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.	)	

COMPLAINANT'S REPLY TO RESPONDENT'S POST-HEARING BRIEF

NOW COMES Complainant Secretary of Labor and files this Reply to Respondent's Post-Hearing Brief.

As an initial matter, the Secretary disagrees with several of Respondent's characterizations of the evidence presented at trial, as set forth in the Introduction.

1. Integra claims that its service coordinators were not providing clinical services to members, but were "really just trying to get the individual connected with things just like a family member might." (Respondent's Brief, p. 2). This claim is inconsistent with the testimony of expert Janet Nelson, who testified that the service coordinators were applying clinical tools usually used by licensed and trained clinical social workers. (Tr. 590-593, 1097-1098; Ex. 34). Laurie Rochelle and Scott Schneider also testified that the service coordinators assessed the members' needs, as would a clinician. (Tr. 265, 459-460).
2. Integra claims that service coordinators are "community health workers" as defined by the Bureau of Labor Statistics ("BLS"), as opposed to social workers. (Respondent's Brief, p. 3). Integra provides no citation to the record or expert testimony supporting this

claim. The Secretary's position is that the BLS classification of the service coordinators is not particularly relevant. Both social workers and community health workers are considered types of "community and social service occupations" by the BLS (See http://www.bls.gov/ooh/community-and-social-service/home.htm), and it is undisputed that service coordinators, like many social workers performing home visits, are subjected to similar risk factors contributing to the hazard of workplace violence. Specifically, the service coordinators, like many social service workers, work with volatile, unstable people; work alone or in isolated areas; provide in-home services and care; and work late at night or in areas with high crime rates. [1]

3. The Secretary disputes Integra's claim that it "mandates that newly hired employees complete [the Neumann] training at the outset of their employment" and "provides for the Service Coordinators to observe face-to-face meetings with Members conducted by more senior staff." (Respondent's Brief, p. 4). The testimony at the hearing established that several of the nine Florida service coordinators did not complete the on-line training or perform any "shadowing" of more senior employees before beginning their jobs and interacting with members. (Prymmer, Tr. 123-124; Rochelle, Tr. 261; Rentz, Tr. 371, 373; Daniels, Tr. 434-435; Schneider, Tr. 488).

4. The Secretary also disputes Integra's claim that it conducted "three two-day training programs in the Fall of 2012" which "encompassed safety discussions that included role playing scenarios and demonstrations." (Respondent's Brief, p. 4). Integra's own witness, Annie Hinman, testified that during corporate training in September 2012, service coordinators did not engage in role playing. (Hinman, Tr. 817). Service

[1] Indeed, Ms. Nelson testified that the service coordinator's lack of formal social work training actually increases their risk of workplace violence, because they lack the experience and clinical knowledge necessary to adequately assess a member's propensity towards violence. (Nelson, Tr. 1100).

coordinator Scott Schneider testified that he did not receive any safety training prior to [redacted] death (Schneider, Tr. 456), and service coordinator Kimber Daniels stated, "I wouldn't consider anything I received safety training". (Daniel, Tr. 436).

5. The Secretary disputes Integra's assertion that "OSHA did not obtain a copy of [redacted] criminal record until after the Citation had been issued." (Respondent's Brief, p. 8). CSHO Prymmer's testimony makes clear that he did discover [redacted] history of violent criminal behavior early in the course of his investigation, well before the issuance of the Citation. (Tr. 138-139).

The Secretary next addresses each of Respondent's arguments in turn:

I. Intentional Criminal Acts by Integra's Members Constitute a Workplace Hazard, Recognized by Both the Industry and Respondent.

Respondent's first argument is that "intentional criminal acts by Integra's members do not constitute a recognized workplace hazard," because "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." (Respondent's Brief, p. 8 and 11). In support of this assertion, Respondent quotes extensively from and relies exclusively upon the *Megawest* case, also addressed in the Secretary's brief. *Megawest Financial Inc.*, 17 BNA OSHC 1337 (No. 93-2879, 1995). The *Megawest* decision is an un-reviewed ALJ decision from nearly twenty years ago involving workplace violence against administrative staff in an apartment leasing office. As such, the decision is not binding upon this court and, in any event, it is clearly distinguishable from this case.

