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

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

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EMPLOYER'S REPLY BRIEF

Respondent Integra Health Management, Inc. ("Integra"), by and through its undersigned counsel, hereby submits this Reply Brief in response to the Post-Hearing Brief ("Brief") submitted by the Secretary of Labor.

INTRODUCTION

The sole disputed issue in this case is whether or not Integra violated the general duty clause of the Occupational Safety and Health Act of 1970 (the "Act") by failing to provide a workplace free of what the Secretary alleges was the "recognized hazard" of criminal assaults by certain members of the community to whom Integra provides services. In his Brief, the Secretary admits that enforcement of the "novel" Citation would be unprecedented, in that only one prior citation involving an alleged violation of the general duty clause based on an incident of workplace violence has ever previously been litigated. *See Megawest Financial, Inc.*, 17 BNA OSHRC 1337, 1995 OSAHRC Lexis 80 (No. 93-2879, 1995) (hereafter, *"Megawest)"*; *Secretary's Brief* at 24. Notably, the ALJ presiding in that case declined enforcement of the citation on the grounds that the violent conduct of third parties at issue in that case was not a

recognized hazard. The Secretary thus seeks to break entirely new ground in sanctioning Integra for a criminal act committed by a third party, even though Integra had in place at the time of the criminal assault a safety program for its employees that exceeded the standards for similarly situated community health workers.

Equally troubling is the fact that the Secretary's proposed findings of fact in support of the Citation depict a grossly distorted picture of Integra's employee training and safety programs. The most egregious example appears at Paragraph 100 of the Secretary's proposed findings of fact, which blithely asserts: "Integra did not provide safety training to its employees." That assertion is plainly incorrect in light of the extensive testimony offered at the hearing and references within the Secretary's own Post-Hearing Brief concerning the extensive employee training programs provided by Integra. Such programs included not only the week-long online training course for newly hired employees (referred to throughout the hearing as the "Neumann training"), but also multiple in-person training sessions conducted by Integra management as well as weekly telephone conferences. (Tr. 766-67, 849-50, 875-76, 889-94, 1027). Likewise, the Secretary's proposed finding that "[t]here was no real buddy system or partnering for safety reasons" ignores the testimony of multiple witnesses – including compliance safety and health officer Jason Prymmer – that Integra did have a "buddy system" in place as of December 2012. (Tr. 231-32, 793-94, 821-22, 847-48). The findings of fact proposed by the Secretary depict a wholly distorted and inaccurate view of the facts underlying this case, relying on:

1. selective presentation of certain statements from former disgruntled employees whose documented job performance and circumstances of separation from the company cast considerable doubt on their own credibility;

2. selective presentation of certain statements from a retained witness hired by the Secretary who produced a report citing the absence of numerous safety protocols and practices within Integra that she subsequently acknowledged were in fact present, and whose scope of expertise was recognized by the ALJ to be limited to clinical Social Work and specifically did not include the areas of safety training, industry safety standards or the community health workers industry; and
3. the omission of all testimony concerning the safety programs, training, protocols and practices proactively put in place by Integra prior to (b) (6);(b) (6) death despite the absence of generally accepted standards for the same within the community health worker industry.[1]

For the reasons set forth herein, and as fully set forth in Integra's Post-Hearing Brief, the Secretary has failed to carry his burden of establishing each of the elements constituting a violation of the general duty clause. Specifically, "being physically assaulted" was not a recognized hazard to Integra employees within the meaning of the Act, nor has the Secretary met his burden of establishing that the abatement measures identified in the Citation would have materially reduced or eliminated the alleged hazard. Further, the general duty clause is unconstitutionally vague as applied on the facts of this case, particularly in light of the

