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.

REPLY BRIEF OF INTEGRA HEALTH MANAGEMENT, INC.

January 22, 2016

Kevin C. McCormick
Whiteford, Taylor & Preston, L.L.P.
7 Saint Paul Street, Suite 1800
Baltimore, Maryland 21202
(410) 347-8700
kmccormick@wtplaw.com

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Judicial Decisions

Commission Decisions

ALJ Decisions

Respondent Integra Health Management, Inc., by undersigned counsel, hereby submits its Reply Brief in connection with the Commission's review of the citation issued in this case alleging a violation of the general duty clause of the Occupational Safety and Health Act of 1970 (the "Act").

ARGUMENT

I. The ALJ erred in classifying criminal acts of violence by third parties as a recognized hazard to employees of Integra under the general duty clause.

A. The general duty clause cannot validly be applied to the hazard of physical assault identified in Citation One, Item One.

The hazard upon which the Citation at issue in this case is based is that of "being physically assaulted by members with a history of violent behavior." (Exhibit 1) As set forth in Integra's Brief, application of the general duty clause in this context is contrary to both the legislative history and enforcement history of the Act. Indeed, in the only previous case since the Act's passage in which an alleged violation of the general duty clause premised on criminal violence was considered by an ALJ, the ALJ noted that "nowhere in the legislative history pertaining to the Act or in the scope of the then-existing standards was there any implication that OSHA should police social behavior." *Megawest Financial Inc.*, 17 BNA OSHC 1337, 1995 OSAHRC LEXIS 80 (No. 93-2879, 1995).

In response to the arguments raised in Integra's Brief, the Secretary simply asserts that because the general duty clause contains no explicit exclusion for criminal assaults on employees, such assaults are inherently within the scope of the hazards encompassed by the clause. In so arguing, the Secretary ignores the fact that in the more than forty-year

history of the Act, not a single decision by the Commission or by any court has found a violation of the general duty clause in the context of a criminal assault on an employee. Consistent with this lack of precedent, the Secretary has previously acknowledged this issue to be one of "first impression for the Commission." *See* Secretary's Unopposed Motion for Extension at 1.

Notwithstanding the Secretary's admission as to the absence of precedent, the Secretary's Brief points to several citations involving workplace violence which were issued and subsequently settled as purportedly supporting his position as to the scope of the general duty clause. The fact that citations were issued and settled does not alter the fact that no finding of general duty clause violation has ever been made on facts even remotely analogous to those of the instant case. Further, the Secretary's reliance on the mere issuance of citations that were not the subject of any substantive proceedings is perplexing in light of the Secretary's previous arguments in these proceedings that no weight should be given to the decision in *Megawest* by virtue of its status as an unpublished decision. In *Megawest*, as fully described in Integra's Brief, the hazard of assaults on employees was found not to have been a recognized hazard despite the prior occurrence of multiple assaults on employees by tenants residing at the apartment complex managed by the respondent.

The decision in *Megawest* was reached notwithstanding the fact that the work performed by the employees in *Megawest* – unlike that performed by Integra's service coordinators - "resulted in direct confrontations between the staff and the residents." *Id.* at *19. Indeed, the respondent's president in *Megawest* went so far as to acknowledge that he

"considered responding to tenant threats to be a normal part of the staff's job." *Id.* at *20. Notwithstanding those facts, the ALJ recognized the absence of precedent for construing the general duty clause as applying the context of an assault on an employee, and noted that "enforcement in this arena could place extraordinary burdens on an employer requiring it to anticipate the possibility of civic disorder." *Id.* at *4. As noted in *Megawest*, criminal violence is "completely different" from the hazards typically addressed by the general duty clause.

The Secretary's Brief attempts to minimize the absence of any precedent to support the instant citation by analogizing this case to *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2013). In proposing this analogy, the Secretary asserts that there is "little substantive distinction . . . between workplace violence perpetrated by animals and workplace violence perpetrated by third persons." Secretary's Brief at 11.

This astounding assertion by the Secretary lays plain the fundamental error in the proposed inclusion of criminal assaults on employees within the scope of the general duty clause. Notwithstanding the Secretary's contention, there is an obvious distinction between the responsibility that an employer can reasonably be expected to bear when it places an employee in the position of handling a wild sea animal as part of an entertainment production and when its business involves employees meeting with members of the community. As an initial point, the whale that was deemed to be a recognized hazard in SeaWorld was maintained by the employer at its facility. The employer had full control over the design of the facility and the conditions under which its employees would interact with the whales. That situation differs markedly from that of the

face to face interactions that take place between Integra's employees and its Members at various locations in the community.