In addition, contrary to Respondent's assertion, the *Megawest* case does not stand for the broad proposition that workplace violence cannot be a recognized hazard under the general duty

clause. To the contrary, *Megawest* specifically recognizes that certain industries – such as liquor stores, detective/protective services, and justice/public order establishments – have been identified by the CDC and NIOSH as having a heightened hazard of "occupational homicide." *Id.* at *10. ALJ Spies notes that certain risk factors increase the risk of occupational homicide, including several of the risk factors relevant to this case, i.e., "working alone or in small numbers," "working late night or early morning hours," "working in high-crime areas," and "working in community settings." *Id.* In finding that the apartment management industry did not recognize a heightened risk of violence against its employees, ALJ Spies relied upon the fact that this industry was not identified in "publicized studies, enactment of legislature, industry publications, or similarly disseminated information known to an applicable industry" as a "high-risk" employer, and that the previous incidents of violence experienced within this Megawest office were not typical of the experiences of "other office staffs . . . throughout the national and local residential apartment industry." *Id.* at *10-11.

In stark contrast to *Megawest*, the industry at issue in this case – whether defined as social service industry or community health industry – does recognize workplace violence as a hazard for employees working within the community.[2] The *Megawest* decision clearly recognizes that workplace violence may be a recognized workplace hazard within certain industries and to certain employers, but merely declined to find that such a hazard was recognized under the specific facts presented in that limited case.

[2] The Secretary, through the testimony of CSHO Prymmer, referenced and/or introduced numerous articles and industry publications in which the hazard is recognized and potential abatement measures are discussed. (Ex. 32, p. 8-9; Ex. 33, p. 8). In addition, the Secretary presented the testimony of Janet Nelson, recognized by the Court as an expert in "personal safety skills and safety programs for health and human service workers" (Nelson, Tr. 584), establishing that the social services industry recognizes that workplace violence is a known hazard. Ms. Nelson has dedicated the majority of her career to teaching self-defense and safety skills to social service and other community outreach workers, and has been hired by multiple chapters of the National Association of Social Workers across the nation to teach these skills. (Nelson, Tr. 558-561).

Respondent also argues that because it had fewer previous incidents of workplace violence than did the employer in *Megawest,* it could not have recognized the hazard of workplace violence. (Respondent's Brief, p. 11). This argument is without merit. [redacted] was murdered by a member within Integra's first six months of operation in Florida. The evidence establishes that within those first six months, service coordinators were exposed to multiple incidents of verbal threats and threatening behavior from the members they served. (Schneider, Tr. 458; Ex. 29, p. 6; Schneider, Tr. 470; Ex. 29, p. 18; Schneider, Tr. 471-472; Ex. 29, p. 24; Hinman, Tr. 831; Rochelle, Tr. 268; Macaluso, Tr. 507, Ex 31, p. 3). Integra was clearly aware of the danger posed by working within the homes and communities of mentally-ill members in high-crime neighborhoods, as evidenced by the warnings and instructions it provided to its service coordinators through the Neumann training. (Exh. 16 and 17). The fact that [redacted] death was the first incident involving an "actual workplace injury" due to workplace violence does not mean that Integra did not recognize the hazard. Indeed, it is well established that the Secretary is not required to show that previous injuries or deaths from the hazard occurred; the goal of the Act is to prevent the first accident. *See American Phoenix, Inc.*, __ O.S.H. Cas. (BNA) __ (No. 11-2969, Mar. 13, 2014) ("The goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors.")

