BEFORE THE UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR	*	
Complainant,	*	OSHRC DOCKET NO. 13-1124
v.	*	
INTEGRA HEALTH MANAGEMENT, INC.	*	
Respondent.	*	

* * * * * * * * * * * * *

BRIEF OF PETITIONER INTEGRA HEALTH MANAGEMENT, INC.

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STATEMENT OF THE CASE

Integra Health Management, Inc. ("Integra") is a privately held corporation with the mission of connecting vulnerable, underserviced members of the community ("Members") with medical care and associated support services. To accomplish that mission, Integra employs teams of community health workers called Service Coordinators,[1] who work in communities to engage with Members in person and via telephone. This case arises out of the tragic killing of (b)(6) a Service Coordinator, by a Member outside of the Member's home on December 10, 2012.

Following an investigation, OSHA issued a Citation alleging a violation of the general duty clause of the Occupational Health and Safety Act of 1970 (the "Act"). The hazard cited by OSHA as supporting the violation of the general duty clause was that of "being physically assaulted by members with a history of violent behavior." This case is thus premised upon Integra's alleged failure to abate a hazard consisting of the risk that third parties would engage in criminal acts of violence upon Integra employees.

It is undisputed that the Commission has never previously found a violation of the general duty clause in the context of an act of criminal violence against an employee. As set forth below, the general duty clause cannot properly be applied to criminal acts by third parties in the factual circumstances of this case. Application of the clause in this context runs afoul of both the legislative history of the Act, as well as its enforcement history over the more than four decades since the Act was passed. Further, the inherent unpredictability

[1] Subsequent to the events at issue in this proceeding, the position of Service Coordinator was retitled to Community Coordinator. (Tr. 758). This Brief will use the term Service Coordinator in light of the fact that this terminology was used throughout the hearing.

of criminal conduct, as well as an employer's lack of control over individuals outside its workforce, renders unworkable any attempt to define a measure by which an employer's acts can be evaluated in determining compliance with the general duty clause in the event of a criminal attack on an employee by a third party.

Even if the general duty clause were held to be potentially applicable to a third party's criminal assault of an employee, the ALJ's decision below must nevertheless be reversed. The record in this case fails to demonstrate that physical assaults by Members constituted a recognized hazard at Integra. Indeed, the facts of this case on the question of a recognized hazard pale in comparison to those of *Megawest Financial Inc.,* 17 BNA OSHC 1337, 1995 OSAHRC LEXIS 80 (No. 93-2879, 1995), the sole prior litigated case involving acts of violence against employees, in which an ALJ concluded that the facts at issue did not demonstrate that the risk of attacks was a recognized hazard. Reversal of the ALJ's decision is further warranted due to the Secretary's failure to meet his burden of establishing the feasibility of measures that would have materially reduced or eliminated the hazard.

Finally, assuming *arguendo* that the Commission were to accept the Secretary's position as to the applicability of the general duty clause, this case must be remanded for a new hearing due to the ALJ's conduct in relying upon facts not contained in the record in assessing the credibility of one of Integra's primary witnesses. Specifically, in explaining the weight he would give to the testimony of Dr. Melissa Arnott, Integra's Vice President of Community Programs, the ALJ invoked facts relating to the university from which Dr. Arnott received her doctoral degree, which led the ALJ to discount Dr. Arnott's testimony

based on his assessment of the university's quality. Such matters were not the subject of any evidence whatsoever during the hearing. Integra was thus deprived of any opportunity to address this matter, which the ALJ explicitly relied upon in assessing the weight to be given to the testimony from Integra's chief witness on the issue of its programs and employee training.

STATEMENT OF FACTS

Integra was founded in 2007. (Tr. 754). The company employs community health workers, known as Service Coordinators, who seek to assist individuals experiencing chronic health conditions and gaps in recommended health care in obtaining access to such care, including preventive care. (Tr. 754-55). Members are referred to Integra by health care providers or their health insurers, based on a review of the individuals' claims histories to identify individuals who are not receiving medical or preventative care consistent with their health conditions. (Tr. 755). These are frequently individuals with whom the insurance provider has previously been unable to make or maintain contact. (Tr. 756).

When an individual is referred to Integra, Integra assigns a Service Coordinator to work with the Member. (Tr. 757). As explained by Integra's President, Michael Yuhas, the assigned Service Coordinator attempts to "locate the individual, introduce ourselves in terms of what we are doing, which is really to help them get connected with health care services." (Tr. 756-57). Prior to assisting a Member, the Service Coordinator seeks to obtain the Member's consent to receive assistance from Integra. As Mr. Yuhas testified, "if they don't consent, we won't do anything more. If they do, then we will figure out

what the barriers are to them being connected with their primary care doctor or other practitioners and work with them to help get appointments set up, make sure they're getting to their appointments, being reminded to take the medications they've been prescribed, et cetera." (Tr. 757).

These services are provided by Integra's Service Coordinators, who, as community health workers, are "non-clinically trained people." (Tr. 757). As Mr. Yuhas explained, "we're not providing clinical services. We don't really train them or want them to be doing anything clinical in nature relative to a condition. We're really just trying to get the individual connected with things just like a family member might . . . if that person existed, for the people we work with." (Tr. 757-58).

Integra began operating in Florida in May 2012. (Tr. 760). Integra was contracted by Amerigroup to provide support services to certain individuals enrolled in that company's health insurance plan who could benefit from the community health worker service model provided by Integra. (Tr. 756-60, 786). Integra then commenced the process of recruiting, hiring and training a local team of Service Coordinators and a supervisor to work with these Members. (Tr. 759-60). At the outset, that team included Whitney Ferguson and Laurie Rochelle. (Tr. 837). Ms. Ferguson had already been working with Integra as a Service Coordinator prior to relocating to Florida. Ms. Rochelle, who was hired as the team supervisor, holds a license in mental health counseling and had maintained a private counseling practice prior to joining Integra. (Tr. 243-44). As additional Members were referred for services, Integra hired additional Service Coordinators in the late Summer and Fall of 2012. (Tr. 843).