More importantly, the analogy drawn by the Secretary, as well as the broader rationale for applying the general duty clause on these facts, rests on simply ignoring the unique considerations inherent to human interaction. The Secretary's analysis casts the fellow citizens to whom Integra's employees provide services as potential hazards, no different from the four-ton sea creatures housed at SeaWorld. That premise is wholly inconsistent with the "premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971). Stated differently, whales are not part of the social compact. Society is premised upon the basic assumption that human beings will act in accordance with the law in their interactions with one another, with the state holding the police power to impose sanctions on those who violate this standard. Nothing in the text or history of the Act suggests that the Act should be construed as to so deviate from these basic principles as to impose upon individual employers via the general duty clause an obligation to assume that third parties will engage in criminal behavior against employees and to undertake the responsibility of preventing criminal attacks that has historically been allocated to the civil authorities.

Indeed, the ALJ acknowledged in his Decision that "Integra cannot reasonably be expected to control the violent actions of these members." Decision at 68. Acknowledgement of that fact is fundamentally at odds with a conclusion that assaults by members constitute a hazard within the scope of the general duty clause. *See Pelron Corporation*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986) ("To respect Congress'

intent, hazards must be defined in a way that apprises the employer of its obligations, and identifies conditions or practices over which the employer can reasonably be expected to exercise control.").

B. No workable standards exist for application of the general duty clause in the context of workplace violence, and no meaningful guidelines are set forth in either the ALJ's Decision or the Secretary's Brief.

The arguments advanced by the Secretary also demonstrate the inherent unfeasibility of drawing reasonable lines in applying the general duty clause to criminal conduct. The ALJ's Decision identified the "rolling off" of Members as the principal abatement measure to be used in responding to the hazard of criminal assaults, a position that is echoed in the Secretary's Brief. As an initial point, it must be noted again that the appropriateness of this measure is premised on the idea that future criminal behavior can be effectively predicted by a background check, a proposition for which neither the ALJ nor the Secretary has provided any analytical support.

Of greater significance, the Decision offers no guidance as to how such an abatement measure would be evaluated for purposes of assessing future compliance. While the ALJ referenced the denial of services to individuals "with a history of violent behavior," the Decision gives no indication as to the type of behavior that would compel exclusion for purposes of compliance with the general duty clause. By example, the Decision gives no indication of whether a felony conviction would be necessary to warrant exclusion, or whether a misdemeanor would require the same action. Nor does the decision indicate what type of crimes would be considered to involve "violent behavior" so as to trigger the duty to deny services. Likewise, there is no indication of whether a

conviction thirty years in the past would warrant exclusion, or whether an employer should only look back a certain period of time.

At a more basic level, the Decision offers no guidance as to the source of information that an employer is expected to use in evaluating the risk posed by potential clients – such as a particular database or other source – nor is there any indication of what steps should be taken if information about a particular individual is unavailable. Indeed, the very definition of the hazard applied by the ALJ, namely that of "being physically assaulted by members with a history of violent behavior," inherently assumes that an employer can reliably determine the nature and extent of the criminal history of those individuals with whom its employees come into contact. No evidence was presented at the hearing to establish the extent to which such information is available, nor the accuracy or reliability of that information which may be accessible to employers or other members of the public.

The circumstances surrounding (b)(6) the individual who killed Ms. (b)(6) demonstrate the fundamental impracticality of applying the general duty clause in this context. In his Brief, the Secretary conclusively asserts that Mr. (b)(6) criminal history, coupled with his mental illness, "should have resulted in his removal from membership." As described by the ALJ, Mr. (b)(6) record reflects a number of criminal convictions. The most recent offense for which Mr. (b)(6) was convicted, however, took place on September 19, 1997. *See* Decision at 4 n.3. Ms. (b)(6) was killed on December 10, 2012. It is thus the Secretary's position that Mr. (b)(6) criminal conduct fifteen years prior to the events at issue in the Citation compelled his exclusion from Integra's program. The

necessary conclusion stemming from that position is that in order to comply with the general duty clause, Integra was obligated to ascertain, consider, and act upon information contained in the criminal records of its potential Members stretching back a period of more than a decade. Such a requirement is not only wholly unprecedented, but is fundamentally at odds with the principle that the scope of the general duty clause extends solely to hazards that employers "can reasonably be expected to prevent." *Pelron Corporation*, *supra*; *Greene Construction Co. & Massman Construction Co.*, 4 BNA OSHC 1808 (No. 5356, 1976).[1]

II. The evidence in the record as to the efficacy of the proposed abatement measures fails under the standard cited as applicable by the Secretary.

As fully set forth in Integra's Brief, no evidence was presented at the hearing in this case to support the Secretary's assertion that the proposed abatement measures would have materially reduced the hazard of criminal assaults. In his Brief, the Secretary does not challenge Integra's assertion that no statistical or quantitative evidence was introduced as to the effectiveness of any of the proposed abatement measures. Instead, the Secretary asserts that no such evidence was necessary, and contends that that he need only show that knowledgeable persons familiar with the industry would regard the proposed measures as both "necessary and valuable."

