UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. UHS of Delaware, Inc., and Premier Behavioral Health Solutions of Florida, Inc., dba Suncoast Behavioral Health Center, Respondents.	OSHRC Docket No. 18-0731

ORDER GRANTING COMPLAINANT'S MOTION TO COMPEL AND/OR TO SHOW WHY RESPONDENTS CANNOT PRODUCE VIDEO SURVEILLANCE EVIDENCE TO THE EXTENT INDICATED HEREIN

I. FACTS[1]

On August 9, 2017 an alleged workplace violence incident occurred at one of Respondents' units. On October 19, 2017, Occupational Safety and Health Administration's (OSHA) Tampa Area Office received a non-formal complaint alleging that there was no adequate protection at Respondents Suncoast Behavioral Health Center's (Suncoast) units from violent mental health patients. October 25, 2017, OSHA, by telephone and letter, requested Suncoast to respond to the alleged hazard of workplace violence.[2] OSHA requested Suncoast conduct an investigation and to provide it with any supporting documentation of its findings, including any applicable monitoring results and photographs which Suncoast believed would be helpful. Suncoast was also specifically instructed to mail any such photographs to OSHA. OSHA

[1] The following facts are drawn from Complainant's Motion to Compel and/or to Show Cause why Respondents cannot Produce Video Surveillance Evidence (Motion to Compel) and Respondents' Response to Complainant's Motion to Compel and/or to Show Cause Regarding Video Evidence (Response to Motion to Compel) and are found solely for the purpose of ruling upon the Motion to Compel.

[2] The specific nature of the alleged hazard was identified as: "(A) At the facility employees are exposed to

requested that Suncoast post a copy of its letter where it would be accessible for review by all of Suncoast's employees. On November 1, 2017, Suncoast provided a written response to OSHA outlining how it addressed the hazard. As part of its response, Suncoast noted that video surveillance cameras monitored its units at all times.

On November 2, 2017, an incident involving an assault allegedly occurred at Suncoast's Coral Key unit.[3] On November 30, 2017, OSHA Compliance (CO) Lizbeth Troche conducted an on-site OSHA inspection of Suncoast. During this on-site inspection, CO Troche asked Suncoast to provide any surveillance video footage showing instances of workplace violence, particularly an instance occurring on August 9, 2017.[4] Although allowed on November 30, 2017 to view on-site video footage showing the instance of workplace violence that occurred on August 9, 2017, she was not provided with a copy of the video footage, or any other videos.

Four and one-half months later, on April 19, 2018, OSHA served an OSHA Subpoena Duces Tecum on Suncoast seeking by April 26, 2018[5] at OSHA the production of :

> [c]opies of any and all video of acts of violence by patients against employees during the period January 1, 2017 to the present, including, but not limited to, the November 2, 2017 incident at Coral Key Unit, in which a patient snatched the hair and pulled the neck of a mental health technician that resulted in the employee having a strained shoulder.

On April 24, 2018, OSHA concluded its inspection and issued a one-item Repeat citation to Respondents for exposing employees to acts of workplace violence, in violation of Section 5

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workplace violence , (sic) in that, the employer has failed to ensure that employees have adequate protection from violent mental health patients. This is a possible violation of OSH Act Section 5(a)(1)."

[3] A patient allegedly snatched the hair and pulled the neck of a mental health technician that resulted in the technician having a strained shoulder.

[4] CO Troche requested the videos to see the actual acts of violence to understand what employees were doing in the moment to address the hazard of workplace violence, and to access whether Suncoast's employees were prepared to respond to any such hazards.

[5] Suncoast did not produce to OSHA any videos that were responsive to the OSHA subpoena.

(a)(1) of the OSH Act of 1970, 29 U.S.C. § 654 (a)(1),[6] and proposing a penalty of $71,137. These incidents of workplace violence include, but are not limited to, physical assaults by patients against employees in the form of punches, kicks, bites, scratches, hair pulling, and battery with objects used as weapons by patients throughout Respondents' facility.

Respondents filed a notice of contest. Pleadings have been filed.

On August 9, 2018, Complainant served his First Request for Production of Documents upon Respondents. Document Request No. 9 (sic)[7] seeks "[a] video surveillance for each incident of workplace violence, including but not limited to those documented in Employee Accident Reports and/or OSHA logs, from February 3, 2016, to the present at the worksite."