Integra is fully committed to and takes very seriously the training of its community health worker employees. Community health workers (CHWs) are a critical resource in providing in-community support to underserved individuals with health care needs. In 2009, the Department of Labor's Bureau of Labor Statistics created a distinct occupation code for CHWs. The services defined within the CHW occupational code include: assisting individuals and communities to adopt healthy behaviors; conducting outreach for medical personnel or health organizations to implement programs in the community that promote, maintain, and improve individual and community health; providing information on available resources; providing social support and informal counseling; advocating for individuals and community health needs; providing services such as first aid and blood pressure screening; and collecting data to help identify community health needs.

While the DOL has formally recognized the community health worker as an occupational classification, there exist no national standards for the training of such employees. For that reason, Integra commissioned the development of a structured online, interactive training program referred to throughout this proceeding as the "Neumann training," to be provided to employees as part of Integra's broader employee training procedures. That program's content was initially developed by Dr. Melissa Arnott, Integra's Vice President of Community Programs, and Dr. Thomas Krajewski, Integra's Medical Director. (Tr. 876-78, 881-83, 1025). The program was refined in conjunction with the faculty of Neumann University, and Neumann University now offers the training as a certificate program. (Tr. 883-85). The Neumann training consists of fifteen training modules that are presented in an online format, with interactive discussion features that

allow employees to communicate with managers regarding the contents of the lesson. (Tr. 889-90).

One of the modules contained in the Neumann training program is dedicated to workplace safety. (Tr. 882, 913; Exhibit J). Integra mandates that newly hired employees complete the Neumann training at the outset of their employment, and pays their salary during the time that it takes them to complete the training course. (Tr. 893-94). In addition to this formal online training program, Integra's training also provides for the Service Coordinators to observe face-to-face meetings with Members conducted by more senior staff – referred to as "shadowing" at various points during the hearing. (Tr. 766-67, 791-93, 961).

The online, interactive safety instruction offered via the Neumann training is also supplemented by face-to-face training from Integra management. Service Coordinator safety training instructs staff to avoid any situation where real or perceived threats to personal safety may be present, to advise their supervisor of any real or perceived safety issue, to take another Service Coordinator with them to meetings with a Member if they felt doing so was necessary, and generally how to perform their job duties safely in the community. (Tr. 231-32, 794-95, 821-22, 932, 941-42). Integra conducted a total of three two-day face-to-face training programs in the Fall of 2012 for its new Service Coordinator team in Florida. (Tr. 789-91, 839-42, 957-59). Those trainings encompassed safety discussions that included role playing scenarios and demonstrations (Tr. 875-76, 959), community-based shadowing, and included written safety-related materials distributed in connection with the online and face-to-face training sessions. (Tr. 956-57; Exhibit F).

In addition to the face-to-face training sessions, Integra conducted a set of twice-weekly telephone calls in which the Service Coordinators were required to participate.[2] One of these weekly calls was led by the supervisor of the Florida Service Coordinator team, while the other was led by Drs. Melissa Arnott and Thomas Krajewski. (Tr. 289-91, 849-50). During their weekly calls, Drs. Arnott and Krajewski facilitated discussion related to service challenges regarding individual Members, reviewed specific training points, and responded to inquiries regarding safety considerations and other workplace issues. (Tr. 766-67, 849-50, 1027).

Integra also employed a practice commonly referred to as the "buddy system," under which employees who felt in any way a real or perceived threat in interacting with a Member were to take a second Service Coordinator or other Integra employee with them for Member visits. (Tr. 231-32, 793-94, 821-22, 847-48). Service Coordinators commonly used a regular partner for these purposes, and were instructed to contact a supervisor if they were not readily able to arrange for another employee to accompany them in meeting with the Member. (Tr. 793-94, 821-22, 847-48). Service Coordinators were instructed that, if they believed a real or perceived threat to their personal safety existed with a particular Member, they should not meet with that Member or meet only when a second Integra employee was present. (Tr. 794-95). The company has always directed its Service Coordinators to leave any meeting immediately if they felt unsafe. (Tr. 932, 941-42). It is undisputed that no employees were ever disciplined for delaying a meeting to ensure a second employee could accompany them, and that no employee ever

[2] These weekly telephone calls were referred to throughout the hearing as "rounds."

suffered a loss of pay or other disciplinary action as a result of not completing a particular number of meetings with a Member or otherwise refusing to interact with a particular Member. (Tr. 191, 313).

Finally, Integra maintained a written workplace violence policy, which provided in relevant part that:

> Violence by an employee or anyone else against an employee, supervisor or member of management will not be tolerated. The purpose of this policy is to minimize the potential risk of personal injuries to employees at work and to reduce the possibility of damage to company property in the event someone, for whatever reason, may be unhappy with a company decision or action by an employee or member of management.
>
> If you receive or overhear any threatening communications from an employee or outside third party, report it to your Direct Supervisor at once. Do not engage in either physical or verbal confrontation with a potentially violent individual. If you encounter an individual who is threatening immediate harm to an employee or visitor to our premises, contact an emergency agency (such as 911) immediately.
>
> All reports of work-related threats will be kept confidential to the extent possible, investigated and documented. Employees are expected to report and participate in an investigation of any suspected or actual cases of workplace violence and will not be subjected to disciplinary consequences for such reports or cooperation.
>
> Violations of this policy, including your failure to report or fully cooperate in the company's investigation, may result in disciplinary action, up to and including discharge.

(Exhibit C).

(b)(6) was a Service Coordinator hired in late Summer 2012 as part of Integra's Florida service team. (Tr. 136). One of the Members Ms. (b)(6) was assigned to work with was (b)(6) an individual who had been diagnosed with schizophrenia and other chronic medical issues. When Mr. (b)(6) was referred to Integra there was no evidence of prior psychiatric hospitalizations or history of a connection with his Primary Care Physician for medical care. His history reflected injectable medication compliance and case management services for the schizophrenia diagnosis and an unrelated acute medical hospitalization and follow-up care related to that condition (Tr. 141).