In any event, the case law in the twenty years since *Megawest* indicates a broader willingness to recognize "unpredictable" or "erratic" behavior of non-employees as a recognized workplace hazard. In the binding D.C. Circuit opinion of *Sea World of Florida, LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014) (hereinafter *SeaWorld II*), the Court recognized that, although "all whales behave differently," the "hazard killer whales posed during performances is not 'so idiosyncratic and implausible' that it cannot be considered preventable." *Id.* at 1210. The

SeaWorld II Court found that "SeaWorld's safety protocols and training[3] [did not make] the killer whales safe; rather, they demonstrate SeaWorld's recognition that the killer whales interacting with trainers are dangerous and unpredictable and that even senior trainers can make mistakes during performances, and the managers repeatedly urged caution in working with the killer whales." *Id.* at 1209. Similarly, although Integra's members' behavior may be unpredictable from day-to-day, Integra clearly recognized that the members posed a risk of violence to its employees, and instructed them accordingly.

SeaWorld II also distinguished the hazard posed by the whales from the alleged hazard in the *Megawest* case, noting that "SeaWorld controls its employees' access to and contact with its killer whales, unlike the employer in [*Megawest*], who could not prevent the potentially criminal, violent actions of third parties residing in the apartment building it managed." *Id.* Similarly, in this case, Integra could control its service coordinators' exposure to the members more than Megawest could control the exposure of its employees to the general public. Specifically, Integra assigned the members to specific service coordinators and instructed service coordinators in how and how often to make a required number of face-to-face interactions with the members.

Finally, Respondent makes a policy argument, claiming that the finding of a recognized hazard in this case would have broad implications "relating to the delivery of any in-home or in-community services," such as the work of a plumber or HVAC technician. (Respondent's Brief at 12-13). This "parade of horribles" is simply inapplicable to this case. The court need not consider whether a plumbing or HVAC service provider recognizes the risk of violence posed by the persons it services; it need only consider whether Integra or its industry recognized that risk.

[3] As with Integra's Neumann training (See Ex. 17, listing alleged "high risk behaviors" of members), SeaWorld "also trains its employees who work with killer whales to recognize particular behaviors that it calls 'precursors,' which indicate that the killer whales may act aggressively." *SeaWorld II*, at 1209. The D.C. Circuit Court found that this training did not succeed in making contact with the whales safe, but did establish that the employer recognized the hazards posed by the whales. *Id.*

Integra does not service the general public; it services a community of predominantly mentally – ill individuals that it itself identified as "dangerous" and "high risk." In any event, "no principle of law requires a court, when reviewing a citation based on specific facts relating to one [service provided] by a single employer, to reach beyond that citation and decide the hypothetical application of the statute to another industry." *SeaWorld II*, at 1213.

II. The Abatement Proposed By the Secretary Is Feasible and Effective.

Respondent next argues that the Secretary has not proven that the suggested abatement would be effective, because he presented no "statistical or other evidence as to the potential efficacy of any of the proposed abatement measures beyond [expert Janet Nelson's] conclusory statements." (Respondent's Brief, p. 14). Respondent fails to recognize that "feasible means of abatement are established if 'conscientious experts, familiar with the industry' would prescribe those means and methods to eliminate or materially reduce the recognized hazard." *Arcadian*, 20 BNA OSHC 2001 at *13 (quoting *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2032 (No. 89-0265, 1997)). Here, Ms. Nelson's testimony that the proposed abatement methods are appropriate and utilized by the industry when workers make home visits to mentally-ill clients[4] is sufficient for the Secretary to meet his burden. This portion of Ms. Nelson's testimony was unchallenged by Integra, which provided neither lay nor expert opinion testimony claiming that these abatement measures were infeasible or would not reduce the hazard of workplace violence. In addition, CSHO Prymmer testified that he developed the list of proposed abatement from the OSHA directive itself, which lists engineering and administrative controls shown to minimize

[4] Ms. Nelson concedes that the proposed abatement methods are not uniformly applicable in all community-outreach or social work settings. For example, where the population to be serviced in-home is elderly or homebound – as opposed to mentally-ill and/or recently released from incarceration – background checks may or may not be recognized as necessary. (Tr. 719-729). However, Ms. Nelson did clarify that for employers who know they are serving "seriously mentally ill people that may have criminal backgrounds, it would be advisable to check on that background before you enter their home." (Tr. 722).

the risk of workplace violence within the healthcare and social services industries. (Prymmer, Tr. 165; Ex. 33, p. 33-38). Furthermore, "the Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard." *Morrison-Knudsen Co.*, 16 O.S.H. Cas. (BNA) 1105, 1122 (No. 88-572, 1993).

