, Item 1 was “serious” in nature, and that the violation in Citation 2, Item 1 was “other-than-serious”.**

Under section 17(k) of the Act, a “serious” violation exists if there is a “substantial probability that death or serious physical harm could result from a condition which exists. . . .” *See* 29 U.S.C. § 666(k). Whether a violation is serious is determined not by whether an accident would likely occur, but whether in the event an accident occurred it could result in bodily harm or possibly death. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 1238, 1989). There is no dispute that on December 10, 2012, (b) (6) was fatally injured as a result of workplace violence. Therefore, the “serious” classification for Citation 1, item 1, should be upheld. *See Trinity Yachts, LLC*, 2001 WL 1682627, \*24 (Feb. 22, 2011) (noting, “as demonstrated by the fatality here”, the violation was properly characterized as serious).

Similarly, there is no dispute that Integra's failure to report the death of (b) (6) in violation of OSHA's regulations, did not create a substantial probability of death or serious physical harm. Accordingly, the Secretary appropriately classified Citation 2, Item 1, as "other-than-serious."

**D. The proposed penalty for each Citation item is appropriate in light of the gravity of the violations established and any mitigating factors.**

Section 17(j) of the Act, 29 U.S.C. 666(j) requires the Secretary to consider four factors in proposing penalties: the gravity of the violation and the employer's good faith, history, and size. The Act does not prescribe how or what weight to apply to the factors. *Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir. 1975), *aff'd*, 430 U.S. 442 (1977) (OSHA penalties are meant to "inflict pocket-book deterrence"). Penalty assessment requires application of administrative discretion. *D.S. Grading Co., Inc. v. Secretary of Labor*, 899 F.3d 1145, 1148 (11th Cir. 1990). Usually, the gravity of the violation is the factor of greater significance. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178 (No. 97-922, 1993). "The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is generally the principal factor to be considered." *Reynolds Packaging Kama, Inc.*, 22 BNA OSHC 1952, 1960 (No. 08-1554, 2009).

The final total penalty of \$10,500.00 should be upheld. CSHO Prymmer appropriately recommended an initial penalty of \$7,000.00 for the "Serious" violation and appropriately did not make any reductions based on Respondent's size and history of violations within last 3 years. He did not further adjust the penalty for "good faith" based on his finding that the violation was

of “high” severity and “greater” probability, which was also appropriate in light of the nature of the hazards and severity of the injuries sustained. (See Prymmer Tr. 168-170). The evidence developed at trial supports CSHO Prymmer’s recommendation to award no reduction for good faith. Respondent ignored a clear and obvious hazard, in the face of multiple reports – regarding (b) (6) and other potentially violent members – that service coordinators faced a serious hazard of workplace violence from the members they served. Its failure to provide even minimal administrative controls to protect its employees establishes bad faith for which no reduction should be granted. CSHO Prymmer also appropriately recommended a penalty of \$3,500 for the “Other-than-Serious” violation, based on a reduction for size, and no reduction for history or good faith. Therefore, the final, adjusted penalty should also be affirmed.

## **VI. TABLE OF AUTHORITIES**

29 U.S.C. § 654(a)(1).

29 U.S.C. § 666(k).

29 C.F.R. § 1904.39(a).

*American Phoenix, Inc.*, \_\_ BNA OSHC \_\_ (No. 11-2969, Mar. 13, 2014).

*Arcadian Corp.*, 20 BNA OSHC 2001, 2997, 2004-2009 CCH OSHD ¶ 32,756, p. 52,074 (No. 93-0628, 2004).

*Armstrong Cork Company*, 8 BNA OSHC 1070, 1074 (No. 76-2777, 1980).

*Atlas Roofing Co. v. OSHRC*, 518 F.2d 990, 1001 (5th Cir. 1975), *aff’d*, 430 U.S. 442 (1977).

*Bethlehem Steel Corp. v. OSHRC & Marshall*, 607 F.2d 871 (3d Cir. 1979).

