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

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| SECRETARY OF LABOR | * | |
| Complainant, | * | OSHRC DOCKET NO. 13-1124 |
| v. | * | |
| INTEGRA HEALTH MANAGEMENT, INC. | * | HON. DENNIS L. PHILLIPS ADMINISTRATIVE LAW JUDGE |
| Respondent. | * | |

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**RESPONDENT'S POST-HEARING BRIEF**

Respondent Integra Health Management, Inc. ("Integra"), by and through its undersigned counsel, hereby submits its Post-Hearing Brief.

**INTRODUCTION**

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 [redacted], a Service Coordinator, outside the home of a Member on December 10, 2012.

*Integra's Operations and the Service Coordinator Position*

Integra was founded in 2007. (Tr. 754). The company employs community health workers, who seek to assist individuals with chronic health conditions in obtaining access to

[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.

health care, including preventive care. (Tr. 754-55). Members are referred to Integra by their health insurers, based on a review of the individuals' claims histories to identify individuals who are not receiving medical and/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 by an insurer, Integra assigns a Service Coordinator to work 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 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

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. 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 (CHW) are a critical resource in providing in-community support to underserved individuals with healthcare needs. In 1978, the World Health Organization recognized the use of CHWs as "an important policy to promote primary care." In 2009, the Department of Labor Bureau of Labor Statistics created a distinct occupation code for CHWs. The services defined within CHW occupational code include:

Assist individuals and communities to adopt healthy behaviors; conduct outreach for medical personnel or health organizations to implement programs in the community that promote, maintain, and improve individual and community health; May provide information on available resources; provide social support and informal counseling; advocate for individuals and community health needs, and provide services such as first aid and blood pressure screening; may collect 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 training of such employees. For that reason, the company commissioned the development of a structured online, interactive training program referred to throughout this proceeding as the "Neumann training." 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 training program is dedicated to workplace safety. (Tr. 882, 913; Exhibit J). Integra mandates that newly hired employees complete this 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 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 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 are present, to advise their supervisor of any real or perceived safety issue, to take another Service Coordinator with them if they felt doing so was necessary and generally how to perform

their job duties safely in the community. Integra conducted a total of three two-day 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), and included written safety-related materials distributed in connection with the 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 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

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

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 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).

*The Events of December 10, 2012*

(b)(6)(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 (b)(6) was assigned to work with was (b)(6)(b)(6) an individual who had been diagnosed with schizophrenia and other chronic medical issues. When (b)(6)(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 [redacted] criminal record. The compliance safety and health officer who conducted the agency's investigation, Jason Prymmer, acknowledged, however, that [redacted] record contained no evidence of any violent activity subsequent to the 1990s. (Tr. 225-26).

[redacted] conducted three face-to-face meetings with [redacted] during October and November 2012. (Tr. 139-40). Although [redacted] notes from one of those meetings indicate that [redacted] felt "uncomfortable, so she asked the member to be respectful or she would not be able to work with him", as confirmed by Mr. Prymmer during the hearing, based on a comment made by [redacted] 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).

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

*The Citation*

Within days of [redacted] death, OSHA opened its investigation.[3] At the conclusion of the investigation, OSHA issued the citation ("Citation") from which the instant proceeding arises. (Exhibit 1). Citation One, Item One of the Citation charges Integra with a violation of the general duty clause contained in Section 5 of the Occupational Safety and Health Act of 1970 (the "Act"). Specifically, Citation One, Item One alleges that Integra failed to keep its

[3] As discussed *infra*, although Integra reported [redacted] death to Workmens' Compensation, it did not also report the fatality to OSHA. OSHA learned of [redacted] death shortly after it occurred as a result of a report from an unknown third-party. (Tr. 81-82).

workplace free from exposure to "the hazard of being physically assaulted by members with a history of violent behavior." Of particular note, the Citation references [redacted] as having a "violent criminal history" in describing the basis for the Citation, yet OSHA's investigator, Mr. Prymmer, acknowledged during his testimony that OSHA did not obtain a copy of [redacted] criminal record until after the Citation had been issued. (Tr. 223).

## LEGAL STANDARD

The provision of the Act at issue in this matter is 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:

> 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. Intentional Criminal Acts by Integra's Members Do Not Constitute a Recognized Workplace Hazard within the Meaning of the Act.

The hazard upon which the Secretary bases his allegation that Integra violated the general duty clause is that of "being physically assaulted" by the Members to whom Integra provides assistance. (Exhibit 1). By this Citation, the Secretary thus defines as a hazard the potential criminal acts of the citizens being served by Integra. Enforcement of the Citation would represent an unprecedented expansion of the general duty clause and, moreover, is unsupported on the record of this case.