At the hearing, OSHA provided evidence of (b)(6) criminal record. The compliance safety and health officer who conducted the agency's investigation, Jason Prymmer, acknowledged, however, that (b)(6) record contained no evidence of any violent activity subsequent to the 1990s. (Tr. 225-26).

Ms. (b)(6) conducted three face-to-face meetings with (b)(6) during October and November 2012. (Tr. 139-40). Although Ms. (b)(6) notes from one of those meetings indicate that Ms. (b)(6) felt "uncomfortable, so she asked the member to be respectful or she would not be able to work with him", the sole evidence adduced at the hearing on that issue indicated that the comment at issue was of a flirtatious, as opposed to a threatening, nature. (Tr. 232-33).

Ms. (b)(6) traveled to (b)(6) residence for a fourth face-to-face meeting on December 10, 2012. (Tr. 119). When (b)(6) arrived at the house, (b)(6) emerged armed with a knife and fatally stabbed her. (Tr. 83).

Following Ms. (b)(6) death, OSHA commenced the investigation that culminated in the issuance of the Citation underlying this proceeding. Citation One, Item One of the Citation charges Integra with a violation of the general duty clause contained in Section 5 of the Act. Specifically, Citation One, Item One alleges that Integra failed to keep its workplace free from exposure to "the hazard of being physically assaulted by members with a history of violent behavior." (Exhibit 1).

A hearing was held before Administrative Law Judge Dennis L. Phillips ("ALJ") from May 6, 2014 to May 9, 2014. The parties each filed post-hearing briefs and post-hearing reply briefs. By a Decision and Order dated June 11, 2015 (the "Decision"), the ALJ affirmed the Citation.[3]

STANDARD FOR APPLICATION OF GENERAL DUTY CLAUSE

The Citation at issue in this case was issued pursuant to the general duty clause, codified at 29 U.S.C. § 654. The clause provides that an employer:

> [S]hall 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.

In construing the general duty clause, the Review Commission and the courts have held that in order to establish a violation of the clause, the Secretary has the burden of establishing four distinct elements:

[3] The Citation also contained Citation 2, Item 1, which was based upon Integra's failure to notify OSHA following Ms. (b)(6) death. As noted by Integra at the hearing, Integra reported Ms. (b)(6) death to workers' compensation, but did not also notify OSHA. (Tr. 86, 168). Integra therefore does not seek review of the ALJ's decision with regard to Citation 2, Item 1.

> To prove a violation of this provision, known as the "general duty clause," the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard.

CSA Equip. Co., LLC, 24 BNA OSHC 1476, 2014 OSAHRC LEXIS 9 at *2 (No. 12-1287, 2014); *see also Fabi Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1081 (D.C. Cir. 2007) (same).

ARGUMENT

I. The ALJ erred in holding that criminal acts of violence by third parties constitute a recognized hazard to employees of Integra within the meaning of the general duty clause.

The hazard underpinning the Citation at issue in this case is that of "being physically assaulted by members with a history of violent behavior." As discussed *infra*, the general duty clause cannot properly be applied to criminal acts by third parties in the factual context of the instant case. Such an application of the general duty clause runs contrary to both the legislative history of the Act, as well as the entirety of its enforcement history, as the Secretary has acknowledged in this proceeding that the instant case is wholly without precedent.

Further, the general duty clause cannot be applied to incidents of criminal violence in a manner that allows for workable benchmarks for employers. Indeed, the primary response urged by the ALJ – assessment by Integra of Member backgrounds – raises intractable questions concerning how such a policy would be applied in the context of the

general duty clause, including the scope and sources of records to be reviewed, the circumstances under which an employer would be required to conduct such a review of its potential customers, how far back in time the employer should look, what sorts of crimes or violent actions would lead to disqualification, and whether an entity should properly deny its services to a customer based on the assumption that the customer's criminal history is suggestive of future violent conduct. Moreover, the ALJ's decision raises the implication that the general duty clause may require in certain circumstances that an employer conduct a medical evaluation of customers to "evaluate" whether a customer has a medical or psychological condition that might make him or her more likely to cause physical harm to employees. How such a requirement could be reconciled with customers' privacy rights and the various statutes that flatly prohibit the limitation of services to those with actual or perceived mental disabilities is entirely unclear.

Finally, even if the general duty clause were held to be potentially applicable to a third party's criminal assault of an employee, the record in this case fails to demonstrate that physical assaults by Members constituted a recognized hazard at Integra.

A. The general duty clause is not applicable to potential injuries resulting from criminal assaults by third parties.

1. Both the legislative history and enforcement history of the Act controvert the Secretary's position that the general duty clause may properly be applied in the context of acts of criminal violence.

The ALJ's Decision in this case depends, at its core, upon the premise that the hazards encompassed by the general duty clause include the risk of criminal assaults upon employees by third parties. Application of the general duty clause in that context is at odds

with both the purpose of the general duty clause as reflected in the Act's legislative history and the enforcement history of the Act during the more than four decades since its enactment.

The legislative history of the Act contains no suggestion whatsoever that the "recognized hazards" encompassed by the general duty clause would potentially include criminal behavior by individuals not under an employer's control. *See Megawest Financial Inc.*, 17 BNA OSHC 1337, 1995 OSAHRC LEXIS 80 (No. 93-2879, 1995) ("[N]owhere in the legislative history pertaining to the Act or in the scope of the then-existing standards was there any implication that OSHA should police social behavior.").

