No. 13-1124

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,

Complainant,

v.

INTEGRA HEALTH MANAGEMENT, INC.,

Respondent.

BRIEF FOR THE SECRETARY OF LABOR

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FILED ELECTRONICALLY ON DECEMBER 18, 2015

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STATEMENT OF ISSUES

This case arose from the fatal stabbing of [redacted] an Integra Health Management, Inc. (Integra) employee, by an Integra client (or member) with a history of violent behavior. After the stabbing, OSHA issued Integra a citation alleging a serious violation under § 5(a)(1) of the Occupational Safety and Health Act of 1970 (the OSH Act), 29 U.S.C. § 654(a)(1), the general duty clause. Integra contested, and in a June 11, 2015 Decision and Order (D&O), Commission Administrative Law Judge Dennis L. Phillips affirmed the citation. The Commission subsequently directed review. The issues on review are:

1. Whether the general duty clause applies to the workplace violence hazard of employees being physically assaulted by persons with a history of violent behavior.

2. If so, whether the Secretary established that Integra or its industry recognized the hazard, and that a feasible means of abatement existed to eliminate or materially reduce the hazard.

3. Whether the general duty clause provided constitutionally adequate notice as applied to Integra in this case.

STATEMENT OF FACTS

I. *Integra's Service Coordinator Program.*

Integra, which is based in Owings Mills, Maryland, contracts with insurance companies to perform mental and physical health assessments and coordinate case management on individuals (called clients or members) referred by the companies. Tr. 270; Joint Prehearing Statement, p. 8. These assessments are performed by employees known as community service coordinators (service coordinators or SCs). Joint Prehearing Statement, p. 8.

The SCs' job is to help the members with medical and mental health issues receive appropriate medical care. Tr. 250, 369; Joint Prehearing Statement, p. 8. The goal is to get members connected with doctors and prevent the members from over-utilizing hospital emergency rooms for their treatment. Tr. 250. Insurance companies, such as Amerigroup, which contracted with Integra in Florida, referred

members to Integra due to chronic difficulties in contacting them. Tr. 270-71; Joint Prehearing Statement, p. 8. The members included drug users, persons involved in criminal activity, persons with mental health issues and some persons with histories of violence who were volatile. Tr. 252-53, 417-18, 436, 451, 469-70. Some members were chronically admitted to crisis destabilization units because they did not have access to their medications. Tr. 451. SCs are assigned a caseload of members and are responsible for conducting face-to-face meetings during which the members are assessed and encouraged or persuaded to register for services. Joint Prehearing Statement, p. 8. SCs attempt to build a rapport with members to get them to consent to receive services from Integra. Tr. 250. SCs are required to make at least two face-to-face contacts with members each month to determine their needs. Tr. 255, 369, 439, 462. They also have a caseload of up to 50 to 60 members each. Tr. 260, 454.

There are no company offices in Florida; SCs work from their homes or in the field. Joint Prehearing Statement, p. 8. SCs primarily work alone and communicate with their supervisors by telephone and email. Tr. 269, 288. Weekly meetings are conducted by telephone. Tr. 269. As of 2012, Integra supervisors did not know where SCs were at any given time. Tr. 375. There were no sign in/sign out procedures for SCs. Tr. 259. SCs did not have panic buttons or alarms. Tr. 258.

In 2012, Integra did not require its SCs to have any specialized education or certification; only a bachelor's degree was required. Tr. 104; Ex. C-9, C-10. SCs were not required to have any previous experience or training as clinicians or social workers. Tr. 1099-1100. Experience visiting the homes of clients was not a requirement. Tr. 249.

SCs were required to perform tasks that clinical social workers would normally provide. Tr. 1103-1104. 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. Tr. 459-60. While service coordinators were hired to coordinate medical and mental services, not to provide counseling, SC supervisor Laurie Rochelle stated that SCs were doing assessments of the client's needs, *i.e.*, whether they should receive counseling and the extent of any substance abuse. Tr. 252, 265.

Consistent with this, 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). Tr. 590-593, 1097-1098; Ex. C-34. SCs do not have the experience or knowledge necessary to accurately apply the clinical tools described in the assessment form. Tr. 1099-1100. These tools are used by trained clinicians to diagnose a patient for mental illness and to assess that patient's level of functioning. Tr. 590-593, 1097-1098; Ex. C-34.

SCs meet with members alone in areas off the beaten path and in areas where the general public could not see them, for example, in trailer parks, government housing projects, and high crime areas. Tr. 134, 135. SCs would usually attempt to locate clients by going to their homes first. Tr. 259, 369. 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 the member's house unannounced and knock on the door. SCs would also visit hospitals, homeless shelters, "abandoned looking buildings that looked like they should be condemned," and unfavorable parts of the city. Tr. 374, 436-437, 451. Some SCs worked at night to locate members for the face-to-face contact. Tr. 374. They worked in areas that were unsafe and that made them nervous. Tr. 374-75.

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. Tr. 417, 452-453, 809. It was mandatory for SCs to drive members in the SCs' personal vehicles to psychiatric appointments. Tr. 430. Employees did not feel safe driving certain mentally ill members in their personal vehicles because these members were not always taking their medications. Tr. 418-19.

II. *Integra's Workplace Violence Safety Program.*

Integra used an on-line training program for its new service coordinators, which it referred to as the "Neumann Training." Tr. 105-106. The Neumann Training was developed by Integra Vice President Melissa Arnott and Integra medical director Dr. Thomas Krajewski. Tr. 106, 1023-26. Session 8 of the Neumann Training (of 15 Sessions), was entitled "In-Home & Community Safety," and included two

power point presentations entitled "Safety in the Community" and "Screening the Dangerous Member." Tr. 108, 345; Ex. C-15, C-16, C-17. The "Screening the Dangerous Member" power point identifies that service coordinators may encounter "dangerous" members and "dangerous situation(s)." Ex. C-16. 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." Tr. 114-15, 349; Ex. C-17.

Integra had no system in place for identifying members with high-risk behaviors. Integra did not perform criminal background checks on members and did not provide SCs with information about a member's previous unsafe behavior. Tr. 109, 346. Integra also did not require SCs to perform background checks or obtain this information prior to meeting with members. Integra relied on members to self-report their criminal behavior, mental state, and history of violence. Tr. 350, 617. Integra also expected SCs to identify threatening situations and high risk behaviors during their assessments of members. Tr. 344, 349-350. Integra relied on the principle of "universal precautions," under which SCs should "get out" of or leave any situation in which they felt endangered. Tr. 1029-31, 1034.