[1] The Secretary's proposed findings of fact draw largely on the testimony of ex-employees Laurie Rochelle, to the outright exclusion of contradictory testimony from other witnesses. Nowhere does the Secretary acknowledge, however, that Ms. Rochelle was terminated by Integra shortly after announcing her resignation, following Integra's discovery of unauthorized charges on a company credit card. (Tr. 332; Ex. TTT). Moreover, several of the other witnesses called by the Secretary also had numerous disciplinary and/or workplace performance problems of their own, that would call into question their objectivity and bias against Integra. Exhibits VV-AAA, TTT, VVV, FFF, GGG, HHH, III, JJJ, KKK and RRR. In his Brief, the Secretary also states that the Service Coordinators are under pressure to have contact with the members, and that if two face to face contacts are not made each month, Integra would not get paid, suggesting that the Service Coordinators were somehow pressured into seeking members, or not get paid. Such a claim is utterly false. As Michael Yuhas testified without challenge, the Service Coordinators were paid a salary for their work that was not dependent on any set quotas or variables based on the number of visits they made in a given month. (Tr. P. 762-766).

Secretary's admission that no cases exist in which an employer has previously been found to have violated the general duty clause based upon violent acts of third parties.

I. The Secretary Has Failed to Establish That Violent Assaults by Members Were a Recognized Hazard Within the Meaning of the Act.

The hazard upon which the Secretary bases Citation One, Item One is that of "being physically assaulted" by certain of the Members to whom Integra provides assistance. (Exhibit 1). The Secretary thus seeks to define as a recognized hazard criminal, violent acts by individuals in the community who are receiving services from Integra – or presumably, by extension, other residents of these same communities with whom Integra staff may have occasion to interact or even pass on the street in the course of performing their jobs.

The attempt to classify such criminal conduct as a recognized hazard was rejected in *Megawest*, which the Secretary acknowledges to be the only litigated case in existence in which a citation was issued based on an incident of violence against an employee.[2] The ALJ who decided *Megawest* concluded that the danger of violent conduct was fundamentally different from the type of hazards which the Act was designed to regulate. *Id.* at *24. The ALJ noted that "[g]enerally, when an employer addresses safety hazards in the workplace, he is dealing with inanimate objects or processes over which he can exercise a certain degree of control. A difference regarding employees is that the employer now must deal with people, capable of volitional, deliberate acts." *Id.* at *26-27. This was deemed to be particularly true of "third parties not in its employ," over which an employer has "even less control." *Id.* at *27.

The Secretary urges that notwithstanding the lack of any other relevant precedent, the *Megawest* reasoning should not be applied in this case due to what the Secretary characterizes as

[2] The Secretary notes that Megawest was "unreviewed" by the OSAHRC, suggesting that the decision has no precedental value. As the Court is aware, if the Secretary believed that Megawest was wrongly decided, it could have appealed that decision to the OSAHRC. The fact that it did not undercuts any attempt to challenge the decision now, some 19 years later.

"instances of violence or aggression" against Service Coordinators. The Secretary's argument on this point fails on several grounds.

First, the Secretary's attempt to distinguish the facts of *Megawest* based on alleged prior incidents involving Service Coordinators ignores the analysis adopted in *Megawest*, in which the ALJ concluded that given the fundamental unpredictability of violent conduct, "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 *29. It is precisely this type of evidence upon which the Secretary bases his contention that Integra was aware of the hazard identified in the Citation. The Secretary's argument in support of the existence of a recognized hazard is thus directly at odds with the reasoning in *Megawest*.

Second, notwithstanding the Secretary's assertions concerning "several instances" of violence or aggression prior to (b) (6) death, the record in fact contains no evidence of any injuries or criminal assaults suffered by Service Coordinators at the hands of Members prior to the attack on (b) (6)(b) (6) Instead, the Secretary references various events which he categories as "close calls," which include a Service Coordinator having been chased by a dog. *See Secretary's Brief* at 17. Such incidents, however, are not of the same nature as the hazard upon which the Citation is based.