To the contrary, the scope of the general duty clause was substantially narrowed over the course of the legislative process. *Compare* H.R. 16785, 91st Cong., 2d Sess., 5(1) (1970) (requiring employers to furnish place of employment "which is safe and healthful"), *with* 29 U.S.C. § 654 (requiring that place of employment be "free from recognized hazards"). That narrowing the general duty clause appears to have been driven by concerns that a broad general requirement would have the effect of discouraging the adoption of specific standards. *See* SENATE COMM. ON LABOR AND PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, 92ND CONG., 1ST SESS. (Comm. Print 1971) at 380 (statement of Senator Dominick: "The major thrust of the Act contemplates the establishment of specific standards. The existence of a vague general requirement increases the risk that its enforcement will form the basis for the law's enforcement to the detriment of the setting of specified standards."). Indeed, the Act's legislative history suggests that the general duty clause was envisioned as a stopgap

measure to facilitate the addressing of existing hazards prior to the adoption of specific standards applicable to the hazard at issue. *See id.* at 852 (report of the House Education and Labor Committee: general duty clause to protect "employees who are working under such *unique* circumstances that no standard has yet been enacted to cover this situation") (emphasis in original); *see also id.* at 150 (report of the Senate Labor and Public Welfare Committee: "[t]he general duty clause . . . would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted").[4] The history of the Act is thus fundamentally at odds with the Secretary's present attempt to apply the general duty clause to criminal acts of violence committed by third parties.

The absence of Congressional intent for the general duty clause to encompass criminal assaults by third parties is further demonstrated by the absence of any past case in which a violation of the Act has been found in comparable circumstances. Indeed, the Secretary has acknowledged in this proceeding that only one case involving an alleged violation of the general duty clause on the basis of workplace violence has ever been previously litigated in the more than forty-year history of the Act. *See* Secretary's Post-Hearing Brief at 24. That single case, discussed *infra*, did not result in a finding of a recognized hazard. *See Megawest Financial Inc.*, 17 BNA OSHC 1337, 1995 OSAHRC LEXIS 80 (No. 93-2879, 1995). The Secretary's claim in the instant case – that Integra

[4] For further discussion of the Act's legislative history, specifically relating to the general duty clause, see Donald Morgan & Mark Duvall, *OSHA's General Duty Clause: An Analysis of its Use and Abuse*, 5 BERKELEY J. OF EMPL. & LABOR LAW 283 (1983).

violated the general duty clause by failing to abate the hazard of criminal assaults on its employees by third parties – is thus entirely without precedent.

Simply stated, neither the Act nor its legislative or enforcement history supports the Secretary's contention that the general duty clause imposes upon an employer a duty to anticipate and prevent criminal attacks on employees by third parties. *See Pelron Corporation*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986) ("To respect Congress' intent, hazards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control."); *see also Oil, Chem. & Atomic Workers Int'l Union v. Am. Cyanamid Co.*, 741 F.2d 444, 449 (D.C. Cir. 1984) ("We are not prepared to speculate that, although Congress was thinking only about tangible hazards such as chemicals, it would, had it considered the subject, have decided that any employer-offered choice which leads to injury rather than discharge is a violation of the Act. . . . It seems to us safer, therefore, to confine the term 'hazards' under the general duty clause to the types of hazards we know Congress had in mind.").

2. No reasonable benchmarks can be set to govern the applicability of the general duty clause to third party crimes against employees, and the manner of its application in this case contravenes public policy.

The fact that there has never been an administrative or court decision finding a violation of the general duty clause arising out of acts of criminal violence is indicative of the impracticality of applying the clause in this context. Such an application of the clause gives rise to intractable questions of defining the limits of an employer's responsibilities,

and places an unworkable burden on employers to predict criminal behavior on the part of persons not under their control.

The foundational premise of the ALJ's decision in this case is that an employer may violate the Act by failing to anticipate that one of its customers may choose to break the law by violently attacking one of its employees. On that basis, the ALJ concluded that Integra's failure to predict, and take adequate steps to prevent, such criminal behavior ran afoul of the general duty clause. However, the decision of a human, imbued with free will, to engage in a violent attack on another person is inherently resistant to prediction. Classification of the possibility that an individual will engage in such conduct as a recognized hazard under the general duty clause is directly contrary to the principle that the clause is to be applied as encompassing only those risks which an employer can reasonably be expected to prevent. *See, e.g., Pelron Corporation, supra*; *Greene Construction Co. & Massman Construction Co.*, 4 BNA OSHC 1808 (No. 5356, 1976) (noting that Commission has "consistently held that employers are not to be held to a standard of strict liability, and are responsible only for the existence of conditions they can reasonably be expected to prevent.").

Apart from the inherent unpredictability of criminal behavior, the exercise of defining the circumstances in which the risk of criminal acts by customers or other third parties is sufficiently high to warrant action by the employer resists the drawing of meaningful lines and lends itself instead to *ex post facto* analysis. This concern is amply demonstrated by the instant case.

In discussing the feasibility of various abatement measures, the ALJ concluded that Integra not only was obligated to conduct a background review of potential members, but also to deny services to those "with a history of violent behavior." *See* Decision at 89. Such a conclusion, if accepted, leads inevitably to intractable issues concerning how an employer must set the boundaries of such a policy. The first such issue centers on the types of employers who would be subject to such a duty. While the ALJ's Decision was based in part on the idea that Integra's employees deal with individuals more likely to commit assaults than the general public – a dubious proposition discussed in further detail *infra* – logic dictates that any employees who routinely make calls at customers' homes, such as utility workers and deliverymen, will in the course of their duties encounter individuals with criminal backgrounds in equal or greater number than those encountered by Integra's employees. If the premise that the general duty clause placed upon Integra an obligation to screen its Members before sending employees to their homes is accepted, there is no rational way to define that obligation in such a way that it would not also apply to a range of employers whose workers perform work in the homes of their customers. Such a dramatic rewriting of the Act's requirements is ill suited to be accomplished via application of the general duty clause in individual cases as opposed to the issuance of a standard and the attendant notice and comment procedure.

Even if the Commission were to accept the notion that an employer may in some circumstances be obligated to conduct criminal background checks on its customers, that conclusion raises further issues as to how such inquiries would be conducted and the scope of the information to be sought by the employer. For example, the ALJ's comment

regarding the denial of services to individuals "with a history of violent behavior" calls into question what sort of activities in an individual's history would be sufficient to warrant exclusion, and how far into an individual's past an employer should be expected to look in order to comply with the general duty clause. The facts of the instant case demonstrate the inherent limitations of setting such parameters: the ALJ's Decision reflects that the most recent recorded violent act of the individual who attacked Ms. (b)(6) dated to 1998, fourteen years before the events underlying the Citation. *See* Decision at 4 n.3.