Integra's safety program also included no instruction in practical skills and techniques. The Secretary's expert, Janet Nelson, described the portion of the Neumann training addressing workplace safety as vague and lacking depth. Tr. 609, 614. Ms. Rochelle described the Neumann training as "a joke" and basic, and stated that it did not teach SCs to be "savvy," or about real life safety skills and situations related to the job. Tr. 262. For example, the training did not teach SCs how to get members to come outside their doorways, or teach SCs not to go into a member's home in certain situations. Tr. 262. Prior to Ms. (b)(6) death, Integra did not teach its SCs any de-escalation techniques. Tr. 505-06, 613; Ex. C-31, p. 1. SC Schneider testified that he did not receive safety training prior to Ms. (b)(6) death. Tr. 456. SC Daniel stated, "I wouldn't consider anything I received safety training." Tr. 435-36.

SCs learned their jobs largely through "trial and error." Tr. 435. SCs had to figure out a lot of their duties "as they went along," and they depended upon each other to figure things out. Tr. 455, 487. SC Schneider stated that whenever he asked his supervisors clinical questions, he "never really got

answers." Tr. 455-56. Integra also did not require its leads, like Ms. Rochelle, to prepare incident report of significant events. Tr. 298-99.

Some SCs would shadow other more experienced SCs for a day or a few days when they began working for the company, but such shadowing was not uniformly required for all new SCs. Tr. 122-23, 373, 434-435, 488. Integra did not require SCs to take a partner or buddy with them to meet members; rather, Integra told service coordinators to "consider" taking another service coordinator with them if they, in their subjective opinions, believed it would be useful. Tr. 111, 382; Ex. C-16, C-19. Integra had a voluntary "buddy system," but it was very difficult to implement because SCs often did not have the time to partner up with one another. Tr. 266, 347-48, 439-440. Integra also left it up to the SCs to determine if they needed a buddy for safety reasons. Tr. 353.

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. Tr. 272. Ms. Rochelle reviewed and approved the SCs' progress note reports. Tr. 272. Sometimes, progress note reports entered in the Integra database system would disappear. Tr. 297. Ms. Rochelle made several complaints to her supervisors about the database. Tr. 298.

III. (b)(6) *'s Interactions with* (b)(6)

(b)(6) was an Integra SC in Florida. Ms. (b)(6) had her Bachelor's degree, but did not have any previous experience working with the mentally ill or previous experience or certifications in social work. Tr. 105.

(b)(6) (b)(6) was a member assigned to Ms. (b)(6). When Integra made the assignment, Amerigroup provided Ms. (b)(6) with Mr. (b)(6) diagnosis (schizophrenia and cardiovascular disease), his date of birth, and his home address. Amerigroup did not provide Integra or Ms. (b)(6) with any information about Mr. (b)(6) history of violent behavior. Tr. 357; Ex. C-7, p. 1. Mr. (b)(6) had been incarcerated for aggravated battery with a deadly weapon, aggravated assault with a weapon, and battery against a police officer or first responder. Tr. 136-39; Ex. 25. Integra did not assign an employee to go with Ms. (b)(6) to visit Mr. (b)(6) at any time, nor did Integra

discipline Ms. (b)(6) for failing to bring another SC with her on her visits to Mr. (b)(6) Tr. 278, 285-286.

Ms. (b)(6) had three face-to-face interactions with Mr. (b)(6) at his home prior to the fatal stabbing attack. Tr. 139-140; Ex. C-7. After her first visit with Mr. (b)(6) on October 12, 2012, Ms. (b)(6) reported in her progress note that Mr. (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. C-7, p. 5. After her second visit with Mr. (b)(6) on October 15, 2012, Ms. (b)(6) reported 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. C-7, p. 6. Finally, after her third visit with Mr. (b)(6) on November 14, 2012, Ms. (b)(6) reported that "[m]ember answered the door and pretended to be his own twin brother" and "[m]ember also told SC to get a cowboy hat and go to a rodeo." Ex. C-7, p. 7. Integra management was aware of Ms. (b)(6) reports prior to her death. Tr. 143, 148, 150, 292-94, 356-61, 364-65; Ex. C-7, p. 6, Ex. C-19.

On December 10, 2012, Ms. (b)(6) went to Mr. (b)(6) house to complete her assessment. Joint Prehearing Statement, p. 8. During this visit, Mr. (b)(6) attacked Ms. (b)(6) with a knife, stabbing her nine times while chasing her across his front lawn. Tr. 83, 152, 366; Exs. C-5 at p. 1, C-6 at p. 3. Mr. (b)(6) then went back inside his house, leaving Ms. (b)(6) lying on the ground. Ex. C-5 at p. 1. A passerby saw Ms. (b)(6) and drove her to the local hospital. Ex. C-5 at p. 1. She died of her wounds later that day. Tr. 366. Mr. (b)(6) was charged with murder, but was

found mentally/physically unable to stand trial before the Florida state criminal court. Exs. R-P, R-T.

After Ms. (b)(6) death, Integra implemented new safety protocols. These included: performing background checks and "red-flagging" certain members in the Integra system; "rolling off" members whose criminal backgrounds indicate a history of violent behavior; discussing safety concerns with Dr. Krajewski at rounds meetings; implementing a written workplace violence prevention program; and providing de-escalation training to its SCs. Tr. 160, 166-67, 389, 484, 521-522, 525, 676.

IV. *OSHA's Citation and the ALJ's Decision.*

After the fatality, OSHA conducted an inspection and issued Integra a citation alleging a serious violation of the general duty clause. Ex. C-1. OSHA alleged in the citation that Integra failed to adequately protect its employees against the "hazard of being physically assaulted by members with a history of violent behavior." *Id.*

Integra contested, and in a June 11, 2015 Decision and Order (D&O), Commission Administrative Law Judge Dennis L. Phillips affirmed, the citation. The judge found that Integra recognized the hazard, in part, because "Integra used precautions, inadequate as they were, against violence and also was aware of specific incidents of violence before Ms. (b)(6) death" and "Integra's own training, handbook, and existing policies establish that it recognized that its SCs were exposed to the hazard of workplace violence by members with a history of violent behavior." D&O at 70-71 (citing Tr. 110, 114-17; Ex. C-17). While the judge found it unnecessary to make a finding as to whether Integra's industry recognized the hazard, he found that the opinion of the Secretary's expert, Janet Nelson, "that the SC's face-to-face interaction with an Integra member with a history of violent behavior was recognized, could also establish recognition of the hazard." D&O at 76 n. 110 (citing Tr. 679). Finally, again relying primarily on the opinion of Ms. Nelson, the judge found that Integra failed to take adequate measures to protect against, and the measures the Secretary proposed in the citation would materially reduce, the hazard. D&O at 76-90.

SUMMARY OF ARGUMENT

The Commission should affirm the citation against Integra as a serious violation of the general duty clause. First, the general duty clause applies to the workplace violence hazard of employees being physically assaulted by persons with a history of violent behavior. By its plain terms, section 5(a)(1) of the Act defines the hazards to which the general duty clause applies as those that are "recognized" and "causing or likely to cause death or serious physical harm to employees." Had Congress intended that all instances of physical assault by a third party to be beyond the scope of employee protection, it would have expressly stated such an exemption in the Act.