On October 11, 2018, Respondents served their Response to Complainant's First Requests for Production of Documents. Their response to Document Request No. 9 (sic) stated: "Respondent[8] only keeps thirty days of video under most circumstances pursuant to policy. There is no responsive video to this request."

On October 12, 2018, Respondents' counsel reportedly informed complainant's counsel that Suncoast had advised OSHA's Tampa Area Office in writing that videos that were responsive to OSHA's April 18, 2018 subpoena had been destroyed.[9] Thereafter, Respondents' counsel reportedly learned that Suncoast possessed six of eight videos that were responsive to

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[6] Section 5(a)(1) of the OSH Act, also known as the general duty clause, provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1).
[7] Complainant's First Request for Production of Documents contains two Document Requests No. 9.
[8] Respondent is identified as referring to Respondents UHS of Delaware, Inc. and Premier Behavioral Health Solutions of Florida, Inc. dba Suncoast Behavioral Health Center ("Suncoast" or "Respondent").
[9] OSHA is unaware of its receipt of any such letter.

OSHA's April 18, 2018 subpoena.

On November 6, 2018, Respondents' counsel advised the Secretary's counsel that Suncoast had eight videos from 2018; but none that were from before 2018.

On November 13, 2018, Complainant filed his Motion to Compel. Complainant seeks an order compelling Respondents to produce all of those videos that are within their possession or control that are responsive to Complainant's Document Request for Production No. 9 (sic). To the extent any responsive videos existed but were destroyed since October 25, 2017, Complainant seeks an order compelling Respondents to show cause why any such destruction does not constitute spoliation of relevant evidence, for which sanctions may be appropriate.

On November 28, 2018, Respondents filed their Response to Motion to Compel. Respondent argues:

1) Complainant has not explained the basis for his Request for Production of Documents No. 9 (sic);

2) the Motion to Compel should be denied as to UHS-DE because UHS-DE has no videos in its possession;

3) no videos were kept under Suncoast's video storage policy because there were no incidents that resulted in any employee disciplinary action;

4) they object to the production of six existing videos because they are: a) irrelevant; i.e. because the Secretary alleges Respondents failed to follow their alleged procedures so any analysis as to whether Suncoast followed its own procedures is irrelevant, b) their production is not proportional to the needs of case, and c) irrelevant to expert Dr. Jane Lipscomb's analysis to determine whether the application of behavioral health protocols addresses patient behavior

since she was not qualified to serve as an expert on such a subject;

5) OSHA has no authority to opine on patient care and management of behavioral health patients;

6) any videos that are responsive to Document Request No. 9 (sic) contain only limited information; e.g. four such videos only show employee entries and exits from patient's bedrooms; and better evidence is contained in Employee Accident Reports (EAR);

7) Suncoast no longer has the August 9, 2017 video that was viewed by CO Troche on November 30, 2017; but reports that it may be with another agency since an employee pressed charges against the patient that was involved in that incident;

8) Complainant's spoliation claim is frivolous because: a) the Occupational Safety and Health Review Commission (Commission) has no reported spoliation cases; b) the mere opening of an OSHA inspection does not sufficiently convey notice to an employer to preserve evidence that may be relevant to OSHA's inspection; and c) the Secretary has not been prejudiced; and

9) the time frame sought for the production of material through "to the present" is too long because the Secretary should not be able to seek materials that came into existence after April 24, 2018, when the citation was issued.

Discovery closes March 29, 2019. An eight-day trial commences on April 23, 2019 at Bradenton, Florida.

II. DISCUSSION

When solving discovery disputes, it is appropriate for the Court to consider the need of the moving party for the information sought, any undue burden to the party from whom the

discovery is sought, and any undue delay in the proceedings that may occur. *KLI, Inc.,* 6 BNA OSHC 1097, 1098 (No. 13490, 1977). The Court finds that Complainant has sufficiently demonstrated a need to have Respondents produce a video surveillance for each incident of workplace violence, including but not limited to those documented in EARs and/or OSHA logs, from February 3, 2016, to April 24, 2018. The Court further finds that there would not be: 1) an undue burden on Respondent to do so, and 2) any undue delay in these proceedings in doing so.