Under the standard cited by the Secretary, the evidence presented at the hearing was woefully insufficient. The sole individual who offered testimony in support of the proposed abatement measures was Janet Nelson. Not only did Ms. Nelson fail to offer any

[1] Assuming arguendo that the general duty clause were held to be applicable to acts of criminal violence, application on the specific facts of this case is improper for the reasons discussed in Part I.B of Integra's Brief.

testimony to establish that knowledgeable people viewed the proposed abatement measures as necessary, she readily acknowledged that she could not confirm that they would have a meaningful effect:

> 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).

Ms. Nelson also offered no testimony as to the extent to which the various proposed abatement measures have been adopted by other employers in the industry. Given the absence of evidence as to either the effectiveness of the proposed measures or the extent to which other employers have found them sufficiently essential to adopt, it cannot reasonably be concluded that the Secretary has established that knowledgeable persons in the industry would deem the abatement measures "necessary." *See also 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.").

III. Application of the general duty clause on the facts of the instant case would be unconstitutional.

The issues discussed *supra* further support the position set forth in Integra's Brief that application of the general duty clause in this case would be unconstitutional. Courts considering the general duty clause have stated the "problems of fair notice" inherent to the clause only dissipate 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).

For the reasons discussed *supra* in Part II, a reasonable employer in Integra's position would not have known that the abatement measures proposed in this proceeding were required. In the course of this proceeding, the Secretary has produced no evidence to indicate that the proposed abatement measures would be effective, let alone that they were the standard among employers in the industry such that Integra should have recognized that their adoption was required. Given that fact, the general duty clause, as applied in this case, is unconstitutionally vague.

IV. The facts of this case do not support classification of Citation One, Item One as a serious violation.

As fully set forth in Integra's Brief, in the event that the Commission were to affirm the ALJ's conclusion that the general duty clause was violated, any such violation cannot properly be classified as a serious violation as that term is defined in the Act.

The Act provides that a violation cannot be classified as serious where 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 described *supra*, Integra could not reasonably have known of the violation as found by the ALJ. The sole argument advanced on this issue by the Secretary asserts, citing *Georgia Electric Co. v. Marshall*, 595 F.2d 309 (5th Cir. 1979), that classification of the violation is determined solely by reference to whether the employer should have known of the "violative condition," not whether the employer knew "that the condition violated the Act." Secretary's Brief at 27. As an initial matter, the Secretary's interpretation appears to overlook the statement in *Georgia Electric* that the "only question relevant to the employer's state of mind is whether he knew or with the exercise of reasonable diligence could have known of the violation." *Id.* at 318-19. Moreover, the distinction that the Secretary draws – between knowledge of the condition and knowledge of the violation – collapses when the alleged violation at issue concerns a type of hazard that has never before been held to be encompassed by the general duty clause.

Georgia Electric provides an instructive contrast. The citation at issue in *General Electric* was issued following the electrocution of a worker when the light pole he was helping to erect made contact with a nearby electrical transmission line. *Id.* at 311-12.

The portion of the court's holding cited by the Secretary as to the classification of a violation as serious concerned the violation of a published standard directly applicable to the case, which mandated a certain amount of clearance between the pole being erected and the transmission line. *Id.* at 312, 318. Moreover, the court noted that the employer had been provided with a copy of the applicable regulation as part of an OSHA investigation into a prior violation. *Id.* at 313. Given those circumstances, the court deemed the violation willful. Later in its opinion, the court found a serious violation of the general duty clause based upon the fact that the control panel on the truck used to lift the pole was reversed, such that when the lever controlling the pole was moved to the "raise" position the crane was lowered, while moving the lever to the "lower" position would raise the crane. *Id.* at 317. The operator's inadvertent lowering of the crane had directly resulted in incident underlying the citation. In addressing the classification of the violation as serious, the court concluded that "[i]n light of the potential danger in operating a crane, known to be defective, within close range of live power lines, the Company was given adequate notice that such might violate the general duty clause." *Id.* at 322 n.32.

In contrast to the situation presented in *Georgia Electric*, the hazard upon which the instant citation is based is not the subject of any OSHA standard, nor has it been the basis for any previous finding of a violation by the Commission. While it is in no way surprising that *Georgia Electric* deemed that a reasonable employer should have known of a violation involving the operation of a defective crane in unlawfully close proximity to live electrical lines, those facts are in no way comparable to those of this case. A reasonable employer in Integra's position would not have known that a violation existed

because the circumstances underlying the Citation have never been deemed to constitute a recognized hazard under the general duty clause in any previous case.

V. The ALJ's consideration of, and reliance upon, evidence not contained in the record requires that a new hearing be granted.