The only precedent that Integra has located involving an alleged "recognized hazard" consisting of criminal conduct by a third party is *Megawest Financial Inc.*, 17 BNA OSHC 1337, 1995 OSAHRC LEXIS 80 (No. 93-2879, 1995). Megawest involved an apartment complex managed by the respondent-employer. After a series of incidents in which staff members were threatened and physically assaulted by residents, the Secretary issued a citation pursuant to the general duty clause. The presiding Administrative Law Judge ("ALJ") denied enforcement of the citation on the grounds that potential violent acts by the residents were not a recognized hazard for purposes of the general duty clause. *Id.* at *32. In so holding, the ALJ recognized that the nature of the hazard at issue was not consistent with those envisioned at the time of the Act's passage: "The hazards that the Act has traditionally dealt with have been hazards that arise from some condition inherent in the environment or the processes of the employer's workplace. Thus, the Act addresses the hazards of falling, of electrocution, of amputation, of suffocation, of overexposure to lead, and to noise." *Id.* at *24. The ALJ recognized that "'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.'" *Id.* at *25 (quoting *Pelron Corporation,* 12 BNA OSHC 1833, 1986 OSAHRC LEXIS 114 at *10-11 (No. 82-388, 1986)).

The ALJ further 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.

On that basis, the ALJ concluded that the Secretary had failed to establish a recognized hazard sufficient to support enforcement of the citation. Integra has been able to locate no decisions, in the nearly twenty years since *Megawest* was decided, in which the Commission or an ALJ has directed enforcement of a citation based upon the hazard of potentially criminal acts by a third party.

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 "were often subjected to threats or belligerent conduct and, on a few occasions, to physical attack." *Id.* at *7. Those events included an incident in which two employees had to be hospitalized following an attack by a resident armed with mace, as well as an incident in which an employee was attacked with a telephone. *Id.* at *8-9. Here, in contrast, although there was testimony of a few 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 (b) (6) on December 10, 2012.

Further, the question of whether a recognized hazard exists is not considered in a vacuum, but rather involves consideration of whether the need for a particular type of corrective

action was known to the industry or to the individual employer. *See Cargill, Inc.*, 8 BNA OSHA 1745, 1980 WL 10234 at *9 (Nos. 78-4482 & 78-5289, 1980) (framing Secretary's burden as one of establishing that "hazard posed by tramp metal in respondent's conveyor system was recognized by respondent or respondent's industry to require installation of a tramp metal detector"). The Secretary has failed to carry his burden to prove that the methods of abatement identified in the Citation were recognized by the community health worker industry as required practices under the Act. Indeed, the expert witness offered by the Secretary, Janet Nelson, was unable to identify how widely adopted, or how effective, the abatements proposed by the Secretary have been. *See infra*, Part II.

In sum, the Secretary is seeking by this Citation to classify as a "recognized hazard" a group of Americans, who are presently neither confined nor committed, based solely on the Secretary's conclusion that such individuals are more predisposed to violent conduct than other members of the community. Integra has been unable to identify any instances in which such a classification has been accepted by the Commission or by any court. Further, the implicit conclusion in the Citation that providing services to individuals with a criminal background or mental illness represents a recognized hazard requiring prescreening of such persons raises broader questions relating to the delivery of any in-home or in-community services. Specifically, the Secretary's suggestion that an employee cannot lawfully be sent to perform job duties at the home of a Member absent a predetermination of that individual's historical criminal behavior would appear to apply with equal force to any occupation involving entry into a person's home for the purpose of delivering a service. The work of a plumber or HVAC technician, to name only two examples, involves extended time spent in the homes of individuals who, under the Secretary's theory in this case, could pose a danger of violence based on past

criminal activity or mental illness. The Secretary has never, to Integra's knowledge, asserted that employers in those industries are under a duty to conduct background checks or take other actions intended to predict or ameliorate potential violent action by customers.

The Secretary has failed to meet the "high standard of proof" identified in *Megawest* as required to support the conclusion that potential criminal conduct by Members was a "recognized hazard" for Integra employees. Absent such a recognized hazard, enforcement of Citation One, Item One must be denied. *See CSA Equip. Co., LLC*, 24 BNA OSHC 1476, 2014 OSAHRC LEXIS 9 at *2 (No. 12-1287, 2014).

## II. The Secretary Has Failed to Meet His Burden to Show that the Abatement Measures Identified in the Citation Would Be Effective to Abate the Alleged Hazard.

Assuming *arguendo* that a recognized hazard exists, the Secretary has failed to demonstrate that the abatement measures identified in the Citation would effectively abate the hazard. The Secretary's burden 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 (1973).