Second, the Secretary established that Integra and its industry recognized the hazard, and that a feasible means of abatement existed to eliminate or materially reduce the hazard. Integra's awareness of the hazard is shown by its adoption of a safety program designed to protect employees from assaults by "high risk" members, including those with a history of violent behavior, and because "prior to the fatal attack on Ms. (b)(6) Integra managers were aware of several instances of violence or aggression by members against other SCs." D&O at 72. Further, the testimony of Janet Nelson, the Secretary's expert, OSHA's directive on workplace violence (Ex. C-33) and related guidelines for healthcare and social service workers (Ex. C-32), as well as the numerous publications and studies within the social services and healthcare industry addressing the hazard of workplace violence in that industry, establish that Integra's industry recognized the hazard. Finally, Integra failed to take adequate and feasible measures to materially reduce the workplace violence hazard. Knowledgeable persons familiar with Integra's industry – again, Ms. Nelson and the authors of the numerous publications within the social services and healthcare industry – would regard the measures proposed by the Secretary in the citation as necessary and valuable for a sound safety program in the particular circumstances existing at Integra's worksite.

Finally, the general duty clause provided constitutionally adequate notice as applied to Integra in this case. Integra's facial challenge to the Act should be rejected because the hazard of physical assaults

on SCs by members with a history of violent behavior was preventable and a reasonably prudent employer in Integra's industry would have recognized the proposed abatement measures were required.

ARGUMENT

I. *The General Duty Clause Applies to All Recognized, Serious Hazards in the Workplace; There is No Per Se Exclusion for Physical Assault on Employees by Persons with a History of Violent Behavior.*

The general duty clause requires "[e]ach employer" to "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). To prove a violation of the general duty clause, the Secretary must demonstrate 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 and effective means existed to eliminate or materially reduce the hazard." *Pegasus Tower*, 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005). The Commission directed the parties to brief the question of the application of the general duty clause to the hazard of employees being physically assaulted by persons with a history of violent behavior separately from questions concerning the statutory elements of proof of a general duty clause violation – here elements 2 and 4. To preserve an analytic distinction between these separately listed issues, the Secretary reads the first question as asking, in effect, whether the general duty clause applies to the hazard at issue assuming (at least for this initial analysis) that the hazard was recognized by Integra or its industry and that feasible means existed to materially reduce it. In other words, is the hazard of being physically assaulted by persons with a history of violent behavior *per se* excluded from the ambit of the general duty clause? That question is answered by the OSH Act itself, for no such exclusion is either stated or implied in the statutory text.

The analysis begins – and should end – at step one of the two-step framework applicable to an agency's interpretation of its organic statute. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under this framework, the Commission must first determine, using the

traditional tools of statutory construction, whether Congress has expressed its intent on the interpretive question. *Id.* If, in light of these tools, "the intent of Congress is clear, that is the end of the matter; for the [agency] must give effect to the unambiguously expressed intent of Congress." *Id.* In determining whether the intent of Congress is clear, the text, structure, and stated purpose of the statue must be examined. *Animal Legal Defense Fund v. U.S.,Department of Agriculture*, 789 F.3d 1206, 1215 (11th Cir. 2015). As to the statutory text, the Eleventh Circuit has said, "we presume that Congress said what it meant and meant what it said." *Id.* If, however, the Commission determines that the statute is ambiguous, the Secretary's interpretation must be upheld so long as it is reasonable, *i.e.*, sensibly conforms to the statute's wording and purpose. *Chevron*, 467 U.S. at 843-44; *Martin v. OSHRC*, 499 US 144, 150-51 (1991).

The plain language of section 5(a)(1) of the Act defines the hazards to which the general duty clause applies as those that are "recognized" and "causing or likely to cause death or serious physical harm to employees." A hazard can be deemed "recognized" under the Act only if it is preventable by demonstrably feasible means, but, insofar as this requirement is satisfied (see Argument II, pp. 16-25) there is no further limitation on the scope of hazards that employers must address under section 5(a)(1). *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1265-67 (D.C. Cir. 1973). "All preventable forms and instances of hazardous conduct must . . . be entirely excluded from the workplace." *Id. at* 1266-67*; SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1207 (D.C. Cir. 2013) (quoting *Nat'l Realty* and collecting cases).

Integra and *amicus curiae* the Chamber of Commerce (the Chamber) assert that the general duty clause does not encompass the hazard of physical assaults by third parties. The reasons they advance for this interpretation are entirely unconvincing. Integra first asserts that the OSH Act's legislative history supports such an exclusion. (Br. at 12-15). However, resort to legislative history is unnecessary where the intent of Congress is clear, and should certainly not be done to undermine the plain meaning of the statutory language. *Animal Legal Defense Fund*, 789 F.3d at 1218. In any event, nothing in the legislative history cited by Integra addresses physical assaults on employees or

suggests, even remotely, a Congressional intent to exclude preventable instances of such conduct from coverage.[1] Had Congress intended that all instances of physical assault by a third party to be beyond the scope of employee protection, it would have expressly stated such an exemption in the Act. *Cf. SeaWorld*, 748 F.3d at 1213-14 (nothing in the Act exempts theme-park performances involving employee interaction with dangerous killer whales from the scope of the general duty clause). Congress did not expressly state such an exemption in the Act, and that should end the enquiry.

Integra next argues that the absence of any cases in which workplace violence has been found to be within the scope of the general duty clause is indicative of Congressional intent to exclude such cases from coverage. (Integra Br. at 14-15). However, the D.C. Circuit's decision in *SeaWorld* that the hazard of killer whales biting or pulling trainers into deep water was within the scope of the general duty clause is a close parallel to the case at bar. There seems little substantive distinction for purposes of coverage under the Act, between workplace violence perpetrated by animals and workplace violence perpetrated by third persons. Moreover, while it is true that no case has expressly found a violation predicated upon the hazard of physical assault on employees by third persons, the possibility of such a violation in circumstances analogous to those at bar has been recognized. In *Ramsey Winch, Inc. v. Henry*, 553 F.3d 1199 (10th Cir. 2009), the Tenth Circuit rejected the district court's holding that gun-related workplace violence was a recognized hazard under the general duty clause and that the clause therefore preempted state law authorizing employees to store guns in locked cars on company property. However, the court noted that OSHA had issued a citation to Psychiatric Hospital in Chicago under the general duty clause for failing to protect its employees from patients' violent behavior. *Id.* at 1207, n.8. The court stated that the

[1] Integra argues that the scope of the general duty clause was narrowed during the legislative process from requiring that workplaces be "safe and healthful" to requiring that workplaces be free from "recognized hazards." Integra Br. at 13. It then suggests that this narrowing was intended to encourage adoption of specific standards. *Id.* To the extent Integra's argument is that the Secretary could only regulate the hazard of assaults upon employees by third parties through rulemaking, it is entirely unsupported. The Act vests the Secretary with discretion to determine which hazards to address through standards, and in the absence of any standard, the general duty clause applies by its terms.

conduct in *Psychiatric Hospital* involved injuries "arising out of work situations" because the primary function of a psychiatric hospital's work is to manage unstable and often violent behavior. *Id.* (quoting 29 U.S.C.§ 651(a)). In contrast, the court noted, nothing in the state provision authorizing the storing of firearms in locked cars on company premises implicated the "fact-specific circumstances present in *Psychiatric Hospital* that are required by OSHA to constitute a general duty clause violation." *Id.* (citing OSHA Standard Interpretations Letter, December 10, 1992).