The ALJ's conclusion that Integra could address the risk of assault – and thereby avoid violation of the general duty clause – by simply denying service to individuals with violence in their past also raises substantive issues of public policy. Such a result would place the burden on employers to choose which members of the public should be denied services based on their past actions, notwithstanding the fact that such individuals are not presently under any restriction by the police or civil authorities. The suggestion that employers are under a duty to screen out such individuals is particularly problematic where, as in the instant case, the services offered by the employer are specifically directed at improving the situation of uniquely vulnerable persons. Further, given the racial disparities in criminal prosecutions in this country, any policy that an employer may enact to screen out individuals from receiving services based on their criminal histories would raise troubling concerns of discrimination. Indeed, in the context of hiring decisions, the United States Equal Employment Opportunity Commission ("EEOC") has taken the position that blanket exclusion of candidates on the basis of criminal record runs afoul of the nation's antidiscrimination statutes. *See* EEOC, *Enforcement Guidance: Consideration*

of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (No. 915.002, April 25, 2012) ("African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population. . . . National data, such as that cited above, supports a finding that criminal record exclusions have a disparate impact based on race and national origin.").

Finally, it must be noted that the conclusions reached in the ALJ's Decision with regard to the risk posed by Integra's Members rest upon a disturbing line of reasoning, namely that the Service Coordinators are at a heightened risk because many of the individuals they serve are mentally ill. *See, e.g.*, Decision at 68 (suggesting that "personal inquiries may be conducive to hostile reactions by a severely mentally ill member with a history of violence"). As noted *supra*, the Members served by Integra are not individuals who have been deemed incompetent to live freely by the authorities. No scientific evidence was presented at the hearing in support of the notion that individuals with mental illness pose a heightened risk of violence, and that assumption is not borne out in the scientific literature on the issue. *See, e.g.*, Jillian K. Peterson et al., *How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior Among Offenders With Mental Illness?*, 38 LAW AND HUMAN BEHAVIOR 439, 439 (2014) ("Although offenders with mental illness are overrepresented in the criminal justice system, psychiatric symptoms relate weakly to criminal behavior at the group level."); Heather Stuart, *Violence and Mental Illness: An Overview*, 2 WORLD PSYCHOLOGY 121 (2003) ("First, mental disorders are neither necessary, nor sufficient causes of violence. . . . Second, members of the public undoubtedly exaggerate both the strength of the relationship

between major mental disorders and violence, as well as their own personal risk from the severely mentally ill. It is far more likely that people with a serious mental illness will be the victim of violence.").

The ALJ's suggestion that the Act obligates Integra to conduct its own screenings of the members of the public that it serves, and to exclude individuals from service in reliance on such screenings via the making of predictions as to future criminal behavior, represents an unprecedented expansion of the general duty clause that is at fundamentally odds with both public policy and the legislative and enforcement history of the Act, in addition to being wholly inconsistent with industry practice.

3. OSHA's prior issuance of a guidance document regarding workplace violence against healthcare and social service workers does not support application of the general duty clause in the instant case.

In its September 18th Briefing Notice, the Commission requested that the parties address "the effect, if any, of OSHA's Guidance for Preventing Workplace Violence for Healthcare and Social Service Workers." It is Integra's position that the Guidance for Preventing Workplace Violence for Healthcare and Social Service Workers ("the Guidance") does not provide support for the Secretary's position in the instant case as to the applicability of the general duty clause.

As an initial matter, the Guidance expressly disclaims any effect on an employer's obligations under the Act. *See* Guidance at ii ("This publication does not alter or determine compliance responsibilities which are set forth in OSHA standards and the OSH Act."); *id.* at iv ("This guidance document is advisory in nature and informational in content. It is not a standard or regulation, and it neither creates new legal obligations nor

alters existing obligations created by the Occupational Safety and Health Administration (OSHA) standards or the Occupational Safety and Health Act of 1970 (OSH Act or Act)."); *id.* at 1 (characterizing document as "voluntary guidelines").

The age of the Guidance, along with the concomitant lack of enforcement history, also militates against the Guidance being given weight in this proceeding. The current Guidance updates the original publication first issued in 1996, and updated in 2004. Yet in the nearly 20 years since the Guidance was first published, OSHA has issued no standard addressing the issue of violent acts against employees. *See Metzler v. Arcadian Corp.*, 1997 OSHD (CCH) P31,311, 1997 U.S. App. LEXIS 12693 (5th Cir. 1997) ("[C]ourts have consistently held that standards are the preferred enforcement mechanism and that the General Duty Clause serves as an enforcement tool of last resort."). Nor has there been any litigated case involving such circumstances. The absence of any enforcement activity or rulemaking in this area, coupled with the explicitly voluntary nature of the Guidance, demonstrates that the Guidance has no bearing on this case.[5]

[5] Additionally, even if the Guidance could be deemed to be applicable in the abstract, no evidence was presented at the hearing to suggest that any of the voluntary steps suggested by the Guidance would have had the effect of reducing the likelihood of an attack in the specific context of the work being performed by Integra's Service Coordinators. Indeed, the Service Coordinators are neither healthcare nor social service workers in the traditional sense. Instead, the Service Coordinators meet with Members to identify social, economic, behavioral, and environmental barriers to their receipt of medical care and other resources and to arrange for the Members to have those needs met. (Tr. 754-55). The Service Coordinators do not provide medical care, nor do they perform the functions of social workers. Most significantly, they do not perform the sort of high-risk tasks, such as removing children from a home or carrying or dispensing prescription medication, that are cited in the Guidance as supporting the need for heightened safety measures.

B. Assuming *arguendo* that the general duty clause may apply to acts of criminal violence, the ALJ erred in concluding that the risk of such assaults constituted a recognized hazard on the facts of this case.