III. The General Duty Clause as Applied Is Not Unconstitutionally Vague.

Facial challenges to the general duty clause have been rejected, *see Ensign–Bickford Co. v. OSHRC,* 717 F.2d 1419, 1421 (D.C. Cir. 1983), and although an as-applied challenge would be possible, courts have long accommodated possible constitutional problems with fair notice in this context by interpreting "recognized hazard" only to include preventable hazards, *see id.* (citing *Nat'l Realty & Constr. Co. v. OSHA,* 489 F.2d 1257, 1265–66 (D.C. Cir. 1973)), or applying the clause only "when a reasonably prudent employer in the industry would have known that the proposed method of abatement was required," *Donovan v. Royal Logging Co.,* 645 F.2d 822, 831 (9th Cir. 1981).

Integra contends the general duty clause is unconstitutionally vague as applied because it lacked fair notice that the abatement measures would be required. But the record establishes that Integra did not lack fair notice because (1) the hazard arising from service coordinators' close contact with members with histories of violence may be materially reduced by the proposed administrative and engineering controls; (2) the industry has published multiple articles outlining proposed abatement measures determined to be effective at preventing or lessening instances of workplace violence (See Ex. 6; Ex. 32, p. 25 and 44-46; Ex. 33, p. 36-38); and (3) OSHA has published a directive for Enforcement Procedures for Investigating or Inspecting Workplace Violence (Ex. 33, effective September 2011), as well as Guidelines for Preventing Workplace Violence for Health Care & Social Service Workers (Ex. 32, published in 2004), both of which

are available to the industry and which specifically address the heighted hazard of workplace violence faced by social service workers providing services within the community, and which describe effective abatement measures.

IV. Citation One, Item One is Properly Classified as Serious.

Respondent argues that because there is no evidence that Integra "knew or should have known" that it was in violation of the general duty clause, any potential violation should not be classified as serious. (Respondent's Brief, p. 18). This argument makes no sense. Under section 17(k) of the Act, a "serious" violation exists if there is a "substantial probability that death or serious physical harm could result from a condition which exists...." *See* 29 U.S.C. § 666(k). There is no "employer knowledge" component to the classification of a violation; the only consideration is whether "in the event an accident occurred it could result in bodily harm or possibly death." *Whiting-Turner Contracting Co.*, 13 O.S.H. Cas. (BNA) 2155, 2157 (No. 1238, 1989). As set forth in Complainant's Brief, there is no dispute that on December 10, 2012, (b) (6) was fatally injured as a result of workplace violence. Therefore, the "serious" classification for Citation 1, item 1, should be upheld. *See Trinity Yachts, LLC*, 2001 WL 1682627, *24 (Feb. 22, 2011) (noting, "as demonstrated by the fatality here", the violation was properly characterized as serious).

V. Citation 2, Item 1 should be Affirmed as Issued.

In its post-hearing brief, Respondent admits that it does not contest Citation 2, Item 1; therefore, this Citation should be affirmed as issued. (Respondent's Brief, p. 18).

Respectfully submitted, this 4th day of August, 2014.

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CERTIFICATE OF SERVICE

I certify that all parties have consented that all papers required to be served in this action may be served and filed electronically. I further certify that a copy of the foregoing Complainant's Reply to Respondent's Post-Hearing Brief was filed electronically and a copy was served via electronic mail this 4th day of August 2014 on the following counsel for Respondent:

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