It is also relevant in this context that OSHA has issued other general duty clause citations to facilities and social service agencies similar to Integra for failing to protect their employees from assaults by third parties, and that at least three of these citations have resulted in settlements incorporated into Commission final orders. In *North Suffolk Mental Health Association* (OSHRC No. 11-2132), the operator of a group home was cited for failing to protect employees from assaults by clients confronting emotional difficulties, mental illness, and developmental difficulties. In *Brookdale University Hospital and Medical Center* (OSHRC No. 14-1350), the hospital was cited for failing to protect employees from violent assaults by patients and visitors. In *Corizon Health, Inc.* (OSHRC No. 14-1346), the provider of medical, dental and psychiatric services in prison clinics was cited for failing to protect employees from assaults during interactions with inmates. These citations and corresponding settlement agreements are contained in the attached Appendix. Thus, the Secretary's position that Integra violated the general duty clause by failing to abate the hazard of criminal assaults on its employees is not "entirely without precedent." (Integra Br. at 15).

Finally, Integra contends that applying the general duty clause in cases of physical assault on employees by third parties would be entirely impractical and contrary to public policy. (Integra Br. at 15-20). As a basis for this argument, Integra cites potential problems with two of the abatement steps proposed by the Secretary: (i) conducting criminal background checks on members with whom Integra employees will be required to interact; and (ii) removing from the program ("rolling off") those members with a history of violent behavior. However, these two measures were implemented by Integra itself following Ms. (b)(6) death in December 2012. D&O at 87 (Integra

now regularly performs background checks on all members before assigning them to an SC and typically "rolls off" members with a criminal history); *see also* Tr. 126, 160, 166-67, 377, 389, 410, 521-22, 525, 676, 810; Ex. R-R. Integra presented no evidence that conducting criminal background checks on new members and "rolling off" members with a criminal history have, in practice, proved unworkable or problematic. The company's claim (Br. at 17) that requiring criminal background checks might be problematic for other industries that interact with members of the public in their homes is irrelevant, for no legal principle requires the Commission to reach beyond the facts of the instant case and decide the hypothetical application of the statute to another industry. *SeaWorld*, 748 F.3d at 2013. Lastly, Integra's criticism of the suggestion that severe mental illness is a risk factor for violent behavior (Br. 19-20) is contrary to the company's own training, which identifies "paranoia/suspiciousness, psychosis/confusion" as "high-risk behaviors."[2] Tr. 114-15, 349; Ex. C-17.

The Chamber's arguments that the hazard of assaults on employees by third parties is not cognizable under the general duty clause are equally unpersuasive. According to the Chamber, application of the general duty clause is precluded on three separate grounds: (1) face-to-face interactions between employees and Integra's members is a core-activity of Integra's business and eliminating such interactions eliminates the business; (2) the actions of third party members are outside of Integra's control and the hazard is therefore unpreventable; and (3) the Secretary's definition of the hazard fails to inform employers of the conditions or practices they must prevent. (Chamber Br. at 3-14). We address these claims in order below.

As to the first point, nothing in the abatement proposed by the Secretary eliminates all face-to-face interactions between employees and members. Rather, the Secretary's abatement measures, which consist largely of steps Integra itself implemented following Ms. (b)(6)s death, are primarily designed to make such face-to-face interactions safer. As the judge explained, measures such as a

[2] The Secretary is not arguing that mental illness, *per se*, is a risk factor, but that certain conditions may be linked with violent behavior.

written workplace violence program, criminal background checks, "red flagging" potential violent members, and mandatory reporting of violent incidents, reduce the likelihood of physical assaults by enabling employees to identify and prevent, or escape from if necessary, violent scenarios. D&O at 89. None of these measures prevents employees from continuing to provide services through face-to-face interactions or otherwise impacts Integra's business model.[3]

The Chamber's claim that the hazard is unpreventable because the actions of the members are outside Integra's control is equally unfounded. (Chamber Br. at 6-11). Integra may not be able to control the behavior of its members, but it can control the knowledge and training employees receive to protect themselves from potential assaults during interactions with members, and it can eliminate employee contact with the most dangerous members. The Chamber's assertion that no amount of training would have protected Ms. (b)(6) from Mr. (b)(6) knife attack may (or may not) be true, but Mr. (b)(6) extensive criminal record, including multiple assaults with a weapon, coupled with his severe mental illness, should have resulted in his removal from membership. Clearly, Integra can control critical elements of the working environment in a way that eliminates or materially reduces the risk of harm to employees from assaults by members, even if it cannot directly control members' behavior. The Chamber's position that the general duty clause is inapplicable because Ms. (b)(6) death resulted from the "wild card" of human behavior should be rejected. (Chamber Br. at 8).

Finally, there is nothing to the Chamber's claim that the hazard in this case was not adequately defined. (Chamber Br. 12-13). "A hazard 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." *Arcadian Corp.*, 20 BNA OSHC 2001, 2007 (No. 93-

[3] "Rolling off" of members with histories of criminal violence will eliminate face-to-face interactions with these members; however there is no evidence that this will affect Integra's business model. The evidence shows that Integra service coordinators are assigned approximately 35 to 38 members each. Integra began rolling off members with criminal histories following Ms. (b)(6) s death, but as of the hearing, had removed only 8 members. D&O at 13, 18. *See also* discussion of feasibility of "rolling off" members, *infra*, at 22-25.