This Court has already acknowledged in *N. Suffolk Mental Health Assoc.,* No. 11-2132, https://www.oshrc.gov/assets/1/6/11-2132.pdf, at *8-9 (April 18, 2012), where the Secretary indicates that he has knowledge of instances of violence or threatened violence at an employer's facilities, the Secretary may obtain evidence of those and other such instances during the course of discovery. There this Court also stated that "[t]he Secretary may utilize the evidence she obtains of other instances of workplace violence to show, for example, Respondent's knowledge of the cited hazard." *Id.* at 6. Knowledge of a hazard may be gained by an employer through prior accidents, prior injuries, employee complaints, and warnings communicated to the employer by an employee.

Respondents have offered a litany of reasons explaining why they should not have to produce any video surveillance for each incident of workplace violence, including but not limited to those documented in EARs and/or OSHA logs, from February 3, 2016, to the present. Most, except as to argument nos. 8 and 9 indicated above, have no merit. The Court finds Complainant has explained the basis for his Document Request No. 9 (sic).[10] Suncoast's

[10] *See* fn 4.

response to Document Request No. 9 (sic) states "Respondent[11] only keeps thirty days of video under most circumstances pursuant to policy and there is no responsive video to this request." In their Response to Motion to Compel, Respondents now assert that only UHS-DE is not in possession of any responsive videos from Suncoast's facility, while admitting that Suncoast has six responsive videos. Respondents response to Document Request No. 9 (sic) must be amended and at least the six videos in Suncoast's possession must be produced.[12]

Respondents' argument that no videos were kept under Suncoast's video storage policy because there were no incidents that resulted in any employee disciplinary action disregards Suncoast's other requirements to maintain video footage if such footage relates to: (i) "liability claims;" (ii) "or an investigation by any administrative, civil, or criminal authority, through the receipt of notification or other information identifying the possibility of legal action …"; or (iii) for any allegations of "assault or other physical altercations involving patients or residents; …."

Respondents' objection to the production of the six existing videos because they are irrelevant and not proportional to the needs of case is near spurious. During the conduct of her OSHA inspection on November 30, 2017, CO Troche viewed on-site video footage showing the instance of workplace violence that occurred on August 9, 2017, a workplace violence incident that may have served as a basis for OSHA issuing its citation. The August 9, 2017 video should also have been produced by Suncoast when asked for by OSHA on November 30, 2017 and a copy thereof should have been retained by Respondents if and when it was given to

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[11] In the prelude to their discovery responses, Suncoast identifies Respondent as UHS of Delaware, Inc. and Premier Behavioral Health Solutions of Florida, Inc. dba Suncoast Behavioral Health Center ("Suncoast" or "Respondent").

[12] Similarly, Respondents need to further amend their response to Document Request No. 9 (sic) with regard to the assertion that they no longer have the August 9, 2017 video that was viewed by CO Troche on November 30, 2017 because it may be with another unidentified agency. At a minimum, Respondents need to identify the agency that may have the August 9, 2017 video and explain the circumstances by which it was transferred to that agency.

another agency at a later date. Videos are often introduced and admitted as evidence in cases heard before the Commission. The production of the six known existing videos relating to workplace violence incidents at Suncoast's facilities is also not out of proportion to the needs of this case.

"Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense... Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1). The Commission's parallel rule, found at 29 C.F.R. § 2200.52(b), similarly provides: "The information or response sought through discovery may concern any matter that is not privileged and that is relevant to the subject matter involved in the pending case. It is not ground for objection that the information or response sought will be inadmissible at the hearing, if the information or response appears reasonably calculated to lead to discover of admissible evidence, regardless of which party has the burden of proof."

The Supreme Court has construed the language, "relevant to the subject matter in the pending action," as being sufficiently broad "to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501 (1947)). The video footage requested by the Secretary is relevant to, and discoverable in, this matter.

Respondents' argument that OSHA has no authority to opine on patient care and management of behavioral health patients is not dispositive of whether the videos are producible in discovery and need not be further addressed herein with regard to this Motion to

Compel.