Assuming *arguendo* that the Commission were to conclude that the general duty clause is applicable to the facts of this case, and that the Secretary has produced evidence capable of supporting the existence of a recognized hazard and the feasibility of abatement, a new hearing is warranted based upon the ALJ's consideration of evidence outside the record.

As described in Integra's Brief, the ALJ expressly stated in his Decision that he was according less weight to the credentials of Dr. Melissa Arnott, Integra's Vice President of Community Programs, based upon his consideration of evidence regarding her alma mater that was not part of the record. *See* Decision at 22 n.36. Compounding this issue, the evidence upon which the ALJ relied in discounting Dr. Arnott's testimony consisted of criticism of the university contained in an administrative decision made twenty-five years prior to the time Dr. Arnott obtained her doctoral degree from the school. *Id.*

In response to this breach of the baseline tenet of administrative proceedings that decisions are to be made solely based upon record evidence, the Secretary simply asserts that the error is harmless because Dr. Arnott's testimony did not form the basis of the ALJ's substantive findings. That contention erroneously seeks to recast Dr. Arnott's testimony as collateral to the determinative issues in this case. Contrary to the Secretary's assertions, Dr. Arnott's testimony touched upon virtually all of the factual issues

underpinning the Decision, including Integra' workplace safety policies and the Neumann training program and other employee training programs provided to the Service Coordinators. (Tr. 341-42, 344-49, 353-55, 890-909, 976-79). Of particular note, Dr. Arnott testified extensively regarding Integra's working file on (b)(6) including with regard to the meaning of notes made during interviews of Mr. (b)(6) by Ms. (b)(6) That testimony went directly to the issue of whether Mr. (b)(6) diagnoses indicated that he posed a heightened risk of dangerous behavior. (Tr. 356-66).

Given the wide-ranging nature of Dr. Arnott's testimony, the Secretary's suggestion that the ALJ's conduct in discrediting her testimony based on information outside the record can be neatly separated from the reminder of the Decision is without merit.[2] It is a basic principle of administrative law that a party is entitled to respond to the evidence against it and that the decision is to be made on the evidence in the record. Integra was deprived of that basic protection in the instant case, and suffered prejudice as a result given that the ALJ discredited the testimony of Integra's chief witness based on matters not raised at any point during the hearing. In the event that the Commission were to conclude that the general duty clause is applicable on the facts of this case, the matter should be remanded for a new hearing.

[2] The Secretary also asserts that the ALJ did not err in considering the information used to discredit Dr. Arnott's testimony, and suggests that "Integra does not dispute the factual underpinnings of the court documents and administrative case" cited by the ALJ. Secretary's Brief at 27 n.12. This argument misstates the issue, in that Integra had no opportunity to dispute those matters given that the issue was not raised at any point prior to the issuance of the Decision. In any event, the information cited by the ALJ was irrelevant to Dr. Arnott's credentials, given that it involved criticism of the university's programs made in a decision that predated Dr. Arnott's graduation from the university by more than two decades.

CONCLUSION

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

CERTIFICATE OF SERVICE

I certify that counsel for the Secretary has consented that all papers required to be served may be served and filed electronically. I further certify that a copy of the foregoing Reply Brief was served on January 22, 2016 on counsel for the Secretary as follows via electronic mail and first-class mail:

Charles F. James
Lee Grabel
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., NW
Washington, D.C. 20210
email: James.Charles@dol.gov; Grabel.Lee@dol.gov

I further certify that a copy of the foregoing Reply Brief was served upon the following amici curiae, if unrepresented, or their counsel, if represented, via first-class mail:

Sky Westerlund, LMSW
Executive Director
Kansas Chapter, National Ass'n of Social Workers
700 SW Jackson, Ste. 1109
Topeka, Kansas 66603

Counsel for Chamber of Commerce
Steven P. Hehotsky
Warren Postman
U.S. Chamber Litigation Center, Inc.
1615 H St., NW
Washington, DC 20062

Jacqueline M. Holmes
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 2001

Counsel for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union, AFL-CIO/CLC
Antonia Domingo
Assistant General Counsel
United Steelworkers
60 Boulevard of the Allies, 8th Floor
Pittsburgh, PA 15222

Counsel for the American Federation of Labor and Congress of Industrial Organizations
Lynn K. Rhinehart
Harold C. Becker
Yona Rozen
Angelia Wade Stubbs
815 Sixteenth Street, NW
Washington, DC 20006

Counsel for National Association of Social Workers, National Council for Occupational Safety and Health and Service Employees International Union
Randy Rabinowitz
Occupational Safety & Health Law Project
P.O. Box 3769
Washington, DC 20027

Kevin C. McCormick
Whiteford, Taylor & Preston, L.L.P.
7 Saint Paul Street, Suite 1800
Baltimore, Maryland 21202
(410) 347-8700
kmccormick@wtplaw.com

Counsel for Respondent