The Citation at issue defines the applicable hazard as that of "being physically assaulted by members with a history of violent behavior during a face-to-face interaction." The ALJ's conclusion that this constituted a recognized hazard at Integra is unsupported on the record of this case.

As noted *supra*, the *Megawest* decision is the only previous case in which the Commission or an ALJ has considered the question of whether violent, criminal acts of third parties served by the employer constitute a recognized hazard. The proposed application of the general duty clause was rejected in that case, and there has not been any decision supporting its applicability in similar circumstances in the twenty years since *Megawest* was decided.

In the instant case, the ALJ suggested that *Megawest* could be distinguished on the grounds that the violent acts at issue in *Megawest* were more "random" and less connected to the employees' work than in the instant case. Decision at 66-67. That characterization fundamentally misconstrues *Megawest*, and a review of the circumstances underlying the *Megawest* decision demonstrates that the circumstances of the present case are far less indicative of the existence of a recognized hazard than the facts which were deemed insufficient to support a violation in *Megawest*.

The employer in *Megawest* operated an apartment complex in Lauderhill, Florida. *Megawest Financial Inc.*, 17 BNA OSHC 1337, 1995 OSAHRC LEXIS 80 at *1 (No. 93-2879, 1995). The enforcement proceeding stemmed from a complaint filed with OSHA by

the small group of employees who worked at the management office on site at the apartment complex. The evidence produced at the hearing indicated that the police considered the area in which the apartments were located as "probably one of the highest" crime areas in the city, and that police responses to 911 calls were often delayed due to the high volume of calls received for the area. *Id.* at *6-*7. The case involved the employer's alleged violation of the general duty clause, with the alleged hazard consisting of "exposure to assault and battery by tenants of the apartment complex." *Id.* at *2.

The facts adduced at trial revealed that Megawest's employees had been the subject of multiple attacks by tenants. One such incident involved a tenant spraying mace in the eyes of two employees after being informed that Megawest would not return a security deposit. *Id.* at *8. In another incident, a tenant injured an employee's finger by slamming a telephone on it. *Id.* at *9. In a third incident, a tenant scratched and slapped an employee during a dispute about the tenant's use of the office telephone. *Id.* at *11-*12. In addition to the actual physical attacks, the ALJ's decision noted that the evidence indicated that staff members were "often subjected to threats or belligerent conduct." *Id.* at *7. These included a threat to pour boiling water on office staff, a threat to shoot anyone knocking to collect rent, and a threat to kill a night security officer following the towing of a tenant's car. *Id.* at *9, *10, *21.

Given the responsibilities of the office staff, the ALJ acknowledged that their work "resulted in direct confrontations between the staff and the residents." *Id.* at *19. This stemmed from the fact that the staff's duties involved giving notice of evictions, refusing to return security deposits, addressing maintenance disputes, and collecting rent. *Id.* at

*19-*20. Indeed, Megawest's president went so far as to acknowledge at the hearing that he "considered responding to tenant threats to be a normal part of the staff's job." *Id.* at *20. All of this stands in stark contrast to the nature of the duties performed by Integra's Service Coordinators, who were providing a voluntary service at no charge that Members could choose to accept or reject.

Notwithstanding the incidents involving past attacks on Megawest employees and the at-times adversarial nature of their relationship with the tenants, the ALJ concluded that assaults by tenants did not constitute a recognized hazard supporting the alleged violation of the general duty clause. In so holding, the ALJ noted the absence of precedent on the issue, and cautioned that "enforcement in this arena could place extraordinary burdens on an employer requiring it to anticipate the possibility of civic disorder." *Id.* at *4. On that point, the ALJ noted that "[g]enerally, when an employer addresses safety hazards in the workplace, he is dealing with inanimate objects or processes over which he can exercise a certain degree of control. A difference regarding employees is that the employer now must deal with people, capable of volitional, deliberate acts." *Id.* at *26-*27. This was recognized as particularly true of "third parties not in its employ," over which an employer has "even less control." *Id.* at *27. The ALJ went on to acknowledge the fundamental difference between criminal activity by third parties and types of hazards generally regulated via the general duty clause:

> The Secretary now asks employers to anticipate and prevent criminal behavior on the part of non-employees. Such behavior, while certainly hazardous to its victims, is completely different from any other hazards addressed by the Act. The hazard of physical assault in the present case arises not from the processes or materials of the workplace, but

> from the anger and frustration of people. The anger and frustration may be fueled by drugs, alcohol, or mental health problems. But the assaults are intentional acts, deliberately committed by reasoning (though, perhaps, irrational) beings.
>
> Violence is, unfortunately, an all too common occurrence nowadays. It impacts upon all segments of society and is by no means limited to the workplace. While the threat of workplace violence is omnipresent, an employer may legitimately fail to recognize that the potential for a specific violent incident exists. It may reasonably believe that the institution to which society has traditionally relegated control of violent criminal conduct, *i.e.*, the police, can appropriately handle the conduct. To validly assess an employer's actual or constructive knowledge of workplace violence, it must be acknowledged that violence occurs when an intellect actively seeks to cause it, that violence exists in society and may occur unpredictably, and that society empowers the police to control the conduct. For these reasons, a high standard of proof must be met to show that the employer itself recognized the hazard of workplace violence. It is not enough that an employee may fear that he or she is subject to violent attacks, even if that fear is communicated to the employer, and even if the employee is one whose knowledge can be imputed to the employer. Nor is it sufficient that there has been a previous injury from a violent incident.

Id. at *27-29.

The reasoning of *Megawest* applies with equal force in the instant case. As recognized in that decision, the violent conduct of a third party is an inherently unpredictable act of a different nature than the hazards typically regulated under the general duty clause. Significantly, the ALJ presiding in *Megawest* concluded that such violent acts were not a "recognized hazard" notwithstanding the fact that the employees in that case had been subject to frequent threats and occasional physical attacks. Here, in

contrast, although there was testimony of isolated verbal threats by Members, the Secretary did not produce a scintilla of evidence to suggest that any Service Coordinator suffered an actual workplace injury prior to the attack on Ms. (b)(6) on December 10, 2012. The record evidence does not support the ALJ's decision that physical assaults by Members constituted a recognized hazard within the scope of the general duty clause. More fundamentally, the basic observation underlying the *Megawest* decision, namely that violent criminal behavior by non-employees "is completely different from any other hazard addressed by the Act," applies equally here. *Id.* at *28. Given the absence of a recognized hazard to support the citation, Citation One, Item One should have properly been dismissed.