Respondents' arguments that any videos that are responsive to Document Request No. 9 (sic) contain only limited information showing only employee entries and exits from patient's bedrooms, and evidence better than the videos is contained in AERs reflects Respondents' view of the probative value of the videos; and not necessarily that the views of either the Court, or the Secretary. It is not for Respondents to unilaterally make a call on the production of these videos during discovery based solely on its judgment of the value of the videos and its non-disinterested view that better evidence may be elsewhere. As stated by the United States Supreme Court in *Regan v. Time, Inc*.,468 U.S. 641, 678 (1984) "the adage that 'one picture is worth a thousand words' reflects the common-sense understanding that illustrations are an extremely important form of expression for which there is no genuine substitute." *See also R.A. Hinton Constr., Inc.,* No. 81-0552-S, 1982 WL 22690, at *3 (O.S.H.R.C.A.L.J. January 14, 1982) (referring to the adage "one picture is worth a thousand words"). Here, it could be said paraphrasing, a picture in a video of an incident may be worth a thousand words in an AER.

The Court's resolution of Respondents' arguments in response to the Secretary's request that Respondents be required to show cause why any video footage that was responsive to Document Request No. 9 (sic) after October 25, 2017 is premature at this time. First, Respondents need to identify in their response to Document Request No. 9 (sic) any video footage relating to workplace violence incidents that occurred on or after February 3, 2016 through on or before April 24, 2018 that was destroyed on or after October 25, 2017.[13] Second, to the extent any video footage relating to workplace violence incidents has been destroyed on

[13] The Court agrees with the Secretary that Respondents received sufficient notice from OSHA by letter and

or after October 25, 2017, Respondents need to fully explain the circumstances of any such destruction, including identifying who ordered or approved of the destruction and stating why, when and how the video footage was destroyed in an updated supplemental response to Document Request No. 9. (sic).

Upon receipt of any such supplemental responses to Document Request No. 9 (sic), the Secretary may thereafter move for sanctions based upon any alleged destruction and/or spoliation of pertinent videos of workplace violence after first meeting and conferring with Respondents.

Lastly, based upon the Court's analysis of the record before it, the Court finds that the time frame sought for the production of videos from February 3, 2016 through "to the present" is too long and the Secretary shall not be able to seek videos that came into existence after April 24, 2018; the date the citation was issued.[14]

III. CONCLUSION

For the reasons stated above, the Court finds Complainant's Motion to Compel to have merit.

IV. ORDER

WHEREFORE IT IS ORDERED that Complainant's Motion to Compel is GRANTED to the extent indicated herein.

IT IS FURTHER ORDERED that Respondents shall produce all video surveillances, including but not limited to the six or eight videos acknowledged by Respondents to be in

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telephone on October 25, 2017 to preserve any than existing videos relating to any incidents of workplace violence.

[14] The Court notes that the Secretary did not specifically address the "to the present" end date of his Document Request No. 9 (sic) in his Motion to Compel. The Court's ruling herein that the end date is April 24, 2018 is made

Suncoast's possession, and supplement or amend its answer to Document Request No. 9 (sic) on or before December 17, 2018;

IT IS FURTHER ORDERED that Respondents shall by December 17, 2018 identify in their supplemental response to Document Request No. 9 (sic) any video footage relating to workplace violence incidents that occurred on or after February 3, 2016 through on or before April 24, 2018 that was destroyed on or after October 25, 2017;

IT IS FURTHER ORDERED that, to the extent any video footage relating to workplace violence incidents that has been destroyed on or after October 25, 2017, Respondents shall by December 17, 2018 in their supplemental response to Document Request No. 9 (sic) fully explain the circumstances of any such destruction, including identifying who ordered or approved of the destruction and stating why, when and how the video footage was destroyed;

IT IS FURTHER ORDERED that Respondents need to supplement and/or amend their response to Document Request No. 9 (sic) by December 17, 2018 with regard to the assertion that they no longer have the August 9, 2017 video that was viewed by CO Troche on November 30, 2017 because it may be with another unidentified agency, by identifying the agency, and a point of contact therein, that may have the August 9, 2017 video and explain the circumstances, including by whom, when, and how, by which the August 9, 2017 video was transferred to that agency; and

IT IS FURTHER ORDERED that Respondents shall provide Complainant by December 17, 2018 a copy of any correspondence from Respondents to OSHA's Tampa Area Office that informed OSHA that video surveillance footage that was responsive to the Subpoena Duces

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without prejudice to the Secretary seeking to extend the end date beyond that date in another motion should he seek

Tecum that OSHA served upon Suncoast on April 19, 2018 had been destroyed.

SO ORDERED.

/s/ ______________________________
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: December 4, 2018
Washington, D.C.

to do so.