0628, 2004). The judge defined the hazard in the instant case as "the hazard of an Integra SC being physically assaulted by a member with a history of violent behavior during a face-to-face interaction." D&O at 69. The Chamber asserts that this definition does not provide Integra with notice of the precise risks against which it must protect its employees. (Chamber Br. at 12). But the precise risk at issue is clearly stated: the risk of physical harm to employees from assaults by members with a history of violent behavior. And the conditions or practices over which Integra can exercise control are also clearly stated: face-to-face interactions between employees and members with a history of violent behavior. Contrary to the Chamber's assertion, face-to-face interactions with members are conditions or practices of the workplace because such interactions form the core of Integra's business – they are the primary means by which SCs provide their services to members. Accordingly, wherever such face-to-face interactions occur is a workplace. *Anthony Crane Rental, Inc. v. Reich*, 70 F.3d 1298, 1303 (D.C. Cir. 1995) (wherever employees perform work tasks is a "place of employment"). And employee injuries that occur in connection with face-to-face interactions "arise out of work situations." *Ramsey Winch*, 555 F.3d at 1207, n.8.[4]

Lastly, the Chamber's concerns about the potential implications of applying the general duty clause to face-to-face interactions are rather dramatically overstated. (Chamber Br. at 10-14). To comply with the general duty clause, Integra need only continue to implement the measures that Integra itself adopted after Ms. (b)(6) death, together with additional undisputedly feasible measures such as those proposed by the Secretary. The Secretary recognizes that the general duty clause does not apply to every instance of violence that might occur in the workplace. To this end, the agency's Directive on Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents,

[4] The Chamber's reliance on *Pelron Corp.*, 12 BNA OSHC 1833 (No. 82–388, 1986), for the proposition that the general duty clause does not apply to the normal activities of a business is misplaced. (Chamber Br. at 5, 12). As the D.C. Circuit held, "[n]othing the Commission said in *Pelron* immunizes a workplace's dangerous 'normal activities' from oversight; the Commission simply applied well-established law that only 'preventable' hazards can be considered as recognized." *SeaWorld*, 748 F.3d at 1211. As we have discussed, the hazard of assaults on SCs by members with a history of violent behavior "arises out of work situations" and involves conditions over which Integra can exercise control. The hazard is therefore preventable.

CPL 02-01-052 (Sept. 8, 2011) (Ex. C-33, the "workplace violence directive" or the "directive") authorizes regional staff to issue citations under the general duty clause for the hazard of violence directed at employees by customers, clients and others to whom the employer provides a service only if the hazard could result in serious harm, the employer or its industry recognized the hazard, and feasible abatement methods are available to address the hazard. CPL 02-01-052 at 5, 15-18. The Directive further informs staff on how to determine whether the above conditions are met by, for example: assessing the presence of known factors that increase the risk of violence, including, of relevance here, "working with the public or volatile, unstable people," "[w]orking alone or in isolated areas," "providing services and care," and "working late at night or in areas with high crime rates;" and examining whether there is "[e]vidence of employer and/or industry recognition of the potential for workplace violence in OSHA identified high risk industries, such as healthcare and social service settings." *Id.* at 3, 8-12. For these reasons, Integra's and the Chamber's arguments that the hazard is *per se* outside the scope of the general duty clause should be rejected.[5]

II. *The Secretary Established that the Hazard was Recognized and That Feasible Means Existed to Materially Reduce It.*

A. *Integra and Its Industry Recognized the Hazard.*

The Secretary establishes recognition of the hazard either by proving that an employer had actual knowledge that a condition is hazardous, or that the hazardous condition is generally known to be hazardous in the industry. *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-0265, 1997); *Kansas City Power & Light Co.*, 10 BNA OSHC 1417, 1422 (No. 76-5255, 1982). As the ALJ correctly found, the Secretary proved that both Integra and its industry recognized the hazard of

[5] Even if the statute is viewed as ambiguous as to whether the hazard of assault on an employee by a third party is *per se* excluded from coverage under the general duty clause, the citation in the case at bar reflects the Secretary's interpretation that the clause applies where, as demonstrated in Argument II *infra*, the hazard is recognized by the employer or its industry and feasible means exist to materially reduce it. That the Secretary's interpretation is facially reasonable is further supported by the agency's workplace violence Directive, Ex. C-33. *See Skidmore v. Swift & Co.* 323 U.S. 134, 140 (1944) (agency rulings, interpretations and opinions, while not controlling, do constitute a body of experience and informed judgment to which courts and litigants can properly resort for guidance). The Secretary's reasonable interpretation embodied in the citation and Directive is controlling under step 2 of *Chevron*.

employees being physically assaulted by members with a history of violent behavior. (D&O at 70-76).

Integra's awareness of the hazard was shown by its adoption of a safety program designed to protect employees from assaults by "high risk" members, including those with a history of violent behavior. *SeaWorld*, 748 F.3d at 1208-09 (SeaWorld's safety protocols and training established employer's awareness that trainer interaction with killer whales was hazardous); *see also Beverly Enterprises, Inc.*, 19 BNA OSHC 1161, 1186 (Nos. 91-3144, 92-238, 92-819, 92-1257, 93-724, 2000) (precautions taken by an employer can be used to establish hazard recognition in conjunction with other evidence).

Integra taught its SCs to use "universal precautions" and to "[a]ssume everybody you deal with could have the potential for harm." Tr. 1030. Integra also used an on-line training program for its new service coordinators, which it referred to as the "Neumann Training." Tr. 105-106. Session 8 of the Neumann Training (of 15 Sessions) was entitled "In-Home & Community Safety," and included two power point presentations entitled "Safety in the Community" and "Screening the Dangerous Member." Tr. 108, 345; Ex. C-15, C-16, C-17. The "Screening the Dangerous Member" power point stated that service coordinators may encounter "dangerous" members and "dangerous situation(s)." Ex. C-16. In the "Safety in the Community" power point, Integra identified 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."[6] Tr. 114-15, 349; Ex. C-17.

[6] The judge determined that while Integra's safety program recognized the hazard posed by members with a history of violent behavior, it was inadequate to control the hazard prior to Ms. (b)(6) death. D&O at 74, 77-86. For example, he found that Integra's reliance on "universal precautions" improperly placed the duty to assure safety on the employee because it made the SCs responsible for determining when a dangerous situation existed and how to remove themselves from it. *Id.* at 77, 84-85 (citing Tr. 700, 924, 1030-31; Exs. C-16, C-27, C-34, at p. 3); *see also* Tr. 104, 109-110, 247-49, 255-58, 344, 346, 350, 376, 436, 617, 825, 1099-1100; Ex. C-9, C-10. As another example, the judge found Integra's online training (the Neumann training) lacked content; it listed high risk behaviors without providing the knowledge and skills necessary for SCs to identify these behaviors and deal effectively with them in practice. *Id.* at 78-79 (citing Ex. C-27, at 5-10). Thus, the SCs' ability to assess and identify potentially dangerous