*Betten Processing Corp.*, 2 BNA OSHC 1724 (No. 2648, 1975).

*Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 2000 WL 34012177 at \*28 (No. 91-3144, 2000).

*Cardinal Operating Company*, 11 BNA OSHC 1675 (No. 80-1500, 1983).

*Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178 (No. 97-922, 1993).

*Con Agra Flour Milling Co.*, 16 O.S.H. Cas. (BNA) 1137 (No. 88-1250, 1993).

*D.S. Grading Co., Inc. v. Secretary of Labor*, 899 F.3d 1145, 1148 (11th Cir. 1990).

*Empire–Detroit Steel Div., Detroit Steel Corp. v. OSHRC*, 579 F.2d 387 (6th Cir. 1978).

*Fabricated Metal Products, Inc.*, 18 O.S.H. Cas. (BNA) 1072 (No. 93-1853, 1997).

*Foseco, Inc.*, 10 BNA OSHC 1949, 1982 WL 22452 at \*13 (No. 81-944, 1982).

*Gilles & Cotting, Inc.*, 3 BNA OSHC 2002 (No. 504, 1976).

*Kansas City Power & Light Co.*, 10 BNA OSHC 1417 (No. 76-5255, 1982).

*Kastalon, Inc.*, 12 BNA OSHC 1928, 1931 (Nos. 79–3561, 1986).

*Kelly Springfield Tire Co., Inc. v. Donovan*, 729 F.2d 317, 322 (5th Cir. 1984).

*Megawest Financial Inc.*, 17 BNA OSHC 1337 (No. 93-2879, 1995).

*Mineral Indus. & Heavy Constr. Co. v. OSHRC*, 639 F.2d 1289, 1294 (5th Cir. 1981).

*Morrison-Knudsen Co./Yonkers Contracting Co., A Joint Venture*, 16 BNA OSHC 1105, 1121 (No. 88-572, 1993).

*National Realty and Constr. Co. v. OSHRC and Secretary*, 489 F.2d 1257, 1260-61 & n. 7 (D.C. Cir. 1973).

*Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82–388, 1986).

*Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997).

*Reynolds Packaging Kama, Inc.*, 22 BNA OSHC 1952, 1960 (No. 08-1554, 2009).

*Sea World of Florida, LLC*, 24 O.S.H. (Cas.) BNA 1303 (2012).

*SeaWorld of Florida, LLC v. Perez*, 748, F.3d 1202, 1209 (D.C. Cir. 2014).

*St. Joe Minerals Corp. v. OSHRC*, 647 F.2d 840 (8<sup>th</sup> Cir. 1981)

*Ted Wilkerson Inc.*, 9 BNA OSHC 2012, 2016, 1981 CCH OSHD ¶ 25,551, p. 31,856 (No. 13390, 1981).

*Trinity Yachts, LLC*, 2001 WL 1682627, \*24 (Feb. 22, 2011).

*Valley Interior Systems, Inc.*, 21 BNA OSHC 2224, 2007 WL 2127305 at \*3 (No. 06-1395, 2007).

*Waldon Health Care Center*, 16 BNA OSHC 1052, 1060, 1993 WL 119662 (No. 89-2804, 1993).

*Wheeling-Pittsburgh Steel Corp.*, 16 BNA OSHC 1218, 1221-22, 1993-95 CCH OSHD ¶ 30,050, p. 41,291 (No. 89-3389, 1993).

*Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 1238, 1989).

## VII. CONCLUSION

The Secretary submits that, for all of the above reasons, he has met his burden of proving by preponderant evidence that the Citations should be affirmed, with the associated proposed penalties and classifications.

Respectfully submitted, this 21st day of July, 2014.

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SOL Case No. 13-00965

**CERTIFICATE OF SERVICE**

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of the foregoing Secretary's Post-Hearing Brief was filed electronically and a copy was served via electronic mail this 21<sup>st</sup> day of July 2014 on the following counsel for Respondent:

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*s/Lydia J. Chastain*  
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