The Secretary has wholly failed to carry his burden to demonstrate the "likely utility" of the proposed abatement measures. The sole witness offered by the Secretary to testify as to the efficacy of the abatement measures, Janet Nelson,[4] acknowledged that she could not state that further training would reduce the Service Coordinators' potential exposure to violence. (Tr. 615-

[4] It is Integra's position that Ms. Nelson's testimony in this matter should be given little weight in light of the evidence adduced at the hearing regarding her background. Specifically, Ms. Nelson acknowledged that she had never before been qualified as an expert, that she 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).

16). Likewise, Nelson acknowledged that violent incidents could still occur even if the "buddy system" utilized by Integra were codified into a more formalized program. (Tr. 625).

Perhaps most tellingly, 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).

Further, Nelson offered no statistical or other evidence as to the potential efficacy of any of the proposed abatement measures beyond her own conclusory statements.[5]

In light of the Secretary's failure to offer evidence showing the potential effectiveness of the abatement measures proposed in Citation One, Item One, the Secretary has failed to meet his burden of establishing a violation of the general duty clause. *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.").

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[5] Indeed, the entirety of Nelson's testimony as the central question underlying the need for any abatement measures – i.e. the sufficiency or insufficiency of the training actually provided by Integra – was called into question by her admission at the hearing that she was unaware of the nature of the face-to-face training provided by Integra in follow-up to the Neumann training completed by employees at the time of hire, as well as her acknowledgement that she was unaware of the topics discussed during weekly telephone conferences at which Service Coordinators could confer with management about problematic cases and receive additional instruction. (Tr. 682-83).

## III. The General Duty Clause is Unconstitutionally Vague as Applied.

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 Secretary's issuance 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 others in the industry 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 offered utilized by Integra

were below the standards utilized 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 – non one had that out there.

(Tr. 1028).

Finally, the unconstitutionality of the clause as applied in this case is demonstrated by the fact that, to Integra's knowledge, 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. Indeed, 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. The Record Does Not Support Classification of Citation One, Item One as a Serious Violation.

Citation One, Item One has been classified by the Secretary as a serious violation. Assuming *arguendo* that a violation is found, that classification is nevertheless inappropriate in light of the applicable standard for classifying violations.

Section 17(k) of the Act provides that a violation shall be deemed serious "if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . 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); *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 does not appear to have ever 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 industry standard 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. To the contrary, the evidence presented at the hearing revealed that, despite the recognized lack of uniform standards within the community health worker industry, Integra had put in place a robust training program involving a week-long online training course, multiple in-person training sessions, and weekly telephone conferences. (Tr. 766-67, 849-50, 875-76, 889-94, 1027). Additionally, Integra also already had

in place a version of the "buddy system" included in the Citation as a proposed abatement measure.[6] (Tr. 231-32, 793-94, 821-22, 847-48).

In light of the absence of evidence capable of supporting a conclusion that Integra "knew or should have known" that it was in violation of the general duty clause, Section 17(k) dictates that any potential violation cannot properly be classified as serious.

**V. Integra Does Not Dispute Enforcement of Citation Two, Item One.**

Independent of the issues discussed *supra*, the Secretary cited Integra for not reporting (b)(6) death to OSHA within the time period specified by the Act. Integra does not contest Citation Two, Item One. As noted in Mr. Prymmer's testimony, Integra reported (b)(6) death to Workmens' Compensation. Due to a misunderstanding of the law, however, a report was not also made to OSHA. (Tr. 86, 168).

## PROPOSED FINDINGS OF FACT

1. The principal service performed by Integra Health Management, Inc. consists of community health workers locating difficult-to-engage members of the community and seeking to connect them with health care providers and services.

2. To provide that service, Integra employs Service Coordinators.

3. Each Member is assigned to a particular Service Coordinator, who undertakes to meet the Member, gather information concerning the Member's medical and social service needs and personal barriers to accessing such services, and seek the Member's consent to receive support and assistance from Integra.

[6] In fact, Mr. Prymmer acknowledged that the "buddy system" was in place at the time of (b) death and that (b)(6) notes reflect that she was aware of its availability. (Tr. 231-32).

4. Service Coordinators are paid on a salary basis, and their compensation is not tied to achieving a particular number of visits or other contacts with Members.

5. Service Coordinators do not perform clinical services, such as mental health counseling, to the Members, but instead seek to facilitate the Members' receipt of medical care from third-party clinicians and social services available to them.

6. Integra began operating in Florida in May 2012.

7. Integra was contracted by Amerigroup to offer its services to certain individuals enrolled in health plans maintained by Amerigroup.