In addition, the judge found that "prior to the fatal attack on Ms. (b)(6) Integra managers were aware of several instances of violence or aggression by members against other SCs." D&O at 72. This finding is supported by a wealth of evidence. Tr. 268, 376-77, 395, 417-20, 458, 470-72, 495-96, 507-15, 830-32, 1010; Ex. 29, C-31. For example, SC (b)(6) conducted several face-to-face meetings with a member who had burned down his home. Tr. 830-31. She transported the member to provider appointments. During one appointment, the member's therapist asked the member if he had homicidal thoughts. The member pointed to Ms. (b)(6) and told the therapist that he had thoughts of wanting to kill Ms. (b)(6) Tr. 831. Ms. (b)(6) told her supervisor, Ms. Rochelle, that this member admitted to having thoughts of killing her. Tr. 268. Integra required Ms. (b)(6) to continue servicing this member after the incident. Tr. 832. The record therefore contains persuasive evidence that Integra recognized the hazard.[7]

Integra's industry likewise recognized the hazard of physical assault on employees by persons with a history of violent behavior. The "test for determining industry recognition of a hazard is the knowledge or understanding of safety experts familiar with the workplace conditions or the hazard in question." *Beverly Enterprises, Inc.*, 19 BNA OSHC at 1187 (citing *Waste Mgmt. of Palm Beach, Div. of Waste Management, Inc. of Florida*, 17 BNA OSHC 1308, 1310-11 (No. 93-128, 1995)). Here, Janet Nelson, the Secretary's expert, testified that "the social service worker industry recognize[s] the risk of workplace violence when working under conditions that the [SCs] worked under." Tr. 679. Ms. Nelson also testified that, in the past ten years, several high profile murders of social service workers raised awareness of the hazards faced by social service workers. Tr. 555-57. Ms. Nelson's expert testimony established industry recognition of the assault hazard at issue. Integra's SCs worked in the healthcare and

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situations was "dependent on experience, situation, and even naiveté." *Id.* at 74, 84. *See Armstrong Cork Company*, 8 BNA OSHC 1070, 1074 (No. 76-2777, 1980) ("employer cannot shift" duty to comply with section 5(a)(1) "to its employees by relying on them to, in effect, determine whether the conditions under which they are working are unsafe"). Integra does not challenge the judge's findings concerning the inadequacy of its safety program.

[7] As the judge also found, "Mr. (b)(6) exhibited some of the high risk behaviors . . . before he killed Ms. (b)(6) and "Integra recognized that Mr. (b)(6) presented a specific threat to Ms. (b)(6) D&O at 71-72 (citing Tr. 139-43, 148, 278, 285-86, 356-65, Exs. C-7, C-19).

social service industry. While SCs were hired to coordinate medical and mental services, not to provide counseling, as the judge found, "community health workers" (*i.e.*, SCs, by Integra's own admission, Br. at 5) and social workers "are considered types of 'community and social service occupations'" by the Bureau of Labor Statistics ("BLS"). D&O at 76 n. 110; Tr. 252, 265. *See* http://www.bls.gov/ooh/community-and-social-service/home.htm. Indeed, SCs were required to perform tasks that clinical social workers would normally provide. Tr. 252, 265, 459-460, 1103-1104. 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. Tr. 459-60. 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). Tr. 349, 590-593, 1097-1098; Ex. C-34. These tools are used by trained clinicians to diagnose a patient for mental illness and to assess that patient's level of functioning. Tr. 590-593, 1097-1098; Ex. C-34.

Integra argues that SCs are not social workers in the traditional sense.[8] But even if this is true, Ms. Nelson's testimony established industry recognition of the hazard. As the judge found, "Ms. Nelson is a safety expert familiar with the general workplace conditions experienced by Integra SCs" because she: "was qualified in the areas of clinical social work, personal safety awareness, and personal safety skills and safety programs for health and human service workers;" has "a background in field work, which supported her qualification as an expert in this case in health and human service worker safety;" is "an expert in personal safety, which . . . is a basic principle not 'confined to any one industry;'" and was "familiar with interacting with people in the field." D&O at 76 n. 110 (citing Tr. 584). *See also* D&O at 56 n.86 (describing Ms. Nelson's qualifications) (citing Tr. 529-61, 567, 570-72, 575; Ex. C-26). As

[8] Integra asserts that SCs "are neither healthcare workers nor social service workers in the traditional sense" because they "do not provide medical care, nor do they *perform the functions of social workers*." Br. 21 n.5 (emphasis added). As explained above, this is not correct. Moreover, without citing to any source, Integra seems to imply that community health workers should be treated as separate from social workers because community health workers have a "distinct [BLS] occupation code." Br. 5. This ignores BLS's description of community health workers and social workers as types of "community and social service occupations." *See* http://www.bls.gov/ooh/community-and-social-service/home.htm.

such, Ms. Nelson's testimony was based on the knowledge of a safety expert familiar with the workplace conditions in question, and was therefore an appropriate basis for finding industry recognition of the hazard. *Kelly Springfield*, 10 BNA OSHC 1970, 1973 (No. 78-4555, 1982) (finding industry recognition, over employer's objection that expert had no specific experience in employer's industry, based on expert's testimony about "general principle" that "is not confined to any one industry"); *Arcadian Corp.*, 20 BNA OSHC 2001, 2009 (No. 93-0628, 2004) ("[w]here a practice is plainly recognized as hazardous in one industry, the Commission may infer recognition in the industry in question"); *Waste Mgmt.*, 17-BNA OSHC at 1310-11 (industry recognition established by expert who was "familiar with the general workplace condition").

That Integra's industry recognized the hazard is further bolstered by OSHA's directive on workplace violence (Ex. C-33, discussed *supra* pp. 15-16) and related guidelines for healthcare and social service workers (Ex. C-32, Guidelines for Preventing Workplace Violence for Healthcare and Social Service Workers, OSHA 3148-11R (2004)), as well as the numerous publications and studies within the social services and healthcare industry addressing the hazard of workplace violence in that industry. OSHA based its directive and guidelines on a number of these studies, which are referenced in the directive or the guidelines. Ex. C-33, at 36-38 (App. C, studies examining the effectiveness of workplace violence controls for healthcare and social services); Ex. C-32, at 44-46 (App. C, Suggested Readings). OSHA stated that the guidelines "provide the agency's recommendations for reducing workplace violence, developed following a careful review of workplace violence studies, public and private violence prevention programs and input from stakeholders." *Id.* at 7. In addition, the Guidelines for Social Worker Safety in the Workplace, published by the National Association of Social Workers, address the hazard of workplace violence specifically for social workers. Tr. 723-730. The OSHA directive and guidelines and the publications within the social services and healthcare industries (along with Ms. Nelson's testimony) all establish that Integra's industry recognizes the hazard.