II. The evidence presented at the hearing does not support the ALJ's conclusion that the abatement measures proposed by the Secretary would have abated the hazard.

Assuming *arguendo* that the risk of being physically assaulted by a Member constituted a recognized hazard, enforcement of Citation One, Item One must properly be denied due to the Secretary's failure to establish that the proposed abatement measures would have materially reduced the hazard.

The Secretary's burden on this point has been described as that of specifying "the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures." *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1268 (D.C. Cir. 1973). The Secretary failed to meet that burden in the instant case.

The sole witness offered by the Secretary to testify as to the efficacy of the abatement measures, Janet Nelson, acknowledged that she could not state that further training would reduce the Service Coordinators' potential exposure to violence.[6] (Tr. 615-16). Likewise, Ms. Nelson acknowledged that violent incidents could still occur even if the "buddy system" being utilized by Integra at the time of the incident were codified into a more formalized program. (Tr. 625).

Perhaps most tellingly, Ms. Nelson acknowledged that as to one of the central abatement measures proposed by the Secretary, namely implementation of checks to determine the threat posed by new Members, she could offer only a "guess" regarding potential effectiveness:

> Q: In your opinion, does a risk – violence risk assessment, uh, does that decrease the incidence of workplace violence?
> A: I don't know statistics on that, but yes, the more information you have on what you're walking into, the better off you are.
> Q: (Nodding affirmatively).
> A: So I guess I would say yes.

(Tr. 650).

Ms. Nelson was similarly noncommittal when questioned concerning other proposed abatement measures:

[6] Ms. Nelson, the sole expert witness offered by the Secretary, acknowledged that she had never before been qualified as an expert, that she does not hold a doctoral degree and has not undertaken any doctoral studies or served as a faculty member at any institution of higher learning, and that her sole publications consist of a two-page newsletter article and self-published materials. (Tr. 563-67).

Q: In your opinion, even though Service Coordinators are not clinicians, would more – more adequate, more, uh, appropriate safety training have made them less exposed to the workplace violence, risk of workplace violence?
A: I don't know if they would be less exposed. They may be better able to assess –
Q: Hum-hum.

(Tr. 615).

Q: Are you saying that, uh, Integra should have required its Service Coordinators to always be partnered?
A: No, no. Uh, I think given the population they're dealing with and because they have a paucity of information, that double teaming on an initial, uh, helps. Does that mean violence won't happen? It still could. It still could.

(Tr. 625).

Further, Ms. Nelson offered no statistical or other evidence as to the potential efficacy of any of the proposed abatement measures beyond her own conclusory statements.[7] Such unsubstantiated generalizations are insufficient to support enforcement of a citation. *See Champlin Petroleum Co. v. OSHRC*, 593 F.2d 637, 640 (5th Cir. 1979) ("It is the Secretary's burden to show that demonstrably feasible measures would materially reduce the likelihood that such injury as that which resulted from the cited hazard would have occurred.").

[7] Ms. Nelson was likewise unable to provide testimony concerning the extent to which the proposed abatement measures had been adopted in the industry.

III. Application of the general duty clause on the facts of the instant case would be unconstitutional due to the absence of fair notice to Integra.

The general duty clause is unconstitutionally vague as applied in Citation One, Item One. The Supreme Court has recognized that "[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 applications violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). This is particularly applicable in the context of the broad language of the general duty clause, which raises "certain problems of fair notice." *Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir. 1981). As stated in *Donovan*, "these problems dissipate" only when the clause is read "as applying when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required under the job conditions where the citation was issued." *Id.*

The Decision's conclusion as to the enforceability of Citation One, Item One is wholly at odds with the principle recognized in *Donovan*. The record in no way supports a contention that a "reasonably prudent employer" in Integra's position would have known that it was required to implement the proposed methods of abatement. To the contrary, the Secretary's own expert was unable to even identify how many employers in the community health industry use any of the abatement measures at issue. Instead, Ms. Nelson repeatedly couched her testimony as describing "best practices." (Tr. 616, 642-43, 673, 722, 731). Whether a potential program or policy represents a "best practice" in an industry, however, is plainly a different matter entirely than the question of whether a reasonably prudent employer would have known the program to be required. Notably, the

Secretary offered no statistical evidence regarding the extent to which other employers have adopted the proposed abatement measures, nor did the Secretary introduce any other form of evidence from which it could be concluded that the safety programs utilized by Integra were below the standard of those used by other employers in the community health industry. In contrast, Integra's Medical Director, Dr. Krajewski, who has more than thirty years' experience as a physician with extensive experience in the community health field, testified that the training methods employed by Integra in 2012 were "above and beyond" the industry standard. (Tr. 1023-27). In elaborating on that point, Dr. Krajewski explained:

> A: Well, because in a community you have that initial training period. For example, community mental health worker, peer support, specialists who are out there, they typically get the training right up front and they get a certificate that they've been trained. But there is very little training that occurs later on. It might be a once a month meeting – staff meeting that they can talk about. Our training that we had had weekly plus the on-site training plus the on call availability to continue to do training and answer questions immediately was – no one has that out there at all.
> Q: And you're talking about your particular industry?
> A: Yes. As far as I could tell, no one – no one had that out there.

(Tr. 1028).

Finally, the unconstitutionality of the clause as applied in this case is demonstrated by the fact that the Review Commission has at no time in the past ever issued a decision holding an employer to be in violation of the general duty clause based on its failure to prevent a criminal act by a third party of the type at issue in this case. Underscoring this

point, in the course of its investigation OSHA designated this matter as a "novel" case. (Tr. 227-28).