8. To perform that function, Integra hired a number of individuals as Service Coordinators in Summer and Fall 2012.

9. The Service Coordinators hired by Integra for its Florida contract with Amerigroup were required to complete an online training course developed by Integra in conjunction with Neumann University (the "Neumann training").

10. The Neumann training consisted of fifteen modules, and took approximately forty hours to complete. Service Coordinators were paid by Integra for time spent completing the Neumann training.

11. Included in the Neumann training was a module specific to workplace safety.

12. In addition to the online training sessions, Integra management staff traveled to Florida to provide in-person training to the Service Coordinators. In addition to accompanying newly hired Service Coordinators on meetings with Members, Integra management staff conducted a series of three two-day training programs in Fall 2012. Safety training was an inherent component of this training, which also included role playing scenarios and demonstrations.

13. Integra also distributed written safety guidelines and materials in connection with the face-to-face training sessions, copies of which were introduced into evidence as Exhibits B, E, F, J, K, L, R, V.

14. As an additional training tool, Integra required its Florida Service Coordinators to participate in two weekly telephone conferences, frequently referred to as "rounds." One such call was led by the Florida-based supervisor of the Service Coordinators, Laurie Rochelle. The second weekly call was led by Dr. Melissa Arnott, Integra's Vice President of Community Programs, and by Dr. Thomas Krajewski, Integra's Medical Director. During the calls, management and the Service Coordinators discussed individual cases as well as wider training and safety issues.

15. Contact between Service Coordinators and Members occurred both over the telephone and via in-person meetings. Integra provided Service Coordinators with cell phones for communication with Members, management and other Service Coordinators and provided 24-hour on-call management support to staff.

16. From the outset of its Florida operation, Integra implemented a practice commonly referred to as the "buddy system," under which employees who felt any perceived or real threat to their personal safety while interacting with a Member were encouraged to take a second Integra employee with them for any onsite member visits.

17. Service Coordinators were encouraged to find a regular partner for this purpose, but 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. Integra instructed the Service Coordinators that that they were to avoid situations with a real or perceived threat to personal safety existed with a particular Member, or should not meet with that Member unless a second

Integra employee was present if they felt doing so was necessary or make alternative arrangements to meet the Member in a public setting outside of the home. The company directed the Service Coordinators to leave any meeting immediately if they felt a real or perceived threat to their personal safety.

18. Integra also adopted a written workplace violence policy, which provides in relevant part that: Violence by an employee or anyone else against an employee, supervisor or member of management will not be tolerated.... 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.

19. No evidence was presented to suggest that any Service Coordinator was ever disciplined for delaying a meeting to ensure a second employee could be present, nor was any evidence presented to suggest that any Service Coordinator ever 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.

20. The Citation at issue in the instant case was issued following an investigation triggered by the killing of [redacted] a Service Coordinator, by [redacted] who was a Member being served by Integra.

21. While [redacted] had a criminal history prior to the date of [redacted] death, that history contained no record of any violent criminal acts in more than twelve years prior to his attack on [redacted]

22. [redacted] had conducted three face-to-face meetings with [redacted] during October and November 2012.

23. (b) (6)(b) (6) (b) (6)(b) (6) notes of the meetings indicate that a comment by (b) (6) during one of those meetings made her feel "uncomfortable." 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.

24. On December 10, 2012, (b) traveled to (b) (6) home for a fourth face-to-face meeting. When (b) (b) arrived at the house, (b) (6) emerged armed with a knife and fatally stabbed her.

## PROPOSED CONCLUSIONS OF LAW

1. The hazard identified in Citation One, Item One, namely "the hazard of being physically assaulted by members with a history of violent behavior," was not a recognized workplace hazard at Integra capable of supporting the alleged violation of the general duty clause at issue in this case.

2. The Secretary failed to carry his burden of establishing feasible abatement measures that would be effective to eliminate or materially reduce the alleged hazard.

3. The general duty clause is unconstitutionally vague as applied in Citation One, Item One, as a reasonably prudent employer in the community health industry would not have known that the proposed abatement measures were required for employees in the position of Service Coordinator.

4. Enforcement of Citation One, Item One is properly denied.

5. The Secretary met his burden of proving the violation alleged in Citation Two, Item One

6. Citation Two, Item One has been properly classified by the Secretary as a non-serious violation, and the $3,500 penalty identified by the Secretary is appropriate.

Respectfully submitted,

/s/

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to the instructions provided at the close of the hearing in this matter, a copy of the foregoing Post-Hearing Brief was served electronically on counsel for the Secretary of Labor as follows:

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/s/
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