Integra (Br. 20-21) and the Chamber (Br. 16-18) assert that the Secretary may not rely on the OSHA guidelines for healthcare and social service workers, Ex. C-32, to establish recognition of the hazard or feasibility of abatement. Their main argument appears to be that the Secretary should have adopted a workplace violence standard, and absent a showing that such a standard was inappropriate, should not enforce the general duty clause. There is no authority whatsoever for the proposition that the Secretary is required to make a "showing" that "workplace violence issues are inappropriate for specific standards" to establish a violation of the general duty clause. (Chamber Br. at 16). Moreover, the Secretary did not need to follow rulemaking procedures, such as those that require giving the public notice and an opportunity to comment, before relying on the guidelines (or, indeed, any other evidence of a violation) because, as Integra and the Chamber point out, the guidelines are not standards or regulations. Any concerns Integra and the Chamber have about due process are resolved by the Commission's statutorily granted authority to weigh evidence, such as the guidelines and studies on which the guidelines were based, and determine whether the Secretary established a violation. 29 U.S.C. § 659, 660, 661. *See also cf. Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1874 (No. 92-2596, 1996) (proposed OSHA standard, "which advocated protection for all employees [], is evidence that safety officials and other individuals familiar with the industry recognized the hazard"); *Gen. Dynamics Land Sys. Div., Inc.*, 15 BNA OSHC 1275, 1281-82 (No. 83-1293, 1991) (while employer itself "cannot be charged with knowledge" of draft standard, draft standard is "instructive in determining the general consensus of what constitutes a confined space"); *Kansas City Power & Light Co.*, 10 BNA OSHC at 1422 ("industry standards establish industry recognition of [] hazard").[9]

[9] The Chamber is wrong that the guidelines do not focus on risks outside of "hospitals, clinics, and the like." Br. 18. The guidelines specifically advise employers to "[e]ncourage home health care providers, social service workers and others to avoid threatening situations." Ex. C-32, at 19. Similarly, the Commission should reject Integra's speculation that the guidelines are outdated. OSHA updated the guidelines in 2015. *See* https://www.osha.gov/Publications/osha3148.pdf. The updated guidelines continue to show that Integra's industry recognized the hazard and that knowledgeable persons familiar with Integra's industry would regard the measures proposed by the Secretary as necessary and valuable for a sound safety program in the particular circumstances existing at Integra's worksite. *Id.* at 40-45.

Integra argues that the decision in *Megawest Financial, Inc.*, 17 BNA OSHC 1337, 1995 WL 383233 (No. 93-2879, 1995), an unreviewed and nonprecedential ALJ decision, precludes a finding of hazard recognition in the case at bar. Integra's reliance on *Megawest* is misplaced, however, for the judge in that case simply found that the hazard of random physical assaults upon apartment complex staff by tenants upset by management policies was not recognized by the employer or its industry on the specific facts presented. *Id.* at 1340-41. Critically, the judge found that the Secretary did not prove that the employer was actually aware of the hazard based primarily on evidence that a supervisory employee feared for his safety. *Id.* at 1341. In the instant case, by contrast, the evidence of hazard recognition includes the precautions, albeit inadequate, taken by Integra to reduce the risk of assaults by members on SCs during mandatory face-to-face interactions, and the company's awareness of specific incidents of such violence. Nothing in the *Megawest* decision precludes the judge's finding that Integra and its industry recognized the hazard of assaults on employees by members with a history of violent behavior during face-to-face interactions. *See Ramsey Winch*, 555 F.3d at 1207, n.8 (general duty clause violations for incidents involving workplace violence "are entirely dependent upon the specific facts, which will be unique in each situation") (quoting OSHA Standard Interpretations Letter, December 10, 1992).

B. *Feasible Means Existed to Eliminate or Materially Reduce the Hazard.*

In the citation, the Secretary proposed that Integra could abate the hazard of workplace violence through: (1) implementing a written workplace violence prevention program containing specified elements;[10] (2) determining the behavioral history of new/transferred members and establishing 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

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Indeed, the updated guidelines give specific guidance on measures to take to materially reduce workplace violence associated with the field work of social service workers who make home visits. *Id.* at 1, 5-22.

[10] These elements are set forth in the Citation, Ex. C-1.

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. C-1, pp. 6-8. The Secretary established these measures were feasible means of materially reducing the hazard by showing that "knowledgeable persons familiar with the industry would regard the steps as necessary and valuable for a sound safety program in the particular circumstances existing at the employer's worksite." *Cerro Metal Prods. Div., Marmon Group, Inc.*, 12 BNA OSHC 1821, 1822-23 (No. 78–5159, 1986).

First, as explained *supra*, OSHA based the means of abatement contained in the citation on those contained in the OSHA directive and related guidelines for healthcare and social service workers, which were in turn based on numerous publications within the social services and healthcare industry addressing the hazard of workplace violence in that industry. Ex. C-33, at 36-38 (App. C, studies examining the effectiveness of workplace violence controls for healthcare and social services); Ex. C-32, at 44-46 (App. C, Suggested Readings). Second, as the judge found, based on Ms. Nelson's testimony, "performing background checks, implementing certain administrative and engineering controls, including assigning member/caseloads considering member risk, 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 the workplace violence." D&O at 87 (citing Tr. 617, 644-66, 672-75, 1094-95; Exs. C-1, at pp. 6-8, C-27, at p. 12). Moreover, a "written workplace violence prevention program decreases the risk of assault by helping prepare the SC for the possibility of a violent situation" because: "1) a written document is an established resource for trainees, preventing experienced workers from taking all of their knowledge with them if they leave the company; 2) the safety program also provides 'scenarios' to make trainees aware of possible safety situations like a member with a weapon, dogs, trespassing signs, and other people in the member's house; and 3) the safety program will then list ways to identify, prevent, and escape from those scenarios." D&O at 89 (citing Tr. 646-49); *see also* Ex. C-27, at p. 9. Further, the use of a background check "decreases the risk of assault because it allows

the SCs to know who may have a propensity for violence so that they may prepare themselves or alternatively assign the member to a SC based on client risk, rather than geographic or scheduling concerns." D&O at 89 (citing Tr. 618-19); *see also* Tr. 722, Ex. C-27, at p. 11. Finally, "'rolling off' a member with a history of violent behavior decreases the risk of assault because the SC would not be required by Integra to meet with that member," and "mandatory reporting requirements decrease the risk of assault because: 1) by making it mandatory, it decreases the chance that Integra SCs will not report it for fear of looking like they are not doing their job, and 2) it allows all the SCs to know what is going on so that they can all help and prepare for the possibility of a violent situation with a particular member." D&O at 89-90 (citing Tr. 661-62). Thus, there is ample evidence in the record demonstrating that feasible means existed to eliminate or materially reduce the hazard.