Viewed in their totality, these circumstances dictate that a reasonably prudent employer in Integra's position would not have known that the Act required the adoption of the methods of abatement identified in Citation One, Item One. Given that fact, the general duty clause, as applied in this case, is unconstitutionally vague.

IV. In the alternative, this case must be remanded for a new hearing due to the ALJ's consideration of evidence outside the record.

Assuming *arguendo* that the Commission were to conclude that the general duty clause is applicable to the facts of this case, and that the Secretary has produced evidence capable of supporting the existence of a recognized hazard and the feasibility of abatement, this case must nevertheless be remanded for a new hearing in light of the ALJ's decision to independently seek out and consider evidence outside the record in evaluating the credibility of Integra's chief witness.

One of Respondent's primary witnesses at the hearing was Dr. Melissa Arnott, Integra's Vice President of Community Programs. Dr. Arnott, along with Dr. Krajewski, developed the core curriculum for the online Neumann training program in which the Service Coordinators participated and oversaw other training programs provided to the Service Coordinators. Her testimony concerning the nature of the Service Coordinator position and Integra's training programs dealt with core issues central to the Decision.

Notwithstanding Dr. Arnott's nearly twenty-five years in working with the mental health community, the ALJ chose to largely ignore her testimony, and in doing so explicitly relied on information outside the scope of the record. In discussing Dr. Arnott's

educational background, the ALJ indicates that he engaged in some form of outside research concerning the school from which Dr. Arnott received her doctoral degree:

> On November 8, 1991, the University of Sarasota, Inc. filed a voluntary bankruptcy petition No. 8:91-bk-14551-TEB under Chapter 11 in the United States Bankruptcy Court, M.D. FK. A plan was confirmed on April 8, 2002. Dr. Arnott's resume shows that she worked in Pennsylvania from the time she was awarded her Master's degree in 1995 through 2004, the year she was awarded her Doctorate degree in Florida, suggesting most of the work for her Doctorate degree was done off campus. In at least one instance, the University of Sarasota has been seen as a "non-traditional" university and had its doctorate programs called into question. *See* No. 78-2294, *Dr. John Gullo v. Fla. Bd. Of Exam'r of Psychology*, 1979 WL 63236 (Fla. Div. Admin. Hrgs, June 28, 1979 (noting that University of Sarasota does not have an accredited degree program that would qualify the plaintiff to sit for the board examination for certification).

Decision at 22 n.36.

Immediately after setting forth this information – which was not the subject of any testimony or other evidence at the hearing – the ALJ states that: "The Court is crediting Dr. Arnott's Doctorate degree in counseling education with weight less than that accorded a similar degree awarded following completion of a full-time, resident study program taken over the course of several years at a traditional university with a suitable accredited program." *Id.*

The ALJ thus explicitly relied upon information outside of the record, concerning an issue not raised by either party, in determining the weight given to Dr. Arnott's testimony. Compounding this error, the sole authority cited by the ALJ concerning the purported deficiency of Dr. Arnott's alma mater was an administrative decision made a full *25 years* before Dr. Arnott obtained her degree. *Id.*

It is a basic principle of administrative law that a party is entitled to respond to the evidence against it and that the decision is to be made on the evidence in the record. *See, e.g., Butz v. Economou*, 438 U.S. 478, 513 (1978) ("[F]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process. . . . A party is entitled to present his case by oral or documentary evidence, and the transcript of testimony and exhibits together with the pleadings constitute the exclusive record for decision.") (internal citation omitted); *United States v. Abilene & S. R. Co.*, 265 U.S. 274, 288 (1924) ("Nothing can be treated as evidence which is not introduced as such."); *id.* at 289 ("The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties."); *Crowell v. Benson*, 285 U.S. 22, 48 (1932) ("Facts conceivably known to the deputy commissioner, but not put in evidence so as to permit scrutiny and contest, will not support a compensation order.").

Integra was severely prejudiced by the ALJ's decision to consider matters outside the record in this respect, as it was deprived of any opportunity to respond to questions concerning the quality of Dr. Arnott's educational credentials, which were not the subject of any argument or dispute by the Secretary. The ALJ subsequently used this information, never before raised or addressed by either party, to make a determination as to the weight to be given to the testimony of the individual most directly involved with Integra's training

programs for its Service Coordinators. The ALJ's acts on this point warrant setting aside the Decision.

V. The facts of this case do not support the ALJ's classification of Citation One, Item One as a serious violation.

The Decision classifies Citation One, Item One as a serious violation. Assuming *arguendo* that the Commission were to affirm the ALJ's conclusion that the general duty clause was violated, such violation cannot properly be classified as a serious violation as that term is defined in the Act.

With regard to classification of violations, the Act provides:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

See 29 U.S.C. § 666(k) (emphasis added); *see also Landcoast Insulation, Inc.*, 23 BNA OSHC 1168, 2010 OSAHRC LEXIS 59 at *14 (No. 09-0625, 2010) ("A 'serious' violation under § 17(k) of the Act is established if there is a substantial probability of death or serious physical harm that could result from the cited condition and the employer knew or should have known with the exercise reasonable diligence of the presence of the violation.").

For the reasons discussed *supra*, Integra did not know (and could not reasonably be expected to know) that it was in violation of the Act. The Review Commission has never previously concluded on facts even remotely analogous to the instant case that an

employer's failure to prevent violent, criminal acts by third parties constituted a violation of the Act. Further, the Secretary presented no evidence at the hearing as to any existing standard – in the community health industry or any other industry – with regard to use of the proposed methods of abatement so as to suggest that Integra was operating below industry standards and should have known that its failure to utilize those abatement measures would be deemed to be a violation.

CONCLUSION

For the reasons discussed *supra*, Integra Health Management, Inc. respectfully requests that the Commission reverse the ALJ's decision in the instant case and deny enforcement of Citation One, Item One.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October, 2015, a copy of the foregoing Brief was served via first-class mail to:

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Pursuant to an agreement with the counsel for the Secretary, a copy of the foregoing Brief was also served via email to Grabel.Lee@dol.gov.

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