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[3] In his Brief, the Secretary attempts to address this point by characterizing a comment made by (b) (6) that she was "uncomfortable" with (b) (6)(b) (6) s evidence that Integra was aware that (b) (6) epresented a threat to (b) (6) (b) (6) That characterization wilfully ignores the testimony on this point, as OSHA's investigator, Mr. Prymmer, testified that the only available evidence indicated that the statement by (b) (6) that led to (b) (6) comment about being "uncomfortable" was of a flirtatious, as opposed to a threatening, nature. (Tr. 232-33). Moreover, even if Integra had conducted a criminal background check, as the Secretary claims it should have, nothing in (b) (6) prior criminal history would suggest, let alone establish, that (b) (6) who had lived in the community for many years without any serious criminal conduct, would have put Integra or anyone else on notice that (b) (6) was likely to or capable of the serious criminal assault that he inflicted on (b) (6)

Third, the Secretary's suggestion that *Megawest* can be distinguished on the grounds that prior incidents of violence had not occurred in that case is belied by the facts cited in that decision. The ALJ noted that the employees in *Megawest* "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.

Notwithstanding those facts, the ALJ in *Megawest* concluded that given the unpredictable nature of violent criminal acts by a third party, the Secretary had failed in that case to satisfy the "high standard of proof" needed to support enforcement of the Citation. *Id.* at *29. That reasoning is equally applicable in the instant case. Indeed, if any distinction could be drawn with *Megawest* it would be that the nature of the interaction between the employees and residents in that case were arguably more likely to lead to violence given what the ALJ characterized as the inherently "adversarial relationships" occasioned by the employee's duties vis-ã-vis the residents. *Id.* at *23. Service Coordinators, in contrast, provided a beneficial service that Members were free to accept or decline, at no cost to the Members.

The Secretary urges that the *Megawest* analysis should be ignored, and that the hazard of "being physically assaulted" should be deemed recognized based on the existence of various publications in which the topic of workplace violence has been addressed. In so arguing, the Secretary mischaracterizes the nature of an industry's "recognition" of a hazard needed to support a violation of the general duty clause. The case of *Bethlehem Steel Corp. v. OSHRC* – cited by in the Secretary's Brief – is instructive. In affirming a finding that the employer in that case had violated the general duty clause in connection with an accident involving the use of a

crane during high winds, the Court relied on the fact that the employer's safety officer testified that the published standard at issue in the case "represented the consensus in the ship repair industry." 607 F.2d 871, 874 (3d Cir. 1979). Here, in contrast, there was no testimony whatsoever as to whether the additional abatement measures referenced in the Citation have been adopted by a meaningful number of employers, let alone that their use represented a consensus such that Integra's decision not to adopt such measures could be construed as creating a recognized hazard. Indeed, as conceded by the Secretary's own retained expert, there were no such standards for community health workers, and the policies she discussed concerning clerical social workers were nothing more than "guidelines" that have yet to be formally adopted or mandated for use with social workers.

In sum, the evidence presented in this case fails to satisfy the "high standard of proof" identified in *Megawest* as required to support a finding that potential criminal acts by a third party posed a "recognized hazard" for Integra employees. Absent such a recognized hazard, enforcement of Citation One, Item One must be denied.

II. The Secretary Has Not Established That the Proposed Abatement Measures Would Materially Reduce or Eliminate the Alleged Hazard.

Assuming *arguendo* the existence of a recognized hazard, the Secretary has failed to carry his burden under the fourth element of the general duty clause to demonstrate that "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).

In his Brief, the Secretary characterizes his retained witness Janet Nelson, identified as an "expert" witness despite the ALJ's determination that Ms. Nelson's expertise is not in community industry safety training, as having testified that the proposed abatement measures identified in Citation One, Item One would be effective in eliminating or materially reducing the

hazard of physical assaults. Contrary to the Secretary's portrayal of Ms. Nelson's testimony, however, Nelson repeatedly disclaimed an ability to authoritatively speak to the effectiveness of the abatement measures:

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

(Tr. 615).

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

(Tr. 625).

> 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) (emphasis added).

Further, the Secretary presented no evidence at the hearing, from Ms. Nelson or any other witness, regarding the potential effectiveness of any of the proposed abatement measures[4] or, for that matter, that any of these measures would have prevented the criminal assault at issue in this case. Indeed, Ms. Nelson was unable to testify as to how widespread any of the measures are in the industry, indicating that she lacks a basis upon which to offer an opinion as to any demonstrated effectiveness of such measures in preventing incidents of workplace violence relative to the measures that have been clearly documented as having been actually in place at Integra, as well as a lack of knowledge that those measures in fact were in place at the time of (b)(6) death.