Integra and the Chamber question the efficacy of the proposed abatement measures. Integra notes that Ms. Nelson offered no statistical or other evidence to support her conclusions. (Br. at 26-28). However, the Secretary need only show that "knowledgeable persons familiar with [Integra's] industry" – *i.e.*, Ms. Nelson and the authors of the numerous publications within the social services and healthcare industry on which OSHA relied in the directive and related guidelines – "would regard the [measures proposed by the Secretary] as necessary and valuable for a sound safety program in the particular circumstances existing at [Integra's] worksite." *Cerro Metal Prods.*, 12 BNA OSHC at 1822-23.[11] As the judge found, Ms. Nelson testified in detail why the measures proposed by the Secretary were necessary and valuable components of a safety program designed to protect Integra's SCs from physical assaults by members. D&O at 87-89. Moreover, the fact that Integra adopted a number of these measures following Ms. (b)(6) death is strong evidence of their efficacy. *SeaWorld*, 748 F.3d at 1215 (employer's post-citation

[11] Moreover, notwithstanding Integra's assertion (Br. 28 n.7) that Ms. Nelson was "unable to provide testimony concerning the extent to which the proposed abatement measures had been adopted in the industry," the Secretary must show that the proposed abatement measure is technologically and economically feasible, not that the precaution has gained general acceptance in the industry. *Beverly Enters., Inc.*, 19 BNA OSHC at 1191.

implementation of abatement measures "support the finding that these changes were feasible and would not fundamentally alter the nature of" employer's business).

The Chamber argues that refusing to provide services to persons with a history of violent behavior is the only measure that would reduce the hazard and is infeasible because it would have a substantial negative impact on Integra's business model. (Chamber Br. at 15). However, the record does not establish that all members with a history of violence must be eliminated from the program in order to materially reduce the hazard of assaults on SCs. Not all members with a history of violence present the same degree of risk. Abatement measures that effectively prepare SCs for the possibility of violence, such as training on de-escalation and non-harming self-defense techniques, providing "scenarios" to make trainees aware of possible safety situations and how to avoid or escape them, and administrative practices, such as assigning caseloads based on member risk rather than purely geographic factors, may be adequate to reduce the risk of physical assault by some members with violent histories. And even if "rolling off" all members with a history of violent behavior would be required to materially reduce the risk, there is no evidence that it would be infeasible. For Integra could still provide services to all other members, including those with non-violent mental illnesses or other cognitive impairments. Integra provided no evidence of the number or proportion of its members with violent histories, and made no argument below that rolling off all such members would affect its economic viability.

III. *Integra Had Fair Notice of its Obligation to Comply With the General Duty Clause.*

Integra argues that the general duty clause is unconstitutionally vague as applied to it in this case because it could not have known that it was required to implement the Secretary's proposed abatement measures. (Integra Br. at 29-31). This facial challenge to the Act should be rejected because the hazard of physical assaults on SCs by members with a history of violent behavior was preventable and a reasonably prudent employer in Integra's industry would have recognized that additional abatement measures were required. *SeaWorld*, 748 F.3d at 1216. As discussed, *supra*, Integra was aware that SCs faced a risk of physical assault by members with

certain risk factors, including a history of violence and severe mental illness, and specified some measures to abate that risk. Thus, Integra knew that Mr. (b)(6) in particular, and other members with similar backgrounds, posed a workplace violence hazard. Integra also knew or should have known that its safety program prior to Ms. (b)(6) death was inadequate, as it relied primarily upon SCs to assess the degree of risk and to "get out" of or leave any situation if they felt threatened. D&O at 74, 84-86. This approach was "plainly inadequate when, as here, the SC was inexperienced, naïve, untrained, and already face-to-face with a member with a history of violent behavior." *Id.* at 84. *See also* discussion of inadequacy of Integra's approach, *supra*, footnote 6.

As to the proposed abatement, Ms. Nelson's expert testimony establishes that a reasonably prudent employer in Integra's position would have recognized that it was required to implement measures such as a written workplace violence program, training SCs on methods to de-fuse, or escape from, potentially violent interactions, background checks, flagging members with violent behaviors, and rolling off those members with violent criminal records. Moreover, Integra itself adopted a number of measures after the fact that would, if adopted earlier, have prevented Ms. (b)(6) death at the hands of Mr. (b)(6) Accordingly, the hazard was preventable by demonstrably feasible means and the application of the general duty clause in no way deprived Integra of fair notice.

IV. *Integra's Remaining Arguments are Without Merit.*

Integra asserts that the Commission should remand the case for a new hearing because, in a footnote to the portion of the decision summarizing Dr. Arnott's testimony, the judge stated that he was "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." D&O at 22 n.36. Even if the judge had committed error here (he did not), such error

was harmless.[12] Integra does not rely on any of Dr. Arnott's testimony to assert that the Secretary did not establish his case, nor does Integra point to any substantive findings made by the judge that were affected by the credibility determination concerning Dr. Arnott. In any event, the Commission reviews the ALJ's factual findings *de novo*, except on matters of credibility that are particularly observable by the hearing judge (like demeanor). *Waste Mgmt.*, 17 BNA OSHC at 1309-10. The credibility finding to which Integra objects was not based on a matter peculiarly within the judge's purview.[13] Therefore, the Commission may make its own independent factual finding, without regard to the judge's credibility finding, if it so chooses.

Finally, the Commission should reject Integra's argument that it did not commit a serious violation because it "did not know (and could not reasonably be expected to know) that it was in violation of the Act." (Integra Br. at 34-35). As the judge found, Integra's argument relates to the knowledge element of the Secretary's *prima facie* case. The relevant question is whether the employer knew or with reasonable diligence could have known of the violative condition, not whether the employer knew that the condition violated the Act. *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318-319 (5th Cir. 1979). Integra knew that its workplace was not free of the hazard of assaults on SCs by members with a history of violent behavior.

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[12] The judge relied upon Dr. Arnott's own resume in concluding that she did not complete a full-time resident study program. "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." D&O at 22 n.36 (citing Ex. R-TT). Moreover, Integra does not dispute the factual underpinnings of the court documents and administrative case on which the judge relied to conclude that the University of Sarasota was in bankruptcy around the time that Dr. Arnott received her doctoral degree, or that "[i]n at least one instance, the University of Sarasota has been seen as a 'non-traditional' university and had its doctorate programs called into question." *Id.*

[13] In contrast, the judge credited the testimony of witnesses Integra sought to discredit, Laurie Rochelle, Ellen Elaine Rentz, and Andrew Macaluso, based on their demeanor. D&O at 38, 40 n.69, 51 n.80.

CONCLUSION

For the above reasons, the Secretary respectfully requests that the Commission affirm the citation as a serious violation of the general duty clause.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that Respondent Integra Health Management, Inc. has consented that all papers required to be served may be served and filed electronically. I further certify that a copy of the Secretary of Labor's Brief and Appendix was served on December 18, 2015 on the following counsel for Integra Health Management, Inc. via electronic mail and United Parcel Service:

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I further certify that a copy of the Secretary of Labor's Brief and Appendix was served on December 18, 2015 on the following amici curiae, if unrepresented, or their counsel, if represented, via United Parcel Service:

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