Given the absence of evidence demonstrating 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.

III. The Secretary's Acknowledgement as to the Unprecedented Nature of this Enforcement Proceeding Further Demonstrates That the General Duty Clause Is Unconstitutionally Vague as Applied to the Facts of This Case.

As noted in Integra's Post-Hearing Brief, courts considering the general duty clause have noted that the "problems of fair notice" inherent in the clause 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." *Donovan v. Royal Logging Co.*, 645 F.2d 822, 831 (9th Cir. 1981).

In his Brief, the Secretary acknowledges that the 1995 *Megawest* decision – in which the ALJ concluded that the violent conduct by third-parties at issue in that case was not a recognized

[4] The Secretary attempts to rectify this issue by pointing to the fact that several of the abatement measures listed in the Citation were drawn from OSHA's directive on workplace violence. The source of the proposed abatement measures, however, does not remedy the absence of any evidence as to the likely effectiveness of those measures to prevent the claimed hazard at issue on the particular facts of this case.

hazard – is the only case ever litigated by the Secretary in which workplace violence was alleged to support a violation of the general duty clause. *See Secretary's Brief* at 24.

Given the fact that, prior to this case, the Secretary had not sought to enforce a general duty clause citation against any employer based on an incident of workplace violence in nearly twenty years – and had never successfully litigated enforcement of the general duty clause on such facts – Integra cannot be deemed to have "known that the proposed method of abatement, nor in fact any proposed methods beyond those already in place, was required." To the contrary, the construction of the general duty clause urged by the Secretary in the instant case, if adopted, would be entirely unprecedented.

Further, as described in Integra's Post-Hearing Brief, the Secretary failed to offer any evidence in this case as whether the proposed abatement measures identified in the Citation have been implemented by other employers in the industry, let alone that their use represents an industry norm or recognized, established means for preventing such incidents. Instead, the Secretary's retained witness, presented as an expert in Integra's industry, offered her own opinion that the abatement measures were "best practices." (Tr. 616, 642-43, 673, 722, 731). Given the absence of facts to indicate whether any significant number of employers has adopted the abatement measures specified in Citation, there is no basis on which it can be concluded that a reasonably prudent employer would have known them to be required. To the contrary, Integra's Medical Director, Dr. Krajewski, gave detailed testimony as to Integra's training protocols being "above and beyond" standard in the industry. (Tr. 1023-27).

Taken together, the circumstances of this case 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. Citation One, Item One Is Not Properly Classified as a Serious Violation.

As fully set forth in Integra's Post-Hearing Brief, in the event that Integra is found to have violated the general duty clause, the facts of this case do not support classification of the violation as serious pursuant to Section 17(k) of the Act.

In citing Section 17(k) in his Brief, the Secretary notably omits the provision of the statute declaring that a violation involving a substantial probability that serious harm could result will be classified as serious "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). For the reasons cited herein and in Integra's Post-Hearing Brief, Integra did not know (and could not have known through reasonable diligence) that it was in violation of the Act. By the Secretary's own admission, no precedent exists under which the general duty clause has ever been construed as supporting enforcement of a citation stemming from a criminal attack on an employee.

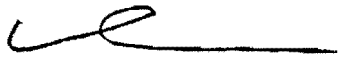
Moreover, the Secretary presented no evidence as to the extent to which the proposed abatement measures have been adopted by the community health worker industry, such that it could be argued that Integra was not operating in a manner consistent with the industry standard. In contrast, Integra presented testimony and evidence pertaining to its comprehensive 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).

Given 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.

CONCLUSION

In light of the foregoing, Integra respectfully requests that the Proposed Conclusions of Law set forth in its Post-Hearing Brief be adopted, and that enforcement of Citation One, Item One be denied.

Respectfully submitted,



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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 Reply Brief was served electronically on counsel for the Secretary of Labor as follows:

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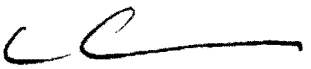

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